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A TRIBUTE TO EDWARD C. BREWER, III

Ed Brewer – intense, extremely intelligent, amazing memory, creative, talented in so many ways, craftsman, charming, incredible writer, artistic, generous, kind, high-maintenance, dedicated, energetic, musical, blessed with a wonderful sense of humor, boisterous, fast-paced, passionate, enthusiastic, engaging, earthy, outdoorsman – there are so many words that can be used to describe Prof. Edward C. Brewer, III, but none truly are able to convey the true essence of him.

While I only knew him for a short while, I feel truly blessed to have shared a bit of time with him as a co-worker and friend; he will be missed more than he’d ever believe.
May his passion for justice, teaching and life be passed on through those that he touched in his time here on Earth . . . and . . . may the memories he created with those he shared his life with bring smiles for many, many years to come.

Anonymous

** ** **

Ed:
I miss you. Your impact is indelible. No one cared more for his students. Your passion for NKU Chase showed in every faculty meeting and email missive. Your love and devotion to your children was apparent in every conversation. You picked me up when I was down – a debt I can never repay. You touched us all.

Rick Bales
Professor of Law and Associate Dean of Faculty Development

** ** **

Ed was a man who could endear himself easily because he was so sincere. I was pleased to have his friendship. He was a man of ideas and strongly held opinions, and I only wish I had taken advantage of opportunities to have more conversations with him in order to challenge my own thinking. I am afraid we often have such regrets when it is too late.

Roger Billings
Professor

** ** **

Being friends with Ed Brewer could wear you out. Take, for instance, the task of keeping up with all the spattered literary, theological, English Common Law, gear-heady, and pop-culture references in your conversations with him. In my experience, you only learned how appropriate they were to what the two of you were talking about after you did some research into your conversation, ex post facto. Sometimes, the sheer density of a conversation with Ed led you to miss the fact that they were also laced with generosity and a desire on his part to be your kindred spirit, to the extent possible without sacrificing either his convictions, or yours.

Although it took years for me to realize the beauty of Ed's desire to be a brother to me, it is clear now that he took to heart that ancient Greek notion of brotherly love – philia – as it applies to his friendship with me. He went to great
lengths to join me on my little adventures scattered around my town, going so far as to bring multiple canoes with him on his journey so that he would not be out-paddled, and hauling his own camper around in case he overstayed his welcome. He was willing to be a workhorse, too, as he huffed and puffed his way along a Vermont back road with a load of blueberries he would only have two breakfasts to enjoy.

Ed Brewer was my teacher, for sure, but in his final year he taught me more about the particularly human effort to be reconciled and reunited with those whom he loved than he ever taught me about Civil Procedure, Remedies, law and religion, or justice. In fact, I think he enlivened those ideas with Aristotle's view that "...the truest form of justice has a friendly quality." If true justice entails friendship, then I saw that in Ed Brewer more than in any man I have known. I only wish I had told him this before he died.

Jason Burgett
Chase Graduate
Attorney
Wooster, Ohio

** ** **

As I read each of the dedications, I was struck by how many people Brother Ed had touched, and how deeply. I would like to add a few thoughts. Brother Ed cared deeply about Chase and legal education as a whole. He was particularly incensed by the cavalier disregard of professional reputation reflected in the 2003-004 reports on Chase by the American Bar Association and the American Association of Law Schools. Brother Ed tendered an incisive detailed critique to the Department of Education. His letter became part of the public record that resulted in the American Bar Association being given only an eighteen month (rather than its normal five year) extension as the approved accrediting entity for American law schools. I have featured Brother Ed’s wonderfully literate legal analysis in a forthcoming article.

I could always rely on Brother Ed to give me clear, although not always concise, advice on any matter, related to Chase or otherwise, upon which I sought his wise counsel. He had a unique capacity to step back from his own difficulties and give dispassionate and nuanced insight into troublesome issues – almost as a pastoral counselor. Shortly after he’d been diagnosed with cancer, I sent him an e-mail about a troubling exchange I’d had with a family member. In response Brother Ed sent me a wonderful, lengthy heart-felt and poetic homily on the nature of love of family, how minor the contretemps I’d mentioned was in that broader context, and the importance of forgiveness. This was from someone
who was heavily medicated and in considerable pain. I’ll never forget his kindness and his words of wisdom.

So Brother Ed, let me end with a few of my favorite lines about death and its imminence. Maybe they’ll help console those of us here below. As Shakespeare said in *Cymbeline*,

```
Fear no more the heat o’ the sun,
Nor the furious winter’s rages;
Though thy worldly task hast done,
Home art gone, and ta’en thy wages.
```

During your very full life and as you lay dying, you lived my favorite Dylan Thomas lines, “Rage, rage against the dying of the light.” And, to you “light” meant more than death – it meant justice, integrity and living the moral life. Brother Ed, you never had to be reminded, “Do not go gentle into that good night.” It wasn’t in your nature.

**David A. Elder**

Regents Professor of Law

** ** ** **

Author Debra Meyerson defines tempered radicals as “people who want to succeed in their organizations yet want to live by their values or identities, even if they are somehow at odds with the dominant culture of their organizations. Tempered radicals want to fit in and they want to retain what makes them different. They want to rock the boat, and they want to stay in it.”¹

Professor Ed Brewer was indeed a radical, but let me assure you, Ed Brewer was not a tempered radical. Ed didn’t care about succeeding within the organization. Ed didn’t care whether he fit in. And Ed LOVED to rock the boat, even if his rocking capsized and sank the boat!

No, Ed was definitely not a tempered radical. He had strong views about legal education and faculty responsibilities. He criticized legal education for devoting too little time and effort on perfecting the art of teaching. Ed thought that in affairs of the law school, matters of personality and convenience too often trumped concerns about effectiveness and merit. And sometimes, Ed thought, educators cared too much for form than substance. Whatever his point of disagreement however, one thing remained constant. No one wanted to be the

---

target of his dissatisfaction for when Ed decided to criticize, his word and actions could wound.

And yet, people loved and respected him. Why?

In part, the answer is simply that Ed was brilliant. He could more than hold his own in any conversation. Indeed, he usually knew more about the subject than anyone else in the group.

In part, it was that Ed was a gifted writer. Even the targets of his missives, whatever their subject, admitted that his writings were almost always literary masterpieces.

And in part, it was because Ed retained a boy-like quality about him. He would huff and puff and rant, and then later come back sheepishly, apologetic, filled with remorse, embarrassed about the incident he had created.

But I think there was a more important reason for why so many of us liked Ed and why those who did not, at least respected him. Ed never acted out of self interest. He never made arguments to cover his own failings. Ed never called out another to gain personal advantage. Ed never attacked another to damage that person. Ed did what he did because he cared deeply about his principles. He cared deeply about the NKU Chase College of Law. He cared deeply about the legal profession. And he cared deeply about his students. Sometimes he cared to a fault, perhaps, but never for selfish reasons. In an era when so many parade self-interest or insincerity and plain viciousness as passionate for a cause or passion in search of truth, Ed’s passion was genuine. He was that truly rare soul, a force for justice. Sadly, we will always have too few who possess that quality. And now, we have one fewer.

**Dennis R. Honabach**
Dean

I have some anecdotes about Ed Brewer that I wanted to share because he meant a lot to me. I know that his writings and other works are of course his public legacy. Their import is, no doubt, broader than what I would like to share here.

The first is just how Ed reached out to help mentor me when I was a "young" professor. (I started teaching when I was 42.) Ed and I had never met, but had read each other's articles and emailed about them, and so when I started teaching I just casually sent him a note to let him know. He called almost immediately and provided some wonderful advice (most of which I lacked the sense to follow,
to be clear). Ed was a great sounding board to me when I was baffled about academic politics, the publication game we play with our articles, and other mysteries of academia. There are things that a young professor cannot ask at his own institution, and Ed was very easy to talk to about those things, as well as the job generally. He was generous of his time. I saw him give to others in various ways.

The second relates to, of all things, flame wars on the Internet. Ed and I were both members of a "professional responsibility" list serve that often resulted in what I saw as a couple of loud mouths shutting down discussion and basically needing to dominate things. One time, one of them went too far and was down right rude to another list serv member. I got beyond mad and called the loud mouth out, and had one of those "flame wars" that often results in many participants to hit delete and move on. The loud mouth persisted, and I got multiple off list emails praising my efforts to shut the loud mouth down and let others talk. But no public support. When I asked one of the "silent supporters" why no one was speaking up, he explained that the loud mouth had lots of connections and had "power" in the organization, and no one wanted to offend him, even though many agreed with what I was saying.

Except Ed. Ed had had enough too, and he was the only person to publicly stand up to the loud mouth. The lack of respect for others was too much for him, too, and the cost to himself was not enough to stop him from doing what was right. It may sound trite, and perhaps it is, but from my view, when no one else would do what was right because it was personally costly, Ed did.

The final one is the last time I talked to Ed. I'd finally actually met him at an academic conference, and actually having a face with the voice and email text was a good thing. But we still mostly communicated by email or the occasional call. Shortly after that, he let me know he was having some personal issues, and our communications had dropped off. When he called me in fall or perhaps it was winter and seemed desperate to talk, I was surprised. It took us a while to get a time to talk. Because I didn't think it would be the last time I ever talked to him, I didn't pay enough attention to the details of the call. I think he said he was in Colorado, I believe he said, building or repairing something (a fence?). He had had some rough personal times, and shared a bit with me about them, and wanted my advice about living and life. Things had turned a bit upside down for a while and he was taking time to get his bearings. The call was too brief because I was too busy to talk long. I've always regretted not talking to him longer then, and feeling like I had not had enough time for him. It was not just his death that made me feel guilty about not talking longer, or not calling back. I got busy. But, he had always had enough time for me.
I've heard other stories about Ed, and he shared with me some of the run ins and controversies he had experienced. He wasn't perfect. But I know I've lost a friend, and someone who would help others.

David Hricik
Professor
Mercer University School of Law

** ** **

Ed Brewer began his career as a law professor in 1996, just a few years before I began my own. But when I arrived at Chase College of Law, it seemed as though Ed was already my most famous colleague. Whenever I told a friend or acquaintance in legal academia that I had just taken a post at Chase College of Law, I was invariably asked if I knew Ed Brewer. I wondered how Ed had become so well-known around the country while he was still only an Assistant Professor.

I soon discovered the answer. Ed was an enthusiastic (some might say logorrheic) participant on legal-academic email listservs, almost from the inception of the genre. And because his scholarly and professional interests were catholic (but never parochial) and his energy was boundless, Ed participated on many such listservs: possibly all of them. For that reason, his name was familiar to law professors nationwide with professional interests in many different subject areas.

As I soon learned, Ed effortlessly dispatched so many of his thoughts into the electronic ether because he was passionate about the law and joyful about communicating with his professional peers. He believed that law was a force that could improve society and that robust scholarly discourse was a force that could improve law. He loved the immediacy of online debate, which was well-suited to a man who was opinionated but also open-minded, and to whom language came quickly and naturally.

Ed Brewer also loved the Salmon P. Chase College of Law. Indeed, his dedication to the institution was limitless and unconditional. Ed threw himself into his teaching with abandon. He took a genuine interest in the lives of his students, and forged lifelong friendships with many of them. And he also took a selfless and uncommon interest in faculty governance and institutional service, both within the College of Law and in the broader University. Although Ed sometimes displayed great emotion, he labored mightily to transform the College of Law into a just and rational institution, ruled by reason and responsive to evidence rather than to passions or certitudes.
Ed also was fearless. He despised lazy thinking, hypocrisy, and condescension, and was never happier than when he was speaking truth to power. He respected people, but did not respect offices. He valued integrity, sincerity, thoughtfulness, courage, and kindness. He detested careerism, obsequiousness, sanctimony, and mendacity of every stripe. A natural-born lawyer, Ed loved to stand up for the rights of others. Ed Brewer had some faults, but no one was more aware of those faults than he was. He was quick both to apologize and to forgive, and always sincere in so doing. He was dedicated to improving his own character. Ed thought every day about how he could be a better person. Ed was never self-righteous, but he did aspire to righteousness. I am glad I had the opportunity to know him. I miss him already.

Ken Katkin
Professor

*** *** ***

Thank you for inviting me to be with you today. I would like to start the remembrances with a few words about Ed - my college roommate, my partner-in-almost crimes, my brother, my friend.

I have read a lot of philosophers on friendship in the last two months, Aristotle, Plato, Socrates, Kant, Russell, Nietzsche, and Kierkegaard. They all have high and lofty things to say about friendship; but I think I have something to add to their canon. True friendship is not minding when you answer the phone at 2:00 in the morning only to hear the maniacal laughter of Ed Brewer as he recites his latest original limerick. Now I stare at the phone, waiting for his call, and it doesn’t come.

What does it mean to have Ed Brewer for a friend? It means having what we used to call...“Adventures.” One singular Adventure was driving from Nashville to Detroit in a small truck designed to carry 800 pounds, picking up 4,000 pounds of commercial bakery mixers, and then getting caught in a blizzard on our way back home.

Another Adventure was driving non-stop to Texas so we could enjoy ribs the way my dad cooked them. Dad made a huge platter of ribs and set it down in the middle of the table for Mom, Dad, Edward and me. Ed, being the Sewanee gentleman that he was, demonstrated true Southern courtesy by engaging my parents in conversation as we ate. I, on the other hand, merely ate. Finally Ed looked down at that diminished platter of ribs and then looked at the bone pile on my plate. It occurred to him that I was NOT going to be polite. If he wanted any ribs he had best stop talking and start eating.
But our best Adventure was driving 3600 miles in nine days to two different countries in search of the perfect … donut. We did finally find it – 30 miles from home.

I want to include a sidebar here: For all of you who are or were students of Ed’s, the best way to honor his memory is to love the law for what it can be, not for what it is.

I have tried, and I simply cannot sum up 38 years of friendship in a few paragraphs. Ed and I shared too much through these years to be distilled for this occasion. I can say that Ed was a fiercely loyal friend and that he was a generous brother. He strove to help others who were in pain from this world’s trials and the things we people sometimes do to each other – and he carried pain in large portion himself, frequently because he had to face the fact that he was NOT perfect.

So I would like to close with a poem by Mary Oliver that could have been written about and for Ed. It is called, “Wild Geese.”

You do not have to be good.
You do not have to walk on your knees
for a hundred miles through the desert repenting.
You only have to let the soft animal of your body
love what it loves.

Tell me about despair, yours, and I will tell you mine.
Meanwhile the world goes on.
Meanwhile the sun and the clear pebbles of the rain
are moving across the landscapes,
over the prairies and the deep trees,
the mountains and the rivers.

Meanwhile the wild geese, high in the clean blue air,
are heading home again.
Whoever you are, no matter how lonely,
the world offers itself to your imagination,
calls to you like the wild geese, harsh and exciting
over and over announcing your place
in the family of things.

Robert Kiefer
Best Friend

** ** **
I am a lawyer specializing in ethics in the San Francisco area. Ed was an e-mail correspondent on the APRL listserv (Association of Professional Responsibility Lawyers) and I was on a panel or two with him. Here is what I would say about him: "Ed and I met long ago at a symposium on ethics. I am from the South, and we became fast friends. I could talk to him about emerging ethics issues and the best place to get good bar-b-que in the same conversation. He was obviously very bright and well-spoken, and we at APRL appreciated him for his insightful comments on ethics issues. But I appreciated him even more for his humility, kindness and sense of humor. Mr. Brewer will be missed by all."

Carol M. Langford
University of San Francisco School of Law

** ** **

Metaphorically, Ed was for me a door, not a step, wall or window. After I passed through it once, standing on the outside waiting for it to open I felt a mixture of apprehension and excitement because I knew that what was on the other side had the potential for rainbows laced with heavy storms. Remembering Ed takes me to the end of a great rainbow, full of unimaginably vivid colors that I’ve seen only once as a lad in a small group of variegated pine trees in Coconut Grove, Miami, 1955.

Bob Lilly
Regents Professor of Sociology

** ** **

My association with Ed Brewer has been the most important professional association of my career. It will doubtless remain so. In 1996, after several years of work, Ed, Randy Sheppard, and I published GEORGIA APPELLATE PRACTICE. That book helped me establish myself as an appellate lawyer, and I like to think it helped Ed realize his dream of becoming a law professor.

Now published by West, the book is well regarded; and I am proud of my contribution to it. But my contribution was largely to summarize law often summarized by others. Ed’s contribution was original and unique. Tasked with setting out the appellate jurisdiction of Georgia’s superior courts, he produced a complete catalogue of every Georgia government entity - at every level and in every branch - that exercises any sort of judicial authority, as well as the procedures for appealing from their decisions. Much of the information Ed assembled was not to be found in codified statutes or published appellate
decisions. Kind things have often been said to me over the years about our book. Most of them have been about Ed's unique contribution.

That contribution reflected one of Ed's passions. He was passionate about the due process of law. He was offended by unlawful exercises of authority and usurpations of power. When his research led him to conclude that the City Court of Atlanta, a unique court that had existed for decades, had been created through an illegal procedure, Ed undertook to persuade our supreme court to order its abolition.

After he moved from Georgia to Kentucky, Ed and I rarely saw one another. Our friendship was conducted by telephone and email, mostly as the annual deadlines for updates approached. But I will miss that friendship. I will miss his keen insights. And I will miss the inspiration of his passion for intellectual honesty and the rule of law.

Christopher J. McFadden
Attorney at Law, Appellate Practice

** ** **

Thank you for coming this afternoon to celebrate the life of Professor Edward Cage Brewer III. Ed was a true southern boy born in Mississippi on January 20, 1953 to Edward Cage Brewer Jr. and Elizabeth (Betty) Blair Alford Brewer. Ed is survived by his mother, Betty, five children, three daughters, Katherine, Julia, Caroline; two sons, Matthew and Andrew Brewer. Three brothers, Luke Brittain, William, and John Brewer and two sisters, Erin Elizabeth and Rule Brewer. Two grandchildren and his friend since college Robert Kiefer and many friends at Northern Kentucky University and across the country.

We have with us today, Ed's mother, Betty, two of his brothers, John and Bill, his two sons, Matthew and Andrew and their mother, Karyln.

Ed graduated magna cum laude from the University of the South in Sewanee, Tennessee and received his JD from Vanderbilt in Nashville, Tennessee.

He was a law clerk for the Honorable Albert J. Hendren, United States Court of Appeals and he also clerked for the Honorable Virgil Pittman, United States District Court. He practiced law for fourteen years in Atlanta and was an Adjunct and Visiting Professor of law at Emory University School of Law and Georgia State University College of Law.
I have thought long and labored over what I would say today about my friend, Ed. A soliloquy of what a wonderful person Ed was is the thought of the day. But Ed, like all of us, had his demons. I know that anything other than the absolute truth would be enough for Ed to somehow email me a two page, single-spaced email to correct any inaccuracies in my portrayal of him. So here I go, telling you about my friend. Ed was not a saint and never claimed to be. He had his issues and problems and was honest about them. He was so very intelligent and so very talented. He was a talented teacher, musician, singer, song writer, writer of poems/limericks, and a scholar. Ed was a very kind and generous man.

Ed’s mind raced with a million thoughts and issues and he could easily get caught up with what he thought were injustices. This at times caused him much turmoil. Ed was like a roller coaster ride running at full speed with very highs and then some very lows, some fast curves and dips. However, a true friend accepts you as you are.

For more than eleven years I have been proud to call Ed, my friend. We have shared many memories, and have worked through some difficult times. He wasn’t always right, but if he was wrong he’d say so. If there was an injustice, he was ready to make it right. These last couple of years were tenuous and at the same time good – he had a chance to go places and do things, sample life in a way most of us only think about. He would call me from a mountain top and describe the beauty of a waterfall, then the next time he would call me, he’d be in the desert describing a flower that he saw blooming along the road. Another time he might be building a fence for a friend and tell me how he felt working with his hands. He truly enjoyed his last year and a half traveling and living. He was working so hard to put his life together so he could come back to his love – teaching. Things don’t always work out the way we want, there are sometimes different plans for our lives – then the cancer showed its ugly head.

The last time I saw Ed was when he stopped by the College in July to pick up a few things on his way to Vanderbilt. We had an opportunity to talk for several hours as I helped him pack up for his trip. He had a positive attitude and told me it was in God’s hands with the help of his physicians. He kept me updated during his treatment and progress through email and phone.

I spoke to Ed the Wednesday before Thanksgiving – we were discussing his plans to return to Chase and his love of teaching. He was in a great deal of pain, but he wanted assurances that his position would be waiting for him when he was well enough to return. We talked about little things to help him keep his mind off the pain, about the stained glass artwork he had given me, and I told him about the vivid colors bouncing off the wall, how it looked with the sun shining on it, and how every time I looked at it I was reminded of him. Maybe
he knew he would never talk to me again. For as we were saying goodbye, he said, “you’ve been a good friend and I love you.”

Ed Brewer was my friend and I miss him, but I will treasure his memory and in his association I have met new friends, Ed’s family, especially his mother, Betty, and his friend since college, Robert Kiefer. Thank you Ed.

Karen Ogburn
Associate Dean for Administration

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The tragic and untimely death of my dear friend Ed Brewer has deprived the College of Law of a true genius. And yet unlike so many who claim to be so gifted, Ed possessed no whiff of condescension, arrogance, or hubris. Ed was a devout Episcopalian who believed that human frailties are God given. As a consequence, his grace, charm, humor and self deprecation were on display for all to observe. So too was some pugnaciousness from time to time, no doubt occasioned by Ed's need to right some perceived wrong. The richness of my relationship with him allowed me to laugh him out of his quarrelsome moods and to see the multi-talented, mirthful, kind, generous and riotously funny individual bound up in the genius. My life was so enriched by knowing him as I'm certain were the lives of many others. Go in peace, my brother. May God give your soul the rest it so richly deserves.

Henry L. (Steve) Stephens, Jr.
Professor of Law

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LINCOLN’S CONSTITUTION REVISITED

Jason A. Adkins*

In the beauty of the lilies Christ was born across the sea, With a glory in his bosom that transfigures you and me: As he died to make men holy, let us die to make men free; While God is marching on.

From “The Battle Hymn of the Republic”
Julia W. Howe, 1861

INTRODUCTION

Interest in Abraham Lincoln’s approach to the Constitution is exploding. The issues Lincoln faced are surprisingly comparable to the ones we face today: the extent of executive power; separation of powers; federalism; civil liberties in wartime; and judicial supremacy. But the recent scholarship addressing these questions is often partisan, attempting to fit Lincoln into one side or the other of today’s constitutional debate. Lincoln is either a champion of expansive federal power and a scourge of the latter-day federalists—exposing their neo-states’ rights ideology.1 Put another way, he was a wily constitutional pragmatist who was able to bend—but not break—the Constitution to achieve the righteous aims of preserving the Union and defeating slavery.2 Or, Lincoln becomes a sophisticated theorist3 of constitutional law whose expansive vision of executive

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2. See FARBER, supra note 1, at 199 (extolling Lincoln’s “ruthless pragmatism”); see also Paulsen, supra note 1, at 692 (“Lincoln was what we today might call a pragmatic textualist in matters of constitutional interpretation.”).

power during national emergency guides us today.\footnote{4} Partisans on all sides generally concede that Lincoln went too far in his assault on civil liberties during the war, but tend to forgive any abuses out of deference to the justice of the cause.\footnote{5} Thus, Lincoln is praised for having the foresight to stretch or even ignore the Constitution to achieve his purportedly noble purposes.\footnote{6} Lincoln’s Constitution is essentially pragmatic and utilitarian;\footnote{7} sometimes one has to break some eggs to make an omelet.\footnote{8}

But the recent scholarship is unsatisfying because it fails to explain the deeply ideological core of Lincoln’s Constitution. How could Lincoln, so

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\item \footnote{Paulsen is absolutely correct to argue that the Constitution should be interpreted to preserve the constitutional order of the republic that it governs. “Constitutional norms” remain the same—the Constitution does not change—but those norms are applied differently in a time of emergency. \textit{Id.} at 810. But Paulsen’s theory does not delve deeply enough into why Lincoln believed national self-preservation was so important. For Lincoln, America was not just any nation, but one established by God in his providence to be a beacon of liberty and hope to mankind—to improve the lot of men everywhere. The Constitution effectuated the principles of the Declaration of Independence, the sacred text of the chosen nation. Paulsen’s theory does not account for Lincoln’s brand of American exceptionalism, and does not provide a principled stopping point at which “necessity” may be permissibly invoked, especially because his theory of necessity includes massive loss of innocent lives, or perhaps another “emergency.” \textit{Id.} Thus, Lincoln’s Constitution becomes Jack Bauer’s Constitution. \textit{See 24 (FOX)} (On this popular television show, special agent Bauer is always “bending the rules” in order to “save lives”). Here, Paulsen’s “Constitution of Necessity” diverges from “Lincoln’s Constitution,” and looks like post-hoc support for a Jack Bauer-friendly executive.}
\item \footnote{5. FARB\textit{er, supra} note 1, at 197 (stating that Lincoln’s was “[n]ot a perfect record, but a creditable one, under incredibly trying circumstances”); see also Paulsen, supra note 1, at 695 (noting that Farber does not judge Lincoln too harshly on his curtailment of civil liberties); Paul Finkelman, \textit{Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian}, 91 MICH. L. REV. 1353, 1366 (1993) (noting various scholars who share the view that Lincoln’s excesses regarding civil liberties were justified by the purposes of the war).}
\item \footnote{To support his argument that Lincoln had a flexible approach to the Constitution in order to address the needs of the time, he quotes Lincoln out of context to the effect that “the dogmas of the quiet past are inadequate for the stormy present.” \textit{See Farber, supra} note 1, at 117. As will be shown, Lincoln was very dogmatic in his view of the Constitution, but not from the perspective of our current constitutional debates.}
\item \footnote{7. Historian Allen Guelzo notes that Lincoln’s apologists are often “pulling apart means and ends, either apologizing for the former or explaining away the latter[,]” \textit{Allen Guelzo, Lincoln’s Emancipation Proclamation: The End of Slavery in America} 5 (Manning Ferguson Force ed., Simon & Schuster 2004) [hereinafter “L.E.P.”].}
\item \footnote{8. This is the analogy of noted scholar James McPherson, describing Lincoln’s approval of General William Tecumseh Sherman’s “March to the Sea,” that savaged the civilian populations of Georgia and South Carolina. \textit{James M. McPherson, Abraham Lincoln and the Second American Revolution} 38-39 (Oxford University Press 1991) [hereinafter “McPherson”]. Two scholars have recently noted that Lincoln’s policy of total warfare probably violated the international laws of war. \textit{See Robert Delahunty & John Yoo, Executive Power v. Int’l Law}, 30 HARV. J.L. & PUB. POL’Y 73, 93-99 (2006-2007).}
\end{itemize}
nakedly committed to the rule of law, be so willing to transgress constitutional boundaries? The answer is that the meaning of the Constitution cannot be ascertained solely by parsing its phrases or interpreting its provisions in an isolated manner. Rather, Lincoln believed the Constitution was the practical (and prudential)9 implementation of the natural rights principles of the Declaration of Independence. Thus, he believed the Constitution should be interpreted and applied in light of its background principles, which can be readily seen in its Preamble, and the Declaration itself—the first of our organic laws.10 Taken together, the Declaration of Independence and the Constitution are an inseparable and foundational charter of republican government.11

Lincoln’s Constitution is not just an example of a particular strain of American political thought, but was part of what he himself described as his “civil religion.”12 Lincoln saw America as the vanguard and beacon of both liberty and democratic self-governance around the globe.13 America had been chosen by God in his Providence to act as a model of government “of the people, by the people, for the people.” Lincoln understood slavery and secession not simply as threats to the Union, but a false political idolatry that represented an assault on the advance of republican government.14 The unifying theme of his political career was the rededication of America to its sacred charge.

To understand Lincoln’s approach to the Constitution, one must apply the hermeneutic of his civil religion: The Declaration of Independence is the sacred text of Lincoln’s civil religion, and represents the interpretive key to why he acted the way he did in particular circumstances.15 Above all, Lincoln subordinated the particular provisions of the Constitution to its overall purpose of securing liberty and the true aims of republican government.16 In political philosopher Isaiah Berlin’s terms, referring to Aesop’s classic fable, Lincoln was a “hedgehog” rather than a “fox” because he organized his political action around one coherent vision—his civil religion—rather than a series of

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9. For a discussion of the role of prudence in Lincoln’s statesmanship, see L.E.P., supra note 7, at 3-5.
10. See The Declaration of Independence (U.S. 1776).
11. The Declaration’s equality principle, Lincoln stated, was written for all time as a “standard maxim for free society.” James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President’s War Powers 138 (Simon & Schuster 2006) [hereinafter “Simon”].
13. McPherson, supra note 8, at 56.
14. Lincoln’s one-time friend Alexander Stephens remarked that for Lincoln, preserving the Union rose to the level of religious mysticism. Simon, supra note 11, at 233.
16. See Simon, supra note 11, at 200 (stating that Lincoln exercised his presidential war powers in a way he believed faithful to his sacred charge to preserve the Union, as it “represented the best hope in the world ‘to elevate the condition of men’”).
independent aims. Part I of this article will examine Lincoln’s civil religion, or theology of America, in detail. Part II will describe the connection between the Declaration of Independence and the Constitution in Lincoln’s thought and its place in his comprehensive civil religion. Finally, Part III will apply this hermeneutic to particular constitutional questions that Lincoln confronted. If we wish to apply Lincoln’s lessons to today’s debate, we need to understand him on his own terms, rather than fitting him into an ideological box wrenched from its historical context.

I.

The Mall in Washington D.C. is the sanctuary of the American civil religion. The Lincoln Memorial is a gateway into the sanctuary because Lincoln embodied the American civil religion himself; he was its high priest and prophet. Lincoln’s regular use of religious language was at the service of his civil religion, or “political theology.”

A civil religion is a theological narrative used expressly as a political device. In other terms, a civil religion can be described as a way of articulating a theory of politics that transcends merely utilitarian ends. Especially useful in democratic societies, a civil religion can provide a common framework of values or ideals to serve as a touchstone for a free people. If a shared history or cultural heritage is lacking, a substitute narrative involving a special set of values or destiny can provide that firm foundation through which to measure a political theory. Lincoln’s civil religion is the classical expression of American civil religion, wedding the Puritan-Hebraic model of John Winthrop and his “city on a hill” with the natural rights theory of the Founders.

It is a tremendous irony that the greatest theologian of the American civil religion, and the political figure who most effectively employed religious language to frame the national debate, was not himself religious, at least in the

17. For a discussion of this useful analogy, see McPherson, supra note 8, at 113-30.
18. For a general discussion of the geography of the Mall and its representation of the American civil religion, see Stout, supra note 12, at xviii.
19. Id. at xix (“American presidents have traditionally been viewed as the prophets and priests of American civil religion.”).
21. For a brief, but illuminating discussion of American civil religion, see Stout, supra note 12, at xvi-xxi.
22. Id. at xviii.
23. Thurow, supra note 20, at 10.
24. Lincoln was often criticized for espousing “Hebraic-Puritan” ideas that fostered war by requiring adherence to absolutist moral principles. Id. at 16.
26. Thurow, supra note 20, at 49.
orthodox sense of the term. Rather, Lincoln’s religious worldview was intimately shaped by his life experiences of growing up as the ambitious son of Baptist pioneers. Specifically, Lincoln’s civil religion was formed by his rejection of the austere Calvinism of his youth and his embrace of Whig ideology.

A. The Guiding Hand of “Providence”

Lincoln’s religious upbringing was fairly typical for someone growing up in the rural frontier of early-nineteenth-century America. There were few established churches, and most received their instruction from traveling preachers and personal Bible reading.

Lincoln could recall almost any passage of Scripture at will. Later in life, he would employ biblical imagery in jury arguments, in private conversation and correspondence, in jokes, and in his most important speeches. But Lincoln was scandalized by the traveling preachers he encountered, and frequently satirized their fire and brimstone sermons. Lincoln never assented to the peculiar version of Calvinist theology known as “hards hell Baptist” found most often in the Kentucky and Indiana frontier. In particular, Lincoln could not grasp how God could create persons, and then predestine them for hell despite their actions or beliefs to the contrary.

Thus, at an early age, Lincoln developed a religious skepticism that prevented him from adhering to any particular established Christian church, or embracing any of the orthodox creeds. In his early years as a hired hand in New Salem, Illinois, Lincoln was generally known as a skeptic and for “infidelity” because of his reading habits and refusal to join a church.

While his early years were indeed a reaction against the hard-boiled Calvinism of his parents, Lincoln was still deeply affected by the religious culture and ideas of his youth. As Lincoln matured, the heavy emphasis on

32. L.E.P., supra note 7, at 6-7.
33. GUELZO, supra note 31, at 36.
34. L.E.P., supra note 7, at 6-7.
35. GUELZO, supra note 31, at 80-81.
36. DAVID HERBERT DONALD, LINCOLN 33 (Alfred Knopf 1995) [hereinafter “DONALD”].
37. CARWARDINE, supra note 29, at 34-35.
predestination in the Calvinism of his early years re-emerged as “Providence”38—the guiding force of the divine being that governs the actions of both individuals and the larger universe of activity.39 According to one scholar, this satisfied the growing need throughout his life “to ascribe all human events to some form of causation.”390

Despite his heterodoxy, it was Lincoln’s Bible reading that informed his religious views about God’s providence. Lincoln’s attraction to the Bible was largely in its narrative format: It is about events and the hand that guides them. Events are how God reveals his will.41 This guiding hand gave moral support to Lincoln, who constantly sought to discern the meaning and pattern of events.42

Lincoln’s reading of the Scriptures, especially the Hebrew prophets, taught him that God achieves his purposes through a “servant people, with a responsibility to the entire ‘family of man.’”43 One of the major tenets of orthodox Christian theology is that God chooses a special people, his elect, from the nations to bring his wise and loving care to all of creation.44 This servant people would be a model to the nations, from whose conduct and justice the ways of God would be known.45 In Christian theology, the servant people are the descendants of Abraham, the biblical Israel. The twelve tribes of “Israel” are reconstituted by Jesus Christ, through his twelve apostles, as the Church.46 The Church, the New Israel, continues the mission of God’s chosen throughout history to bring his wise and loving care to all of creation.47 To use Augustine’s terminology, the City of God (the Church) and the City of Man (the secular order, properly speaking) were separate and distinct realities, but it was the Church’s role to inform the activities of the City of Man.48

After the Reformation, Calvinism joined the two cities—the temporal and the spiritual—together by creating covenanted, spiritualized communities of the elect—God’s chosen—such as Calvin’s Geneva. The Calvinist Puritans in

38. GUELZO, supra note 31, at 318-20.
39. See MARK A. NOLL, AMERICA’S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 427 (Oxford University Press 2005) (“Lincoln’s conception of God’s rule over the world set him apart from the recognized theologians of his day.”) [hereinafter “NOLL”].
40. GUELZO, supra note 31, at 153; see also WHITE, supra note 30, at 18 (describing Lincoln’s God as one who acts in history).
41. TRUEBLOOD, supra note 28, at 62.
42. Id. at 31-32.
43. Id. at 119.
46. See generally CCC, supra note 44, §§ 763-67.
47. Id. §§ 863-65.
England attempted to do the same in aftermath of the English Civil War.\textsuperscript{49} Failed attempts by English Puritans to build the New Jerusalem on that “blessed isle” propelled them to depart for America in the hope that they could create a new order—a city on a hill—built on Christian belief and moral purity that would be a light to the nations; hence the many “Salems” that dot our landscape.

But Puritan covenant theology quickly Americanized.\textsuperscript{50} As the new nation developed, its nascent Calvinism fused in common cause with the progressive and optimistic doctrines of the Enlightenment and its promise of a \textit{novus ordo seclorum}—a new order for the ages—due to their common belief in government “by the people.” And because the notion of a covenanted people is central to biblical revelation, what occurred was a sort of divinization of the American state; not only would it be a beacon of Christian piety and moral virtue, it would bring liberty, justice, and equality to the nations. Thus, America was founded on the twin pillars of Calvinism and the Enlightenment.\textsuperscript{51} In one form or another, this substitution of America for the Church is the hallmark of American civil religion.\textsuperscript{52} Embracing this American “salvation history,” America was, in Lincoln’s own words, “the last best hope” of mankind.\textsuperscript{53}

\textbf{B. Whig “Free-Labor” Ideology}

Lincoln’s early dissatisfaction with “hardshell Baptist”\textsuperscript{54} theology was matched by his dissatisfaction with the stultifying drudgery of agrarian life.\textsuperscript{55} Lincoln’s early lot was to move with his family from plot of land to plot of land, working long and back-breaking hours to milk sustenance from the fields.\textsuperscript{56} Lincoln sought to escape what he saw as a dreary future and seek his fortune in the new centers of commerce emerging in the states and territories of the West.\textsuperscript{57}

Lincoln was a man of ambition, and believed education to be a sure path to improvement. Thus, Lincoln spent most of his free time as a young man reading\textsuperscript{58} and was particularly influenced by \textit{The Autobiography of Benjamin Franklin}, and Thurlow Weems’ \textit{Life of George Washington}.\textsuperscript{59} In these books, Lincoln discovered both the personal virtues and vision of America as a divinely ordained patrimony full of noble spirits, such as Washington, who would bring

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\item \textsuperscript{49} See Noll, \textit{supra} note 39, at 38-40 (discussing the development of Puritan covenant theology).
\item \textsuperscript{50} Id. at 44 (describing how Calvinist theological vocabulary merged with republicanism).
\item \textsuperscript{51} Id. at 14-15.
\item \textsuperscript{52} See generally Richard John Neuhaus, \textit{Our American Babylon}, 158 \textit{First Things} 23 (Dec. 2005) (discussing the tendency to make an idolatry of the nation due to the lack of a coherent ecclesiological framework).
\item \textsuperscript{53} Trueblood, \textit{supra} note 28, at 56.
\item \textsuperscript{54} L.E.P., \textit{supra} note 7, at 6.
\item \textsuperscript{55} Donald, \textit{supra} note 36, at 33.
\item \textsuperscript{56} Id. at 32; Carwardine, \textit{supra} note 29, at 4-5.
\item \textsuperscript{57} Donald, \textit{supra} note 36, at 32.
\item \textsuperscript{58} Id. at 30.
\item \textsuperscript{59} Trueblood, \textit{supra} note 28, at 12.
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about a great improvement in the human lot. He was inspired by Franklin’s reason, commitment to science and progress, and advocacy of the personal restraint and virtues that undergird economic success. In Lincoln’s mind, America—a nation founded by a collection of great men such as the world had never seen—gave everyone the opportunity to make something of themselves. Men of little means could rise to become statesmen and great businessmen. The essence of America was its ability to guarantee to every man the opportunity to pursue happiness.60

Lincoln’s romantic notion of America was confirmed by his life experiences.61 While suffering many personal economic setbacks, Lincoln rose relatively quickly from a flatboater on the Sangamon and Mississippi Rivers, postal clerk, and real estate speculator to state legislator, prominent Illinois attorney, and national politician. America was full of all the promise Lincoln believed.62

Early on, Lincoln learned that his worldview was most consistent with the Whig Party,63 particularly the vision of its most prominent member, the statesman Henry Clay.64 Lincoln quickly became an evangelist of the Whig platform and its emphasis on the expansion of commerce, trade, and economic liberty as the pathway of opportunity by which all men could enjoy the blessings of liberty.65 Man was entitled to the fruits of his labor, and labor was the basis of all economic activity. This free-labor ideology was at the heart of Lincoln’s understanding of the freedom offered by the Declaration of Independence. Thus, when it came to slavery, Lincoln believed it to be a hideous institution that robbed from the black man what was inherently his—economic liberty.66 Lincoln believed it was this principle of freedom and equality that was at the heart of the promise of both America and republican government in general. Slavery undermined the principles upon which self-government rests.67

Lincoln recognized the ideology of slavery in his political opponents: the Jacksonian Democrats. In their attachment to Jefferson’s agrarianism, Lincoln sensed the seedbed of slavery—a system that binds men to the land and denies

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60. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776); see also NOLL, supra note 39, at 14-15.
61. CARWARDINE, supra note 29, at 19.
62. DONALD, supra note 36, at 38.
63. Id. at 42.
65. MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 55 (Northern Illinois University Press 2006) [hereinafter “STEINER”]. Lincoln’s first public statement is illustrative of the issues that drove him into politics, namely the creation of infrastructure to facilitate commerce in Illinois. See Abraham Lincoln, To the People of Sangamo County (Mar. 9, 1832), in SELECTED SPEECHES AND WRITINGS at 3 (Roy Basler & Don E. Fehrenbacher eds., 1992).
66. GUELZO, supra note 31, at 195-96.
67. CARWARDINE, supra note 29, at 3.
them economic opportunity and social mobility; the very experience he himself had lived. Thus, Jacksonian ideology promoted slavery—of all races. For Lincoln, Whig free-labor ideology embodied the spirit of America. It allowed poor farmhands like Lincoln to rise to become moderately wealthy members of an esteemed profession like the law, or even statesmen. To the serfdom in which much of the world’s population appeared to be mired, the American experiment offered a great hope of the three-fold gift of life, liberty, and the pursuit of happiness. This was America’s unique gift to the world, and for Lincoln it was the Whigs who represented the party that perpetuated a proper understanding of America, rather than the retrograde Jeffersonianism espoused by the Democrats.

Lincoln’s biblical understanding of Providence and history, as well as his Whig ideology, shaped the contours of his civil religion. But Lincoln’s worldview was not only a product of his experience of America; it was fused to his observations of events around the globe. Lincoln entered politics at a time when the triumph and progress of liberty around the world was far from certain. Nascent liberal movements in Europe were being snuffed out by the last vestiges of the ancien regime, while at the same time exhibiting violent and totalitarian tendencies on their own, as could be seen in the upheavals of the 1830s and 1840s.

Additionally, popular revolutions in Latin America had given the advocates of constitutional government new hope that what was begun at Lexington and Concord would eventually triumph. In particular, those nations looked to America as their inspiration. For Lincoln, America, as mankind’s “last best hope,” played the key role in the march of liberal institutions through history. If the American experiment in self-government faltered, the other movements would be doomed as well. Lincoln believed that natural rights were universal.

68. GUELZO, supra note 31, at 121-22.
69. Id.
70. Id.
71. See CARWARDINE, supra note 29, at 26 (discussing Lincoln’s interpretation of mid-nineteenth century European nationalist movements as part of “the general cause of Republican Liberty”).
72. The confident march of liberty was a dominant theme of the Enlightenment, and it is not for nothing that scholar Allen Guelzo calls Lincoln “our last Enlightenment politician.” L.E.P., supra note 7, at 3.
73. Id.
C. Lyceum Speech: Lincoln’s Civil Religion Takes Shape

Lincoln addressed this theme in a speech to the Young Men’s Lyceum of Springfield, January 27, 1838. The core of Lincoln’s civil religion, articulated very early in his career, can be found in this lecture. Lincoln dubbed the speech, “The Perpetuation of Our Political Institutions.”

In the speech, Lincoln described how the nation had been blessed by the grace of God with abundant resources, as well as natural boundaries that made its conquer by an outside nation almost impossible. Additionally, its political institutions were of the noblest ever devised. Thus, for Lincoln, America existed as a kind of test case within the sweep of history. It had been given a great inheritance through which to perpetuate the cause of liberty. Lincoln set out to confirm the people in this task, not only for themselves, but also in gratitude to God as well as a duty to posterity and to the species. Their task was one bound intimately in the scope of history to be a model nation of freedom and equality.

Lincoln warned the people not to confuse their cosmic inheritance with their political inheritance. The political inheritance bequeathed to them by the Founders was in constant need of rejuvenation, especially since Lincoln saw ominous trends looming in American democracy. It was not outside dangers that could be the downfall of the nascent republic, but instead dangers from within—particularly disregard for the law, the employment of the passions to confront political problems rather than sober judgment, as well as mob violence.

The speech was written against the background of nearby mob violence, violence that had taken the life of a prominent abolitionist, some gamblers, as well as an African-American criminal. Lincoln saw in the unreconstructed passion for justice embodied in mob rule, what he calls a “mobocratic spirit,” a true threat to the American experiment. According to Lincoln, mob justice, while perhaps accomplishing noble ends, eroded respect for the law, which is the true protector of justice and the innocent. As the institution of law is further

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75. One commentator has described the speech as an expression of Lincoln’s “law and order” Whig ideology. See STEINER, supra note 65, at 57.
77. THUROW, supra note 20, at 21.
78. Id.
80. THUROW, supra note 20, at 25.
82. Id. at 14-15.
83. Id. at 18.
84. Id. at 16.
undermined, the lawless in spirit habitually learn to become lawless in action. 85 Because it sometimes can mete out justice, mob violence is particularly dangerous as an example to others. 86

Further, mobocracy and the erosion of law undermined the patriotism of those who would defend the republic when the tranquility of order is threatened. If the spirit of America was to be found in its laws and noble institutions, and these pillars are undermined by mob rule, then even the republic’s most ardent patriots will not sacrifice to support it. The attachment of the people to their government, a necessary component of perpetuating America’s political institutions, is thus eroded from within. 87 To paraphrase Lincoln, “while noble sentiments remain, if disrespect for the law is allowed to flourish, the government cannot endure.” 88

Thus, Lincoln proposed a unique solution to the problems besetting a republic that had lost its emotional ties to the work of the Founders: a civil religion dedicated to the rule of law and the sacred principles of the Founders.

Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children’s liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars. 89

For Lincoln, the Founding was not just a collection of documents, but rather a sacred event to which the documents attest; a covenant sealed by the blood of the Revolution. 90 By adhering to the laws and principles of the Founding,
“swear[ing] by the blood of the Revolution,” 91 the American people rededicate themselves (like the Founders pledging “our Lives, our Fortunes and our sacred Honor”) to the covenant.92 Crucially, the covenant is not just among the people, but also with God himself, which is why it is so important that reverence for the laws be also cultivated in seminaries and in “Primmers.”93 America is transmuted into the biblical narrative as a covenanted, elect, people of God who model (and extend) his blessings of liberty and self-government to both America and the world. Thus, Lincoln united the two main sources of American political thought into its governing religio-political narrative: the Hebraic-Puritan biblical tradition and the Enlightenment principles of the Founders.94

According to Glen Thurow, Lincoln “attempts to shift the emphasis away from the call to independence and novelty” and “seeks rather to instill the obedience and reverence that are necessary to preserve the benefits the Declaration helped to gain.”95 The Founders solved the problem of devising a means by which people were capable of governing themselves.96 However, it was up to succeeding generations to rededicate themselves to those sacred and noble principles, namely liberty and equality of opportunity. Lincoln thought that one important purpose of free government was to alleviate misery and suffering, and believed that the American experiment in democratic self-government, rooted in the principles of liberty and equality, was the most effective means of ushering in a new age of peace and prosperity.97 Lincoln believed himself to be a prototype of America’s promise.

But unlike more Hegelian Whigs who believed in the inevitable march of liberty and progress,98 Lincoln held a more Augustinian attitude to this supposed march of history.99 It was by no means assured that republican government would prevail at home or abroad. Thus, it was necessary that Americans recommit themselves to the principles of the Founding to ensure its existence in

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92. See GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 88-89 (Simon & Schuster 1992) [hereinafter “WILLS”]. See also DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
94. THUROW, supra note 20, at 37.
95. Id. at 34.
98. See NOLL, supra note 39, at 434 (noting Lincoln’s doubt that God’s purposes and America’s were necessarily one and the same).
perpetuity. But to cultivate the sort of enthusiasm needed to sustain the project required (and requires) a religious devotion to the principles and the personalities that shaped the Founding itself. Lincoln believed that America must cultivate its own religion-political narrative to preserve and perpetuate its noblest ideals. However, it would be a mistake to ascribe to Lincoln a cynical, control-the-masses attitude as the purpose behind his advocacy of the American civil religion. Unlike Rousseau, who argued that the social contract required the cultivation of a civil religion to foster the devotion of the people to the state, Lincoln actually believed in the civil religion he preached. He was its most effective priest, prophet, and king.

In Lincoln’s Lyceum speech we see a comprehensive political theory embedded in a religious framework, which represents the archetype of a civil religion. The work of the Founders represents both a blueprint of conservatism and reform. The noble principles of the past are conserved, while any legitimate reform is tied to reasserting and reapplying those cherished principles. The noble act of the Founding serves as a standard by which the people of every generation shall be judged. Lincoln even invokes imagery whereby George Washington would be standing in judgment over the fidelity of Americans to the principles of the Founders. Closing his speech, Lincoln claimed that fidelity to the laws and the principles of the Founders will assure American freedom and “the gates of hell shall not prevail against it.” Invoking both divine favor and judgment, “he seeks to improve the declining effect of the Revolution by tying the American political institutions to a greater institution that can resist the gates of hell.” America is substituted for the Church, and becomes God’s chosen people. Unlike in a mobocracy, the American people will be able to reasonably respond to the continued threats against democratic self-government through sacrifice, reverence, and fidelity to law. Utilizing sober reason instead of

101. See Carwardine, supra note 29, at 40 (discussing the place of the Declaration of Independence and Lincoln’s heterodox Christian faith).
102. Lincoln’s civil religion was his true personal faith, and replaced any form of orthodox Christian belief. Later depictions of Lincoln present him as a prime actor in the great religious drama he described. In particular, it was said that he acted as priest by offering himself as sacrificial lamb for the good of the nation; he was prophet in his many great utterances; and king in the sense he ruled justly over the nation. See Stout, supra note 12, at xix (describing American presidents as “prophets” of the American civil religion).
103. Thurow, supra note 20, at 35.
104. Id. at 34.
106. Id. at 21.
107. Thurow, supra note 20, at 36.
108. Lincoln used this imagery evoking Christ’s promise to Peter that the “gates of hell” should not prevail against the Church more than once. See White, supra note 30, at 31-32 (noting how Lincoln substitutes America for the Church in the gospel narrative).
the gratification of the passions that characterizes mobs, the Americans will perpetuate their institutions not only for themselves, but for all posterity.\textsuperscript{109}

II.

The connection between Lincoln’s civil religion and his constitutional decisions is established by the sacred text of the civil religion: the Declaration of Independence.\textsuperscript{110} As shown above, Lincoln revered the Declaration as both religious covenant and a charter of liberties and equality, giving birth to a nation that provided endless opportunity for advancement and human flourishing, and that served as a model for other nations around the globe.\textsuperscript{111} The Constitution put into workable form the characteristics of democratic government that would allow the principles of the Declaration to flourish, as evidenced by the consonance between the rhetoric of the Declaration and the Preamble of the Constitution.\textsuperscript{112}

The Declaration acts as a covenant of principles, binding the Union together and establishing the \textit{novus ordo seclorum} where liberty and equality would reign. The Constitution effectuates the purposes and aims of the Declaration, which provides an interpretive key for the document. In short, for Lincoln, the Constitution is the vehicle through which the liberty and equality of opportunity for \textit{all men} is advanced. The medium for that advancement is the Union itself. If the Union were to fail, the cause of liberty would fail as well. The Union, as sacred covenant of the people, is irrevocable. Thus, any act of secession would be unconstitutional, as undermining the purposes of both the Constitution, and the sacred text of the Declaration itself.

The whole corpus of Lincoln’s political activity, including his constitutional actions, from his re-entrance into politics in 1854 until his death in 1865, can be understood as an attempt to defend his particular political theory of republican government, namely, a politics that is rooted in the proposition that all men are created equal.\textsuperscript{113} From his attack on Douglas’s popular sovereignty to his prosecution of the Civil War, Lincoln worked with religious fervor and zeal to ensure that the Declaration of Independence would not become a dead letter. The purposes for which the Revolution was fought and won, that sacred act of sacrifice, could not be lost. For Lincoln, democratic self-government was not simple majoritarian rule. To repeat, he was no positivist. Rather, self-government was impossible unless wedded to the first principles of the natural rights and equality of man. Otherwise, it devolved into tyranny.

\textsuperscript{109} T\textsc{hurow, supra} note 20, at 37.
\textsuperscript{110} Lincoln understood “that the genuine scriptural text of the new Israel is the Declaration of Independence…” SANFORD LEVINSON, CONSTITUTIONAL FAITH 140 (Princeton University Press 1988) [hereinafter “LEVINSON”].
\textsuperscript{111} Wills, supra note 92, at 103.
\textsuperscript{112} Carwardine, supra note 29, at 26.
\textsuperscript{113} Id. at 25-26.
The question of slavery was central to the calculus because slavery undermined the basic principles of the Declaration. The extension of slavery would destroy the very foundation of equality on which the republic was based.\textsuperscript{114} If the principles of the Declaration that make self-government possible were undermined, the sacred text—that covenant between God and America—is broken, endangering the march of liberty both at home and abroad.\textsuperscript{115} Thus, Lincoln believed the political questions of his day were not only political battles, but also spiritual battles for the vindication of liberty. According to Harry Jaffa, “Lincoln became the prophetic statesman of a people, like Israel of old, whose failings and sufferings were intrinsic to the uniqueness of their role as a chosen people.”\textsuperscript{116}

This is Lincoln’s political theory in broad strokes. One can easily ascertain its connection to his own particular theology of America. It is difficult to isolate Lincoln’s particular constitutional theory. Rather, it is part of a grand theory of American politics that cannot be separated from the Declaration of Independence, and thus his civil religion. For Lincoln, the Declaration makes sense only in a theological context.\textsuperscript{117} An analysis of Lincoln’s objection to his main intellectual opponents, Stephen Douglas and John Calhoun, will allow us to grasp more deeply Lincoln’s understanding of the connection between the Constitution and the Declaration of Independence.

\textbf{A. Stephen Douglas and Popular Sovereignty}

The purpose of Lincoln’s re-entry into politics in 1854 was to combat Senator Stephen Douglas’ Kansas-Nebraska Act.\textsuperscript{118} The Act was an attempt to nullify the Missouri Compromise\textsuperscript{119}—the work of Lincoln’s hero Henry Clay.\textsuperscript{120} Lincoln immediately saw in Douglas’ plan the seedbed of the gradual expansion of slavery into the North. The virtue of the Missouri Compromise, at least in Lincoln’s view, was that it was consistent with the Founders’ belief that slavery

\begin{itemize}
\item \textsuperscript{114} See Simon, supra note 11, at 154 (“Lincoln said that his disagreement with Douglas over slavery represented ‘the eternal struggle between these two principles—right and wrong—throughout the world . . . The one is the common right of humanity and the other the divine right of kings.’”).
\item \textsuperscript{115} See McPherson, supra note 8, at 29 (“If secession were allowed to succeed, it would destroy [the republican] experiment. It would set a fatal precedent by which the minority could secede whenever it did not like what the majority stood for.”).
\item \textsuperscript{116} Harry V. Jaffa, A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War xii (Rowman & Littlefield Publishers, Inc. 2000) [hereinafter “NBF”].
\item \textsuperscript{117} Trueblood, supra note 28, at 69.
\item \textsuperscript{118} Carwardine, supra note 29, at 28.
\item \textsuperscript{119} Id. at 29.
\item \textsuperscript{120} Lincoln described Clay as his “beau ideal of a statesmen.” Clay was adamant that slavery be contained as it snuffed out the work of the founders. Abraham Lincoln, First Lincoln-Douglas Debate, Ottawa, Illinois (Aug. 21, 1858) in Selected Speeches and Writings at 152 (Roy Basler & Don E. Fehrenbacher eds., 1992).
\end{itemize}
would eventually wither away if contained. However, popular sovereignty allowed for the expansion of slavery into the new states of the Union so that “the opponents of slavery, will arrest the further spread of it, . . . or its advocates will push it forward, till it shall become alike lawful in all the States.” Lincoln did not believe the Union could continue to hold together half slave and half free. One would subsume the other because “[a] house divided against itself cannot stand.”

Douglas, who was not morally troubled by slavery, sought to save the Union through the principle of popular sovereignty. He liked to say that he cared not one bit whether slavery was voted up or down in the states. Majoritarian rule in the states would decide the question, and save the Union. That was the fundamental difference between Lincoln’s view of republican government and Douglas’.

For Douglas, the principle of republican government lay in home rule, that is, the will of the people of the several states. Difficult moral questions such as slavery are left for individual states to address. Self-determination was the guiding principle of Douglas’ plan. Freedom lay in the unconstrained right of individual states through majoritarian rule to decide fundamental issues that the Constitution did not address.

For Lincoln, that argument was false. As Harry Jaffa notes, “a free people cannot disagree on the relative merits of freedom and despotism.” Republican government was purposive. Its goal was to perpetuate and extend the blessings of freedom and equality. It was rooted in a guiding principle to which the people must continually recommit themselves; that all men are created equal.

Slavery undermined the very principles in the Declaration of Independence upon which self-government rested. In Lincoln’s words, it was a “cancer” on the republic. It was not just morally wrong; it was harmful to the existence of the nation. Lincoln believed slavery to be a powerful threat to the Union because it denied men their rights and dignity, as well as corrupted the habits of

123. *Id.*
125. *Id.* at 29.
the master. It made “open war” on the Declaration of Independence. To paraphrase Lincoln, what master when sitting in the shade contemplating whether to release his slaves out of a sense of moral rightness or duty, will examine the situation of the slave laboring in the hot sun for the master’s sustenance and take off his gloves to relieve the slave? If republicanism could countenance the bondage of slavery, then it could countenance any other taking of man’s liberty. Thus, “in giving freedom to the slave, we assure freedom to the free.”

By opposing popular sovereignty, Lincoln claimed (consistent with his vision of fidelity in the Lyceum speech) that the Republican Party was actually more faithful to the vision of the Founders by favoring a policy that would contain slavery and put it on a path of ultimate extinction. Further, popular sovereignty really means the consent of the governed, which slavery renders impossible. Because slavery undermined the principles of the Declaration of Independence regarding the equality of men, it undermined the whole structure of constitutional government intended by the Founders. It was this latter claim about the nature of constitutional government that would become the heart of the battle between North and South, embodied in the theoretical debate between Lincoln and Calhoun to which this article turns.

B. Calhoun’s Science of Politics

Lincoln had to confront the theory of politics that was at the heart of not only the Southern rebellion, but also the popular sovereignty of Douglas: that of John Calhoun. While the former Vice President and Senator had died in 1850, his ideas remained the animating spirit of Southern political theory. Though the question of slavery was central to the Civil War, it was the issues of constitutional theory regarding the rights to secession and property that characterize Lincoln’s debate with Calhoun’s descendents in the Confederacy.

The Southerners believed the Declaration to be mere surplusage, and even worse, a “self-evident lie.” The Constitution, a compact between the states,
allowed a state to nullify an act of Congress unless the state’s decision was reversed by three quarters of the other states.\textsuperscript{140} Lincoln scholar Harry Jaffa succinctly summed up the issue at stake between the two parties: “The Southern argument for states rights rested upon the separation of state rights from natural rights. The separation of state rights from natural rights corresponded exactly, in Calhoun’s mind, with the denial of any constitutional standing to the principles of the Declaration of Independence.”\textsuperscript{141} This was, of course, anathema for Lincoln who understood the principles of the Declaration to be at the very center of the American experiment.

Calhoun’s ideas were more than just a naked attempt to preserve the South’s peculiar institution; they were a complex mix of prevalent post-Enlightenment philosophical currents. The main source of Calhoun’s thought was a type of historicism. Against the Enlightenment idea that one could discover man’s nature in the abstract, the historical school posited that the truth about man’s nature could only be understood in the concrete manifestation of actual men.\textsuperscript{142}

For Calhoun and his school:

\begin{quote}
There were no such things as human rights or natural rights belonging to human individuals apart from the particular rights recognized in the laws of particular communities. Each political community, in virtue of its history and development, shaped the characters of those who lived within it and formed them into the kind of human beings that they were.

There was no humanity possessed of a nature apart from these particular manifestations.\textsuperscript{143}
\end{quote}

This is clearly a convenient political theory to hold if one is looking to deny the natural law basis for the elimination of slavery. Its inherent positivism denies the existence of any “higher law” or standard through which the politics of a community may be judged or measured, except of course the will of that particular community.

Calhoun’s theory discounted the idea of an ideal political regime because history was inevitably moving toward “the end of history[.]”\textsuperscript{144} Eventually, Calhoun believed, man’s natural faculties would allow him to possess mastery over the entire world.\textsuperscript{145} Dominion was a sign of God’s goodness and blessing

\textsuperscript{\textsuperscript{140}. See Paulsen, supra note 1, at 707-08 (describing Calhoun’s views).}
\textsuperscript{\textsuperscript{141}. NBF, supra note 116, at xiii.}
\textsuperscript{\textsuperscript{142}. Id. at 90.}
\textsuperscript{\textsuperscript{143}. Id. at 90-91.}
\textsuperscript{\textsuperscript{144}. Id. at 91-92.}
\textsuperscript{\textsuperscript{145}. Id.}

the political slaves of King George, and wanted to be free, we called the maxim that ‘all men are created equal’ a self-evident truth; but now when we have grown fat, and have lost all dread of being slaves ourselves, we have become so greedy to be masters that we call the same maxim ‘a self-evident lie.’ The fourth of July has not quite dwindled away; it is still a great day—for burning fire-crackers!!!\textsuperscript{\textsuperscript{146}}\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{$!!$}}}}}.\textsubscript{$!!$}}
and the eventual triumph of civilization over barbarism. Thus, both power and will became central features of Calhoun’s theory.

Lincoln, perhaps better than any other statesmen before or since, understood the danger in Calhoun’s theory.146 If the Declaration was meaningless, if truth cannot be ascertained because there were no “self-evident” truths, then free argument and debate—the purpose of which was to arrive at truth—and thus free government was impossible.147 Authentic freedom consists in the ability to know and pursue the good; what is known as “ordered liberty.” One can pursue the good only because it is rationally recognizable. For Lincoln, recognizing and establishing the truths about man as the basis of free government was the only way one could prevent democracy from devolving into tyranny. Freedom, reason, and truth are inseparable from republican government, which is another reason Lincoln railed against “mobocracy” in his Lyceum speech—because it is nothing other than the rule of the passions, which clouds reasoned judgment.

One practical manifestation of the difference between Lincoln and Calhoun was the right of secession. Calhoun believed that America was a compact of the states that had the qualities of a contract.148 It could be entered into and voided at the will of the parties. But for Lincoln, American was a nation, conceived in liberty. Secession struck right at the heart of the American experiment and undermined the Declaration just as much as slavery. Because the Union was a covenant wrought in the blood of the Revolution, it existed perpetually.149 To secede was to do the impossible. The Union was older than the Constitution,150 being bound together by common principles, friendship, and resistance to Great Britain as early as their first common declaration at the Continental Congress of 1774.151 It is important to note that for Lincoln, the Founding is not a matter of documents or declarations, but instead an event—the birth of a new experiment in self-government and ordered liberty that is forged by the sacrifice of great men under the guidance of Providence.

In disavowing any connection between the Declaration of Independence and the Constitution, Calhoun and his disciples—whether secessionists, Stephen

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147. NBF, supra note 116, at 83.
148. Id. at 365.
149. Id. at 374.
150. Id. at 369.
151. The manifesto of July 6, 1775 is vitally instructive for understanding the way in which the states bound themselves together in Union for the purpose of establishing republican government, including the abolition of slavery, which they believed to be an institution alien to the natural law foisted upon them by the British crown. See id. at 370.
152. LEVINSON, supra note 110, at 134.
Douglas, or the Supreme Court\textsuperscript{153}—claimed that because the Founders drafted a Constitution on the heels of the Declaration that countenanced the existence of slavery, either the Founders were hypocrites\textsuperscript{154} or meant to include only white men. They were eventually able to enshrine this heinous principle in law through the \textit{Dred Scott} decision, a decision that was only overturned through war. This claim by Calhoun cut the legs from under any theory of republican government that was rooted in the “self-evident truths” of the Declaration. Without the higher law foundation, the Constitution could be applied as a positivist document used to secure the rights of slaveholders and the secessionist states.

However, defending the Constitution was of paramount importance for Lincoln in his broader project of defeating Calhoun’s disciples and recommitting the nation to the principle that “all men are created equal.”\textsuperscript{155} Of supreme importance was the necessity of distinguishing the Constitution’s principles from its compromises.\textsuperscript{156} Because the Founders knew there would be no Union without at least some recognition of slavery, they made a provision for it in the Constitution, but put it on the road to ultimate extinction. The 1787 Northwest Ordinance, which excluded slavery from the new Northwest Territories, makes this point abundantly clear.\textsuperscript{157} Lincoln cited this act, promulgated by the same men who wrote the Constitution, as a clear sign that slavery was meant to wither away. The three-fifths compromise was meant to reduce the political power of the southern states rather than assault the dignity of slaves.\textsuperscript{158} Further, the gradual abolition of the slave trade in 1808\textsuperscript{159} highlights the way in which the Founders intended that the institution was gradually meant to cease.

Lincoln repeatedly noted that there was no record anywhere of any of the Founders saying that slavery was a positive good that must be preserved, or that the Declaration’s statement that \textit{all} men were created equal excluded blacks. Rather, this was an invention of Calhoun and his disciples, such as Douglas. A chief component of defeating the Calhounites was the vindication of the Founders; a group of men whose role and accomplishments were central to Lincoln’s civil religion.

\textsuperscript{153} See \textit{Dred Scott v. Sanford}, 60 U.S. 393 (1857).
\textsuperscript{154} Not wanting the Founders to be seen as hypocrites, Douglas argued that they made no moral argument about the rightness or wrongness of slavery. But, as Lincoln noted, that proves too much. To argue that the Founders said nothing about the distinction between liberty and tyranny, the very distinction upon which self-government rested, was absurd. See \textsc{George Anastaplo}, \textsc{Abraham Lincoln: A Constitutional Biography} 161 (Rowman & Littlefield Publishers, Inc. 1992) [hereinafter \textsc{Anastaplo}].
\textsuperscript{155} \textsc{Jaffa}, supra note 126, at 332-33 (stating that for Lincoln, the central idea of republican government is not that “all states as States, are equal,” but rather “all men are created equal”).
\textsuperscript{156} \textsc{Guelzo}, supra note 31, at 198.
\textsuperscript{157} See \textsc{Akhil Reed Amar}, \textsc{America’s Constitution: A Biography} 264-70 (Random House 2005) (discussing the Northwest Ordinance).
\textsuperscript{158} \textsc{Don E. Fehrenbacher}, \textsc{The Dred Scott Case: Its Significance in American Law & Politics} 20 (Oxford University Press 1978) [hereinafter \textsc{Fehrenbacher}].
\textsuperscript{159} See U.S. Const. art. I, § 9, cl. 1.
C. The Gettysburg Address and the “New Birth of Freedom”

The crown jewel of Lincoln’s work was his Gettysburg Address. The address is important for our purposes because it embodies the core of Lincoln’s broader political project: to both re-dedicate and build upon the work of the Founders’ great charter of liberty—the Declaration of Independence. Lincoln knew that a nation rededicated to the Declaration would unleash what he called “a new birth of freedom.”160 This nation, “under God,” would perpetuate the great experiment in self-government not only for its posterity, but also for “the whole species.” All of Lincoln’s actions are subservient to this final cause. Thus, the great project in political theory that was begun in Lincoln’s Lyceum speech comes to fruition in the Gettysburg Address.161

The Address is the pinnacle of Lincoln’s intellectual defeat of Calhoun, as well as a roadmap for ensuring that a new birth of freedom would result from the immortal sacrifices of the dead on the field of battle. In many ways, it also acts as a biblical narrative of American “salvation history.” Thus, our analysis of Lincoln’s civil religion, together with our overview of Lincoln’s understanding of the Declaration as the basis for constitutional government, comes together in the Gettysburg Address. A brief analysis of the speech is warranted.

Lincoln’s address is a subtle reinterpretation of the work of the Founders through the vehicle of his civil religion, particularly the perpetuation of the American experiment as a providentially-ordained, elect nation that serves as a model to the nations of republican virtue. Notably, the beginning of the speech is marked by the dating of the nation: “four score and seven years ago”—1776, not 1787.162 The nation is “brought forth” like a birthing, by its “forefathers” (echoing the patriarchs of ancient Israel)163 and “conceived in liberty.” This highlights its noble, almost-pure beginnings.

Lincoln goes on to say the new nation was “dedicated to the proposition,” not self-evident truth, that “all men are created equal.” Here is where Lincoln subtly reinterprets the work of the Founders. Rather than a truth that is plainly evident or demonstrable, Lincoln, an avid student of Euclid,164 employs the language of geometry and logic to re-tell the story. A proposition is something that must be tested and proven; it is not self-evidently true.165 The task of the

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160. See N.B.F., supra note 116, at 79.
161. See THUROW, supra note 20, at 115-16.
162. See id. at 82 (“By setting the date at 1776, Lincoln declares that we were formed as one people by the principles of the Declaration rather than by the laws of 1787. In so doing Lincoln declares what an American is. We are those who share a common memory back to 1776. Those who look merely to the Constitution without interpreting it in light of the principles of 1776 do not fully belong to the nation.”) (emphasis added).
163. See JAFFA, supra note 126, at 220.
165. ANASTAPLO, supra note 154, at 234.
country is to prove the proposition true. Lincoln attempts to re-establish axioms that the Declaration presupposes. Thus, rather than a nation dedicated to a static conception of the ground of liberties, Lincoln declares that the American experiment was rooted in a desire to continually demonstrate—to constantly affirm—that all men are created equal. The nation would not be judged by the beauty of its principles, but instead its fidelity to those principles. “Instead of a foundation upon which one builds, the principle becomes the building one seeks to construct.” The Civil War was the great test of that American faith.

What happened at Gettysburg is akin to Christ’s sacrifice. Men died so that the nation may live. The address is both witness and testimony to that act (so that others may believe), as well as a baptismal dedication where the people renew their vows and fidelity to the noble proposition that animates the people; the great covenant of the people and the divine.

Just as the gospel needed to be spread, so too did Lincoln exhort his audience to ensure that the sacrifices of the soldiers at Gettysburg not be in vain. The deeds of the hearers must match those that died at Gettysburg. “The worth of their sacrifice is to be determined by the dedication of those yet living.” Thus, “salvation” is achieved only through a rededication to the principles for which the noble soldiers shed their blood, a blood sacrifice by which the nation is redeemed and restored. The speech thus acts as propaganda for the 13th Amendment, the formal cause of the “new birth of freedom,” with the war serving as the efficient cause. What cannot be done through force (permanent emancipation of all slaves), but toward which the bloody conflict points, must be done through the Constitution—the proper organ of governance.

Having outlined in detail the centrality of the Declaration of Independence in Lincoln’s theory of republican government—and by extension, his civil religion—it is now the task of this article to make explicit the connection between his civil religion and particular constitutional actions.

166. See Thurow, supra note 20, at 76.
167. See id. at 74.
168. See id. at 79 (“As with the principle that all men are created equal, liberty is reinterpreted to mean not the minimum conditions for freedom but the perfection of freedom.”).
169. See id. at 84.
170. See id. at 76-77.
171. See id. at 77.
172. See Thurow, supra note 20, at 67.
173. See id. at 85.
174. See id. at 110.
175. See Stout, supra note 12, at 459.
176. See NBF, supra note 116, at 79.
III.

“Lincoln’s Constitution” is informed by his theory of politics, which is the outgrowth of his religious devotion to what the founders “conceived” in the Revolution and articulated in the Declaration of Independence. Each of his actions with regard to the Constitution, in particular, his response to claims of judicial supremacy in *Dred Scott* and *Ex parte Merryman*, his treatment of civil liberties in wartime, and his execution of the war powers, were done with the aim of advancing what he considered the true nature of the Founders’ vision and republican government itself.

To describe Lincoln’s actions as merely results-driven, and his constitutional interpretation as merely purposive, would be a mistake. Because of his firm belief in the rule of law, especially in light of his exhortations about obeying the law in the Lyceum speech, Lincoln knew that his actions had to be grounded in legal principle, not merely in sheer will or force alone. Lincoln knew that the law was the basic principle of order in society, and just as “mobocracy” was a threat to the tranquility of order, so too were tyrannical rulers.

Lincoln’s most important legal teachers were treatise writers such as Joseph Story, James Kent, and William Blackstone. In Story, Lincoln found an approach to the Constitution that shaped and confirmed his broader Whig ideology as well as glorified the work of the Founders. It would be wrong to think that Lincoln merely relied on Joseph Story as post hoc support for his actions, especially since there are few, if any, actual references to Story during his presidency. Rather, as the thematic unity of his political writings and speeches from the Lyceum speech to the Gettysburg Address show, Lincoln formed his worldview and political and legal philosophy at a relatively young age. A religious commitment to those principles guided him throughout his political and legal career.

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177. *See Stein*,” supra note 65, at 58 (arguing that Lincoln possessed “near religious reverence” for law and order).
178. *See id.* at 44.
179. *See id.* at 33; *see also Guelzo, supra* note 31, at 109.
180. Justice Story shared Lincoln’s religious devotion to the Founders, many of whom he knew personally. *E.g.*, Levinson, *supra* note 110, at 11 (“To those . . . whose lives it touched the Revolution was a miracle, a sign of God’s grace, a reminder of the covenant.”).
181. *But see Wills, supra* note 92, at 131 (arguing that Justice Story’s “school of constitutional law, and not a vague sentiment, is what Lincoln relied on in his defense of the Union”).
182. Consider this quote: “Think nothing of me—take no thought for the political fate of any man whomsoever—but come back to the truths that are in the Declaration of Independence. You may do anything with me you choose, if you will but heed these sacred principles. You may not only defeat me for the Senate, but you may take me and put me to death . . . but do not destroy that immortal emblem of Humanity.” Abraham Lincoln, *Speech at Lewiston, Illinois* (Aug. 17, 1858), in *The Collected Works of Abraham Lincoln* 547 (Roy P. Basler ed., Rutgers University Press 1953).
183. *See Wills, supra* note 92, at 126 (“Lincoln knew and used Justice Story’s commentary.”).
Story articulated the legal connection between the Declaration of Independence and the Constitution itself through the issue of secession. The work of the Declaration confirmed that the act of independence maintained sovereignty for the people as a whole through the several states. According to Story, “The declaration of independence has . . . always been treated, as an act of paramount and sovereign authority, complete and perfect per se.” In his treatise, Story quotes approvingly from South Carolina’s Charles Cotesworth Pinckney, who stated during the ratification debates of the Constitution:

The several States [in the Declaration] are not even mentioned by name in any part, as if it was intended to impress the maxim on America, that our freedom and independence arose from our union, and that without it we could never be free or independent. Let us then consider all attempts to weaken this union by maintaining, that each state is separately and individually independent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distresses.

Thus, Story confidently concludes, “[I]t is historically true, that before the declaration of independence these colonies were not, in any absolute sense, sovereign states.” The sovereignty of the several States in union was established by the Declaration of Independence.

One of Lincoln’s most famous descriptions of the Constitution is that the document is, paraphrasing Proverbs, like a silver setting (frame) within which the golden apple of the Declaration resides. However, this famous analogy also has its roots in Joseph Story, who described the Constitution as a frame of fundamental law. He says, “we deduce . . . that as a frame or fundamental law of government, [] The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred.” Noting that a basic and fundamental rule of interpretation reads preambles of statutes as a key for ascertaining the intent of the legislator, Story stated that the basic goals outlined in the Preamble of the Constitution:

[N]ecessarily requires, that every interpretation of its powers should have a constant reference to these objects. No interpretation of the

184. See id. at 131 (illustrating Story’s view of the Declaration as a founding document integral to constitutional interpretation).
185. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 211 (5th ed. 1833) [hereinafter “STORY”].
186. Id. § 212 (emphasis added).
187. Id. § 214.
188. Id. § 215.
189. See LEVINSON, supra note 110, at 140-41 (discussing the golden apple analogy); see also Proverbs 25:11 (King James) (“A word fitly spoken is like apples of gold in pictures of silver.”).
190. See STORY, supra note 185, § 409.
191. Id. § 419 (emphasis added).
192. Id. § 457.
words, in which those powers are granted, can be a sound one, which narrows down their ordinary import, so as to defeat those objects. That would be to destroy the spirit, and to cramp the letter.193

Lincoln profited greatly from Story’s interpretive rules regarding constitutional powers.194 Although Story affirms the basic rule that the clear language of the text must not be defeated,195 he says that when a power is granted in general terms it “is not to be restricted to particular cases, merely because it may be susceptible of abuse.”196 He also notes that all of the ordinary and appropriate means to execute a power are to be deemed part of the power itself,197 and that if the end is within the scope of the Constitution, “all the means, which are appropriate . . . may be constitutionally employed to carry it into effect.”198 Justice Story noted that federal powers were defined in broad terms because the Constitution “was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.”199

Lincoln, “the last ‘Blackstone Lawyer’ to lead the country,”200 was able to make the legal leap from his civil religion and science of politics centered on the Declaration of Independence to his constitutional decisions because of the principles outlined by important treatise writers like Story. Because of Lincoln’s Whiggish “religious reverence” for the law, he was concerned not only with “integrity of ends . . . [but] with the integrity of means.”201 Thus, for Lincoln, pursuing just ends such as preserving republican government and ending slavery must be done through appropriate legal means. The treatise writers provided Lincoln with colorable arguments.

A. Lincoln’s Response to Claims of Judicial Supremacy

Lincoln’s response to assertions of judicial supremacy as exemplified in Dred Scott and Ex Parte Merryman should be viewed in light of his goal of preserving republican self-government, rooted in the proposition that all men are

193. Id. § 422 (emphasis added).
194. See Steiner, supra note 65, at 152 (In a foreshadowing of his later argument defending his suspension of the writ of habeas corpus that “all the laws but one” should be executed so that the constitutional order may be preserved, Lincoln used James Kent’s maxim in a railroad case that statutes must be given a “reasonable construction” and that courts cannot presume the legislature intended an “absurd” or “unjust” consequences to result from a statute. Similarly, the Framers could not have intended for the nation to perish simply because Congress was not in session to suspend the writ.).
195. See Story, supra note 185, § 423.
196. Id. § 425.
197. Id. § 430.
198. Id. § 432.
199. See Farber, supra note 1, at 52-53 (discussing Story’s view that federal constitutional power is derived from the people rather than the several States).
200. Steiner, supra note 65, at 33.
201. See L.E.P., supra note 7, at 5.
created equal. The Preamble of the Constitution, echoing the Declaration of Independence, testified to this truth. As shown above in our discussion of Lincoln’s appropriation of the principles of Justice Joseph Story, the Constitution should be interpreted to effectuate these principles. To demonstrate this claim, Lincoln’s response to each case will be treated separately.

1. Challenging Dred Scott

Beyond the particular holding in *Dred Scott* that under Missouri law (as interpreted by Missouri courts) Dred Scott was still a slave—even after his transport and extended stay on free soil—the monstrous dicta that the Founders did not intend for blacks to be citizens or included in their statement that “all men are created equal,” and the further holding that the federal government had no power to outlaw slavery in the territories, struck right at the heart of Lincoln’s conception of republican self-government as outlined throughout his speeches and writings. Many, including Stephen Douglas and President Buchanan, argued that the Supreme Court had settled the issue and it was up to the people to rally around the magisterial authority of the decision.

Lincoln saw the real implication of the decision as providing the basis for the expansion of slavery throughout the north as a federal constitutional principle. A *Dred Scott* II could build off of the original case’s implicit holding that there is a substantive liberty guarantee to own property in slaves, and impose the rule on all of the states. Further, if the federal government was forbidden from regulating slavery in the territories, it was an explicit rejection of the Founders’ goal of containing slavery, to the end that it eventually may wither away. The dicta of *Dred Scott* were not only morally wrong, they were philosophically and historically wrong. They were a threat to the American experiment itself.

For Lincoln, atrocious decisions that struck at the heart of the American experiment in self-government were to be challenged with an eye toward their eventual reversal. Lincoln made the important distinction between following a

203. See id. at 3, 517, 524-25.
204. See Anastaplo, supra note 154, at 180.
205. See Feithenbacher, supra note 158, at 452.
206. See id. at 27.
207. See Simon, supra note 11, at 146-47 (Lincoln “had no desire to interfere with the cranberry laws of Indiana, the oyster laws of Virginia, or the liquor laws of Maine. But slavery was different. He did not agree with Douglas that slavery was "as an exceedingly little thing—this matter of keeping one-sixth of the population of the whole nation in a state of oppression and tyranny unequalled in the world.""

208. See Feithenbacher, supra note 158, at 4 (noting that *Dred Scott* was the first time the Supreme Court had struck down a major federal law). Thus, Lincoln was somewhat of a pioneer in articulating a coherent and principled theory of political resistance to unjust or incorrect judicial decisions—displaying a different facet of his genius.
case holding as a legal rule, and following it as a political rule. In general, everyone is bound by the particular holding in a case, e.g., that Dred Scott is still a slave. According to Lincoln, if one believes a case in at least most of its particulars to be rightly decided, one is bound to follow it as a political rule, otherwise one brings unnecessary disharmony to the political order. But if one believes a case to be wrongly decided, then one need not follow it as a political rule and can challenge it politically, as well as seek to have it reversed through a number of methods.

In addition to proposing contrary legislation, one could appoint Supreme Court Justices that one believes will overturn the wrong decision, or take executive action contrary to the holding. Lincoln did precisely that during his time in office, challenging Dred Scott by, among other things, issuing patents to black inventors and granting travel visas, signing a bill abolishing slavery in the federal territories, allowing the attorney general to issue an opinion that free blacks were citizens of the United States, and appointing anti-slavery Justices to the Supreme Court such as Salmon P. Chase.

It is unclear whether Lincoln believed it was permissible to challenge any errant holding as a political rule, or just those that struck at the basic principles of republican self-government articulated in the Declaration of Independence. Because those principles were the bedrock of the whole political order, they cannot be threatened or undermined. They are articles of faith; pre-political commitments, the substance of which are, to a certain degree, not open to question or challenge. Because of his particular emphasis on the rule of law, as well as his belief in the Court’s legitimate interpretive role within the constitutional framework, Lincoln would have limited the justification for challenging court decisions to a limited scope of cases—those that threatened the very dignity and existence of the American experiment by denying its basic propositions and aims. Thus, decisions related to the breadth of the Clean Air Act (to use a modern example) should not be challenged under Lincoln’s

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211. Id.
213. See Fehrenbacher, supra note 158, at 4-5; see also, Paulsen, supra note 1, at 713.
215. See Fehrenbacher, supra note 158, at 575-76.
theory, as a greater evil may result. However, this is an interesting question that should be taken up in another article.

2. Ignoring Chief Justice Taney’s *Merryman* Ruling

Lincoln’s disregard of Chief Justice Taney’s order in *Ex parte Merryman*, namely, that the president or a military officer may not suspend the writ of habeas corpus, takes the theory articulated in the context of *Dred Scott* one step further. In particular, when the judicial decision threatens the actual existence of the constitutional order, then the president is bound to adhere to the basic principles of constitutional government and disobey it. Although one can tolerate and work against wrong decisions that impair the vitality and long-term of the constitutional order, decisions that immediately threaten the very existence of the republic must be disobeyed because they are destructive to the very purposes and aims republican government was designed to procure.

Lincoln believed that a military threat against Washington could have ended the War in favor of the South, or at least severely weakened the Union and put it in a compromising position at any future treaty negotiations. Once again, if the Union were to be dissolved or bifurcated, the very existence of republican government, at home and abroad, would be threatened. Lincoln acted to thwart its premature destruction because he conceived it his duty to perpetuate the blessings of liberty through the defense of the Union.

As there was no standing army to guard Washington early in the war, it was especially important that any saboteurs or other threats to the establishment of troops near the capital be subdued. Thus, Lincoln, through his generals, suspended the writ of habeas corpus in a confined geographic location in and around Washington, D.C. Confederate troops across the Potomac, as well as hostile and rioting Marylanders, made Lincoln believe that a threat to Washington was very real. Thus, according to Lincoln, when the very

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218. *See* Fehrenbacher, *supra* note 158, at 5-6 (noting that the Supreme Court’s tendency to attempt to resolve important national debates began with *Dred Scott*). It seems that if the Court exercised institutional restraint when these contentious national debates came before it, and interpreted the Constitution according to its text, structure, history and background principles, it would have more legitimacy and there would be less need to discuss theories of resistance such as Lincoln’s.

219. 17 F. Cas. 144 (1861).

220. *See* Abraham Lincoln, *Special Message to Congress* (July 4, 1861), in *SELECTED SPEECHES AND WRITINGS* at 307 (Roy Basler & Don E. Fehrenbacher eds., 1992) (“Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”); *see also Merryman, supra* note 214, at 92-94.

221. *See* Elshtain, *supra* note 99, at 45 (“The Framers had not resolved but had only postponed the question of slavery, and Lincoln’s sense that the time had come to move, however cautiously, toward a resolution had about it a force of obligation that he did not hesitate to call sacred.”).

existence of the republic itself is threatened by a judicial decision, the president has the constitutional authority and duty\textsuperscript{223} to disregard the ruling. This is the true “constitution of necessity.” Necessity cannot be invoked merely to save lives or pursue some “good;” it can only be invoked when the fate of the constitutional order, whether on a physical or moral level, is at stake. As democracy relies on moral truth, if that moral truth is undermined at a fundamental level, liberty itself is at risk.\textsuperscript{224}

The Constitution is not solely what the judiciary says it is. According to Robert P. George, “Lincoln believed that courts, including the Supreme Court of the United States, could violate the Constitution and even undermine constitutional government. . . . Judges exercising effectively unconstrained power were, in his view, no less a threat to the Constitution than other governmental officers exercising such power.”\textsuperscript{225} He could hold this position only because there was a higher law background of the Constitution to which all interpreters were subject. The presidential oath is not to the justices, but to the sacred covenant established by the Declaration and confirmed in the Constitution.

If the Constitution is just a positivist document, then there is no firm philosophical basis for challenging judicial supremacy. Who’s to say it means something different than what the justices say it does? Since they are the actual “experts,” prudence would dictate final authority should rest in that eminent body. But, if there is a higher set of principles and purposes that the Constitution was meant to secure and perpetuate, then there is a standard that is above the actual interpreters to which all, not just the president, can look to for guidance.\textsuperscript{226}

As someone who has the authority to “take care” that the laws are faithfully executed, it is the President’s constitutional duty to effectuate the purposes of the

\textsuperscript{223} See Necessity, supra note 4, at 1258 (“The Presidential Oath Clause creates a presidential duty to preserve the constitutional order of the United States.”). Paulsen’s view is correct, but his theory regarding what constitutes the “constitutional order” is sufficiently vague, broad, and flexible (not a total vice) to encompass all sorts of emergencies. Rather, the task of this paper has been to clarify what Lincoln meant by “constitutional order,” namely, a political order rooted in the proposition that all men are created equal and endowed by their Creator with life, liberty, and the pursuit of happiness. One could conceive of a zealous president preserving the “constitutional order” by thwarting the very purposes and ends the Constitution was meant to secure. But that was not Lincoln’s Constitution.

\textsuperscript{224} Roe v. Wade, 410 U.S. 113 (1973), raises the issue of the limits of this doctrine of “necessity.” While abortion is a denial of life, liberty and the pursuit of happiness to a certain class of persons (also invoking equal protection), it would not, under Lincoln’s theory, be legitimate to deny the ruling—yet. The case may be overturned and abortion eventually eliminated, whereas the expansion of slavery throughout the North would have undermined the American experiment perpetually. However, if \textit{Roe} becomes further entrenched in law, it may permanently undermine our nation’s most basic commitments. \textit{See generally Richard John Neuhaus, The End of Democracy?: The Celebrated First Things Debate, with Arguments Pro and Con and, “The Anatomy of a Controversy”} (Mitchell S. Muncy ed., Spence Publishing Co. 1997).


\textsuperscript{226} See Abraham Lincoln, \textit{First Inaugural Address} (Mar. 4, 1861), in \textit{Selected Speeches and Writings} at 290 (Roy Basler & Don E. Fehrenbacher eds., 1992) (indicating Lincoln believed that if Supreme Court decisions were irrevocably fixed, the people would cease to be their own rulers).
Constitution,\textsuperscript{227} despite what the Supreme Court may say. Otherwise, there are few real checks on judicial power—an absurd result for a body considered by the Founders to be the “least dangerous [branch].”\textsuperscript{228}

B. Civil Liberties in War Time

Lincoln’s treatment of civil liberties during the war also demonstrates that his approach to the Constitution was oriented toward preserving the Union at all costs. Tens of thousands of individuals were arrested during the Civil War for various reasons, and many media organs were shut down, causing many to criticize Lincoln’s tyranny and dictatorship.\textsuperscript{229} However, it seems Lincoln believed that if liberty was to be perpetuated long term, short-term intrusions on the liberties of suspected rebel sympathizers were warranted. We return first to 	extit{Ex parte Merryman} and then to the case of Clement Vallandigham.

1. All the Laws But One: Merryman and Habeas Corpus

Another facet of 	extit{Merryman} worth discussing is the rationale for suspending civil liberties, particularly the writ of habeas corpus. The suspension of the writ was most likely unconstitutional under mainstream modes of constitutional analysis.\textsuperscript{230} Further, even the great commentators such as Kent and Story were against Lincoln,\textsuperscript{231} locating the right of suspension of the traditional common law privilege in the legislature. But here, Lincoln makes his own best argument: the argument from necessity.\textsuperscript{232} Lincoln’s argument from “necessity” wasn’t motivated by a mere desire to preserve a government or save lives; it was a desire to preserve the Union, which had covenanted itself to sacred principles.\textsuperscript{233} Once again, we have to return to the Declaration and the Preamble of the Constitution. As Story said, any interpretation of the Constitution must effectuate its basic principles. Lincoln creatively applies Story’s fundamental maxim.\textsuperscript{234}

In his July 4, 1861 address to Congress, Lincoln asked whether [republican] governments are too weak to maintain their territorial identity.\textsuperscript{235} “Must a

\begin{itemize}
\item \textsuperscript{227} See Paulsen, supra note 1, at 722.
\item \textsuperscript{228} See The Federalist No. 78 (Alexander Hamilton).
\item \textsuperscript{229} See Simon, supra note 11, at 247 (noting that Lincoln’s detractors considered the war “wicked, cruel, and unnecessary”).
\item \textsuperscript{230} See Paulsen, supra note 1, at 723 (“Under ordinary circumstances, Taney might have had the better of the argument.”).  
\item \textsuperscript{231} See Guelzo, supra note 31, at 282.
\item \textsuperscript{232} Id. at 282.
\item \textsuperscript{233} See McPherson, supra note 8, at 59.
\item \textsuperscript{234} It should be noted that Lincoln, in deference to established law, asked Congress on July 4, 1861 to suspend the writ of habeas corpus in order to legitimate his action. He did not disagree that Congress had constitutional authority to suspend the writ, but believed he had the authority to suspend it in times of constitutional emergency. See Farber, supra note 1, at 117-18.
\item \textsuperscript{235} See NBF, supra note 116, at 1.
\end{itemize}
government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" 236 More famously, he asked:

> Must [the laws] be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen’s liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? 237

Put more succinctly, the question in Lincoln’s mind was: “How can we let the great experiment in republican government falter because of a slavish adherence to a legal doctrine in which the Constitution was unclear in proper application?” 238

Noted constitutional scholar Sanford Levinson has argued that Lincoln’s doctrine of necessity is bound up with his theology of the Founders. Lincoln uses the language of “justly” and “justify” 239 with regard to the particulars of his action. His action is just if “justified” by the people. The people, looking favorably upon the president, impart “saving grace” upon him through their justification of his righteous act. 240 Even if his act were to be unconstitutional, “[T]he preservation of the Union absolved him of the imputation of infidelity to the Founders.” 241

2. Means to an End: Vallandigham and Civil Liberties

Clement Vallandigham, prominent Ohio politician and “peace Democrat,” was the most famous example of Lincoln’s suppression of southern sympathizers on Union soil. Vallandigham was arrested after giving one of his typically inflammatory speeches, all the while pleading his right to free speech. 242 Vallandigham’s imprisonment and subsequent banishment to the Confederacy touched off a host of criticism of “King Lincoln” and his purportedly dictatorial behavior. 243

Vallandigham was criticizing General Order No. 38, issued by Gen. Ambrose Burnside, which imposed martial law in Ohio. 244 Burnside was

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237. Id. at 306-07.
238. See generally MCPHERSON, supra note 8, at 59.
239. See LEVINSON, supra note 110, at 133-34 (discussing the theological quality of Lincoln’s defense of his suspension of the writ).
240. See id. at 134.
241. Id. at 141.
242. See SIMON, supra note 11, at 247.
243. See id. at 247.
244. See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 100 (W.W. Norton & Co, 2004).
scandalized by the amount of criticism of the administration and the war, and believed it ultimately would end up hindering the war effort.\textsuperscript{245} Thus, when Vallandigham challenged “King Lincoln,” Burnside had Vallandigham arrested. Vallandigham was not merely criticizing the administration, but rather damaging the Army, “upon the existence and vigor of which the life of the Nation depends.”\textsuperscript{246}

Lincoln expressed almost absolute certainty that his wartime measures involving civil liberties were constitutional.\textsuperscript{247} He argued that the English liberty protections cited by his detractors were created \textit{after} civil unrest, not \textit{during}.\textsuperscript{248} Further, those who aid and abet the destruction of the Constitution and the laws cannot take refuge in them.\textsuperscript{249} Courts are inadequate in times of rebellion, and other forms of justice must be implemented.\textsuperscript{250} “[T]he Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in time of profound peace and public security.”\textsuperscript{251} Thus, the Constitution is interpreted to effectuate its basic purposes. In wartime, those purposes are threatened in a more fundamental way, requiring a more flexible approach to civil liberties.\textsuperscript{252}

The use of “public safety” in Lincoln’s defense is particularly important for our purposes. Shoe-horning his action into the language of Constitution, Lincoln argued that “public safety” required his restrictions on speech\textsuperscript{253} as well as his use of military commissions. However, it was not “public safety” in the strict sense that was being threatened.\textsuperscript{254} There was no invading foreign army that was going to rape, rob, and pillage and install a totalitarian regime.\textsuperscript{255} What was really threatened were liberty, equality, and progress as advanced by the Union, under God, through the Declaration of Independence: Lincoln’s civil religion.

\begin{itemize}
\item \textsuperscript{245} Id. at 96.
\item \textsuperscript{246} Abraham Lincoln, \textit{Letter to Erastus Corning and Others} (June 12, 1863), in \textit{Selected Speeches and Writings} at 379 (Roy Basler & Don E. Fehrenbacher eds., 1992).
\item \textsuperscript{247} Id. at 374.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at 375.
\item \textsuperscript{250} Id. at 377.
\item \textsuperscript{251} Id. at 379.
\item \textsuperscript{252} \textit{See Simon, supra} note 11, at 251 (noting that Lincoln believed that constitutional norms were different in wartime than in times of peace).
\item \textsuperscript{254} This fact precludes Paulsen’s theory that Lincoln’s Constitution of “necessity” is expansive enough to include “public safety” in the strict sense of preserving life and maintaining public order. It is just not clear whether Lincoln would have exercised his powers simply to avert loss of life or major destruction of property. Under that guise, anything could be justified, and Lincoln was careful to observe his constitutional limits. While he stated that it was wise to sever a limb to save a life, the life he sought to save was republican government that secured the liberty and political equality of its subjects. \textit{See generally} Abraham Lincoln, \textit{Letter to Albert G. Hodges} (Apr. 4, 1864), in \textit{Selected Speeches and Writings} at 419-21 (Roy Basler & Don E. Fehrenbacher eds., 1992).
\item \textsuperscript{255} While there were certainly excesses on both sides, there was still a degree of fraternity between the two warring factions. Or, maybe I’ve just seen too many movies.
\end{itemize}
The loss of the Union was what Lincoln considered most injurious to “public safety.”

C. Lincoln Uses His Executive Power to Preserve the Union

Perhaps the most fundamental areas in which Lincoln’s approach to the Constitution was shaped by his civil religion are the two most decisive actions of his presidency: the decision to go to war against the Confederacy and the emancipation of the slaves. Each will be dealt with separately.

1. War and the Presidential Oath

As described earlier, the South’s interest in protecting its peculiar institution gave rise to a political theory that had transformed the Constitution into a positivist document and a mere contract that the parties could exit at will. The contract existed to protect the rights of the parties, most notably their property rights. While purporting to be faithful to the liberty-guarding tradition of Locke and Jefferson enshrined in the Constitution, they actually elevated property rights above any other principle, thus cutting it off from a true theory of natural right as advanced by Jefferson and the other Founders.

As a Republican ascended to the presidency, the southern states moved to secede as their “rights” in the Constitution were going to be violated. While Lincoln promised repeatedly that he in no way wished to interfere with slavery as it existed in the southern states, the South perhaps knew for years that preserving the Union on Lincoln’s terms meant the destruction of slavery.

Lincoln did not only believe secession was unconstitutional, but also an attack on reason and justice: “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.” Thus, Lincoln construed his oath and the “take care” clause to mean that he was responsible for preserving the Union. Any attempt at secession would be a breach of the fundamental law of the land. For this reason, he treated the Confederacy as a rebellion rather than a foreign state.

258. See, e.g., Abraham Lincoln, Letter to Horace Greeley (Aug. 22, 1862), in SELECTED SPEECHES AND WRITINGS at 343 (Roy Basler & Don E. Fehrenbacher eds., 1992) (“If I could save the Union without freeing any slave I would do it . . . .”).
259. See ANASTAPLO, supra note 154, at 223.
There is also a pragmatic component to Lincoln’s calculus. If secession or schism is an acceptable result of constitutional or political controversy, then republican government will cease to exist: “Plainly, the central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”\textsuperscript{262} While the American experiment had solved the problem of establishing and administering a free republic, it was now faced with the challenge of maintaining it against rebellion.\textsuperscript{263}

Lincoln called the Civil War a “People’s contest;” a “struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.”\textsuperscript{264} Lincoln believed the war was not only a sectional conflict, but also a battle of cosmic dimensions, and he was enlisting forces on the side of justice.\textsuperscript{265} Otherwise, it is hard to justify his firm commitment to thwarting the rebellion with only a flimsy legal argument about executing the laws as justification. It is one thing to uphold the law; it is another to send hundreds of thousands of men to die on a debatable point of constitutional interpretation. Thus, Lincoln’s action must be understood against the backdrop of his broader civil religion and particular view of republican government.

By Lincoln’s time, it had become a truism in Republican circles that the purpose of preserving the Union was to conserve the principles upon which it was based.\textsuperscript{266} Against the radical abolitionists, who considered the Constitution to be a compact with the devil,\textsuperscript{267} Lincoln believed the Union was the necessary means to the principle’s implementation and survival.\textsuperscript{268} According to Lincoln, “the ‘Union must be preserved in the purity of its principles as well as in the integrity of its territorial parts.’”\textsuperscript{269} To allow the Union to fall would be to destroy the sacred covenant that established the basic principles of republican self-government. Lincoln had constitutional authority, even a duty, to preserve the Union.

\begin{itemize}
\item \textsuperscript{262} Abraham Lincoln, \textit{First Inaugural Address} (Mar. 4, 1861), in \textit{SELECTED SPEECHES AND WRITINGS} at 289 (Roy Basler & Don E. Fehrenbacher eds., 1992).
\item \textsuperscript{263} Abraham Lincoln, \textit{Special Message to Congress} (July 4, 1861), in \textit{SELECTED SPEECHES AND WRITINGS} at 314 (Roy Basler & Don E. Fehrenbacher eds., 1992).
\item \textsuperscript{264} Id. at 313.
\item \textsuperscript{265} See GUÉZLO, supra note 31, at 283.
\item \textsuperscript{266} See, e.g., JULIA WARD HOWE, \textit{The Battle Hymn of the Republic} (1861) (written on a visit to a Union army encampment).
\item \textsuperscript{267} See GUÉZLO, supra note 31, at 199-200.
\item \textsuperscript{268} See THUROW, supra note 20, at 52.
\item \textsuperscript{269} Id. at 52.
\end{itemize}
The legal arguments Lincoln employed to execute the war against the rebellion were that he had plenary constitutional power, exercised through the Oath Clause and Take Care Clause, and Commander-in-Chief power. He understood these powers, interpreted broadly, to effect the purposes of the constitutional order. A broad interpretation of federal power had always been a hallmark of Whig constitutional theory. Further implicit in his argument is the principle that republics have the right of self-preservation because they are tethered to the equality of their citizens. They are based on just, consensual government, and thus do not countenance rebellion as a mode of political change. Lincoln also argued that his military action against the South was aimed at preserving a republican form of government in the States, pursuant to both his oath-of-office and the “Take Care” clause. Thus, Lincoln’s actions in suppressing the rebellion were undertaken with a view to the basic purposes of the Constitution itself.

2. The Emancipation Proclamation

The Emancipation Proclamation is perhaps the clearest example of the fusion between Lincoln’s civil religion and his constitutional decisions. Lincoln, who invoked the assistance of the Divine throughout his presidency, relied heavily on prayer as the source of his final decision to emancipate the slaves in occupied rebel territory. In fact, he relied on “God’s justice and approval” for final vindication of his controversial constitutional action.

But the Emancipation Proclamation was not undertaken with abandon to reason or the Constitution—that would have been contrary to the spirit of his Lyceum speech almost 30 years earlier. Rather, it was the product of a fierce debate over executive power, as well as Lincoln’s own interpretive theory of the Constitution bound to his understanding of the Declaration of Independence and the purpose of republican government.

Lincoln faced a serious constitutional challenge to his Emancipation Proclamation from a number of prominent critics who concluded Lincoln had no constitutional authority to issue such a document. With the possibility that a Supreme Court presided over by Chief Justice Taney would strike down any

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270. See NBF, supra note 116, at 363. See also WILLS, supra note 92, at 136 (noting Lincoln’s careful limitation of his Commander-in-Chief power to times of national emergency).

271. See GUELZO, supra note 31, at 282.

272. See id. at 56-63.

273. See NBF, supra note 116, at 363.

274. See Abraham Lincoln, Special Message to Congress (July 4, 1861), in SELECTED SPEECHES AND WRITINGS at 315 (Roy Basler & Don E. Fehrenbacher eds., 1992).


276. See C.W.T.C., supra note 27, at 89.

277. See L.E.P., supra note 7, at 120.

278. See generally GUELZO, supra note 7, at 190-202.
executive action that even appeared to stretch constitutional authority, Lincoln had to carefully craft the proclamation into a dry legal document, denying to it Lincoln’s command of beautiful prose.

Among the criticisms Lincoln faced, critics pointed out that international law only allowed the confiscation of enemy property during a war between states. But Lincoln had strenuously denied the Confederacy its status as an independent warring power, instead depicting the conflict as a rebellion. Former Supreme Court Justice Benjamin Curtis argued that the commander-in-chief power only made Lincoln a “general-in-chief,” and denied him the right to make laws interfering with the domestic relations governed by states and “declare slaves free.” Similarly, others complained of a lack of textual basis for presidential war powers; and even if there were such a thing, those powers governed actions taken against states and combatants, not civilian property.

While Lincoln had able allies making novel arguments that the president’s war power resided in the Republican Guaranty Clause, or was inherent in the “law of preservation,” Lincoln was enough of a lawyer to know that some of these arguments were as constitutionally suspect as those of his critics. When asked by Salmon Chase to extend the scope of the Proclamation to occupied Louisiana and Virginia, Lincoln retorted, “Would I not thus give up all footing upon Constitution or law? Would I not thus be in the boundless field of absolutism?”

Lincoln grounded his authority in the presidential oath to “preserve, protect, and defend” the Constitution of the United States. The outbreak of war had made it necessary to use certain “indispensable means,” chiefly emancipation. But he used those extraordinary means only because they were “indispensable to the preservation of the Constitution” and necessary to prevent the wreck of “government, country, and Constitution all together.” In other words, Lincoln believed, like Joseph Story, that the Constitution contained within its powers the necessary means of preserving republican government and its purpose of providing liberty and equality to all.

279. See id. at 117.
280. See id. at 8.
281. See id. at 46.
282. See id. at 190. See also Sanford R. Levinson, Abraham Lincoln, Benjamin Curtis, and the Implications of Constitutional Fidelity, 4 GREEN BAG 2d 419, 424-26 (2001) (discussing Curtis’s view of the proclamation).
283. See L.E.P., supra note 7, at 191.
284. See id. at 194.
285. See id. at 195.
286. See id. at 198.
288. See L.E.P., supra note 7, at 201.
289. See WILLS, supra note 92, at 145 (“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
Lincoln also relied on his commander-in-chief power, an authority vested in him by the Constitution. By the laws of war, he could take the enemy’s property. And because Lincoln deemed it “necessary” to free the slaves in order to win the war, he had the authority to do so. This was because the fight to preserve the Union was the fight for “the great republic—for the principle it lives by, and keeps alive—for man’s vast future.” Thus, the Constitution gives the president the authority to preserve the constitutional order—by war if necessary. In fighting the war, the president may pursue any means normally authorized by the law of war, including the taking of the enemy’s property. But the president could take such measures only because nothing less than the future of freedom and equality were at stake, not just the institutional and geographical integrity of a certain nation, or the lives of its citizens.

Lincoln believed that slave emancipation was a necessary military measure to deprive the South of both resources and troops. As one scholar has noted, “By September 1862, Lincoln was convinced that he could not fulfill his constitutional oath to preserve the Union unless he acted to destroy slavery in those states and parts of states that were in rebellion against federal authority.” Likewise, “[t]he Emancipation Proclamation progressively deprived the Confederacy of a vast reservoir of slave labor, which had enabled many more Southern whites to serve in the confederate ranks than would otherwise have been possible.” But it was also a powerful action bound into Lincoln’s civil religion and his increasing belief that America should have a “new birth of freedom.”

In repeated references to his action, Lincoln noted that he did the right and just thing, with the assurance of Almighty God, rather than merely taking a necessary military action. And while he did offer a sophisticated defense of the measure based on wartime necessity because of his respect for the rule of

importance—now became a lived reality of the American tradition . . . ‘The United States are a free government.”

290.  See *Emancipation*, supra note 4, at 817.
293.  *Id.* at 392.
294.  *Id.* at 393.
295.  WILLS, supra note 92, at 141.
297.  WILLS, supra note 92, at 136.
298.  *Cf. Emancipation*, supra note 4, at 810-11 (noting that national and constitutional survival, as well as preservation of the lives of citizens, are meta-interpretive principles that override a strict interpretation of any particular provision). As noted above, Paulsen’s reading of Lincoln is a mile-wide, but only a foot deep. Lincoln’s Constitution looks strangely like a post-9/11 president’s Constitution.
299.  See WILLS, supra note 92, at 142.
300.  NBF, supra note 116, at 79.
301.  See *Guelzo*, supra note 31, at 342.
law, his personal correspondence demonstrates his belief that his action had lifted the struggle between the states from the realm of politics to a holy realm. As Lincoln said himself, “It is a momentous thing to be the instrument, under Providence, of the liberation of a race.”

That Lincoln issued the proclamation when he did is almost as inexplicable as his motives. The Union had suffered a long series of military setbacks, and the war had been unexpectedly prolonged. Lincoln, holding fast to his civil religion and relying on the goodness of God’s judgment, penned an interesting reflection that has been dubbed the “Meditation on the Divine Will” It is reaffirmation that no matter the outcome, God’s will and justice would prevail. That the war had been prolonged was intertwined with the inscrutable purposes of the divine. Notably, Lincoln never doubted the justice of his cause.

It may be that, just as he informed his Cabinet of his decision based on a promise he made to God, he considered that the real purpose of this war would now be to expunge slavery from the land. Despite Lincoln’s early comments to the contrary to Horace Greeley, his actions from the announcement of the proclamation to his cabinet, to his Gettysburg Address advocating the passage of an anti-slavery amendment, demonstrate a clear shift in that direction. In the Gettysburg Address, Lincoln called upon the nation to ratify what had been done with emancipation.

CONCLUSION

Lincoln’s Second Inaugural Address, given just weeks before his assassination, is a fitting conclusion for this article. It is a meditation on God’s purposes, in particular, his purposes in allowing a brutal war to drag on for four long years. In particular, Lincoln exhorts both North and South to “bind the nation’s wounds” and rededicate themselves to their common destiny as he articulated it in the Gettysburg Address. Neither side has exited the war totally vindicated, and thus in humility they must seek their common destiny together. “The heart of the speech as a whole attempts to end the war in men’s minds . . . by convincing men that the war is a completed action and that justice has been done.” War is no longer needed, and thus, charity can prevail.

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303. TRUEBLOOD, supra note 28, at 24.
304. Id. at 26.
306. See C.W.T.C., supra note 27, at 89.
307. See GUELZIO, supra note 31, at 341.
309. See NBF, supra note 116, at 79.
310. THUROW, supra note 20, at 93.
exists in demonstrating that both sides were perpetrators of injustice, and both are experiencing divine retribution through the scourge of war that had been wrought upon them. But that is also the basis for their reunification. Even though the North fought to preserve the Union, it was not guiltless in the crime. Both sides must now go forward and re-affirm those sacred principles that bound them together in 1776. America continues to be part of the divine plan, and must be ever vigilant to its sacred bond of equality.

It is safe to assume that had he lived, Lincoln would have approached the constitutional questions regarding Reconstruction in the same theological vein as his Second Inaugural. God’s purposes for America were continuing to unfold, but its destiny lay in its adherence to the original covenant. America had been punished for its sins, and only the path of humility and reconciliation could forge a common destiny. Vindictive righteousness could not be the path of Reconstruction, but rather a common spirit of charity and humility for the sins of the past and a renewed commitment to charity and fidelity in the future. Lincoln maintained his role as the prophet of the American civil religion right up to his death. Unfortunately, when Booth shot Lincoln, the South lost its best friend.

This article attempted to show that the animating spirit of Lincoln’s constitutional actions was his civil religion—his belief that God had given America a special role to play in the history of the world, and it was up to America to be faithful to that charge. Crucial to that goal was thwarting the fundamental attack launched against the whole work of the Founders by Calhoun and his disciples. That struggle, which produced the Civil War, forced Lincoln to reinterpret, re-apply, and in some ways complete the principles and work of the Founders. Lincoln rededicated America to the cause of the Founders, particularly the Declaration of Independence, and thus unleashed a “new birth of freedom.” It is through this lens that we should understand “Lincoln’s Constitution.”

This article addresses those partisans in today’s constitutional debate who seek to use Lincoln as a cudgel to advance their own arguments. Partisans should tread lightly; “Lincoln’s Constitution” is bound up heavily in America’s civil religion—a religion that attempts to explain America’s purpose and destiny within the scheme of Providence. Here, the rhetoric and the constitutional

311. See Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in Selected Speeches and Writings at 450 (Roy Basler & Don E. Fehrenbacher eds., 1992) (“If we shall suppose that American slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him?”).
312. See Thurow, supra note 20, at 94.
313. This is no original claim. The repetition of many scholars has made this statement a truism.
314. See Carwardine, supra note 29, at 44 (noting that Lincoln believed himself to be foreordained by God to save the republic and usher in the “new birth of freedom”).
parallels between Lincoln’s time and our own are unmistakable. But unless those involved in the debate seek to come to terms with Lincoln’s own view, they should refrain from using him as a standard; unless of course, they believe America (and the world) must continue to have “a new birth of freedom.”³¹⁵

LINCOLN’S LEGAL ETHICS

Roger D. Billings Jr.*

The Papers of Abraham Lincoln project has opened a new window into Abraham Lincoln’s life. It contains 96,000 documents about Lincoln’s legal career, and are all available online. There are 5,600 of his cases, representing his practice of law from A to Z, or more accurately, from adoption to usury.1 One of the least explored aspects of his practice is his legal ethics and how they stack up against the modern rules.2

In Lincoln’s day very little was written about attorney-client relations, which are the focus of today’s Model Rules of Professional Conduct. Instead, ethics was a synonym for the word “morality.” Some examples illustrate the difference between the ethics of morality and the ethics of the lawyer-client relationship. As early as 1836, David Hoffman’s influential book, A Course of Legal Study, moralized that the ideal lawyer should not plead the statute of limitations against an honest debt.3 Hoffman might have found Lincoln immoral because he didn’t hesitate to use the statute of limitations to defend his debtor clients, and he also didn’t hesitate to use other technicalities if they would win a case.4

Another example of the confusion between morality and legal ethics was the refusal of some lawyers to represent owners of fugitive slaves. Salmon P. Chase of Cincinnati believed it was immoral to represent slave owners; instead he represented runaway slaves in court when their owners sued to recover them. He did so much pro bono work of this kind that he became known as the “attorney general for runaway negroes.”5 Lincoln was not so moralistic. He noted that slavery was implicitly recognized in the Constitution. Once he even represented a slave owner and when he did so he was in compliance with the modern ethics rule which says, “A lawyer’s representation of a client... does not constitute an endorsement of the client’s . . . social or moral views . . . .” 6 Lincoln’s representation of a slave owner might have conflicted with his personal belief that slavery is evil, but it did not conflict with an ethics rule. Lincoln believed in

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3. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (1817); see also MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 135 (2006).
4. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (1817); see also MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 135 (2006).
representing clients with all the tools the law allowed. Ethics rules say that, “A lawyer . . . should take whatever lawful and ethical measures are required to vindicate a client’s cause . . . .”7 In other words, “The lawyer should represent a client zealously within the bounds of the law” whether or not the client’s cause is popular.8

Frontier courtrooms where Lincoln practiced did not have the formality of today’s courtrooms. A story which took place in a tiny Illinois courtroom illustrates the easy-going camaraderie among lawyers. They were gathered around a table when they noticed that Lincoln’s friend and fellow lawyer, Ward Hill Lamon, had a big tear in the seam of his pants exposing his backside. One lawyer got the idea of passing around a piece of paper on which the lawyers would pledge some money to pay for a new pair of pants. When the paper came to Lincoln, Lincoln wrote, “I decline to contribute to the end in view.”9

The judge who presided in that courtroom was David Davis, one of Lincoln’s best friends, and the man who organized Lincoln’s nomination for President at Chicago on May 18, 1860.10 The friendship was so close that Lincoln appointed Davis a Justice of the U.S. Supreme Court in 1862.11 The relationship between Lincoln and Davis is reminiscent of the ethics rule in the Model Code of Judicial Conduct, “A judge shall not . . . consider . . . communications made to the judge outside the presence of the parties or their lawyers . . . .”12 I wonder whether Lincoln and Davis broke this rule, which is referred to as the “ex parte communication” rule.13 For years Davis and Lincoln were just two lawyers who rode the Eighth Judicial Circuit together, stopping each week at a different county courthouse.14 In 1848, Davis was elected judge of the Circuit and for the next twelve years Lincoln practiced before him.15 Now they were in the relationship of lawyer and judge but their friendship kept growing as evidenced by a letter of Davis to Lincoln dated August 30, 1860:

Bloomington, Ill.
Aug. 30, 1860

Dear Lincoln,

_____

11. Id. at 192-96.
14. KING, supra note 10, at 71-98.
15. Id. at 61.
The Davenport case was not decided at Danville – I intended to decide it but adjourned the court for the Chicago convention. Have not been back since.

I am very sorry of the postponement of your fees but they will have to be deferred until after the Danville court – The court is not until after the election – My mind is now wholly unfit to investigate any law case requiring thought…

(Signed) D. DAVIS

Davis is apologizing to Lincoln for being too exhausted to rule on a case because he knew Lincoln was waiting for his fee. The adjournment to the Chicago convention Davis mentioned refers to the convention where Lincoln was nominated by the Republicans.

Another letter also gives strong indication of the close relationship. In this letter Davis, while a sitting judge, seems to be handling client business for Lincoln:

Springfield, Illinois
March 28, 1856

My Dear Sir –

Mr. Lincoln had examined the questions presented in the statement of facts very thoroughly – and herewith enclosed is his opinion.

I have read the opinion and examined some of the authorities.

I am thoroughly persuaded that he is correct and that the Courts must sustain the views he takes. If any litigation grows out of the matter I would unhesitatingly recommend that Mr. Lincoln be sent for.

His charge for the examination and opinion is $100 – which you can send to me for him – if you so desire and I will procure a receipt from him and send to you. I have been holding Court here for two weeks – will get through tomorrow – shall see Rachel or you at Bloomington in April.

Truly your friend
(Signed) D. DAVIS

Given that Lincoln and Davis traveled together on the prairie and stayed at the same hotels, it is possible that at some time they indulged in ex parte communications about a pending case and that they would have violated the ethics rule. A hint of impropriety comes from a contemporary lawyer, Henry Clay Whitney, who wrote that, “while several of us lawyers were together, including Judge Davis, Lincoln suddenly asked a novel question of court practice, addressed to no one particularly, to which the Judge . . . replied, stating what he understood the practice should be.” Lincoln laughed and said, “I asked that question, hoping that you would answer. I have that very question to present to the Court in the morning and I am glad to find out that the court is on my side.” David Davis’s biographer concludes, however, that Davis was scrupulously impartial with his favorite and in fact decided more cases against Lincoln than for him.

The lawyers Lincoln practiced with had primitive offices by today’s standards. There were no secretaries, no paralegals, no file cabinets, no computers, not even typewriters. Everything was written by hand. Even the law library was sparse. Transportation to county courts on the Eighth Judicial Circuit was by horseback until the 1850’s when jolting train rides were available. Lincoln’s primary filing system was to put documents inside his stovepipe hat. He also left important papers in a stack in the corner of his office. David Donald says that as a result Lincoln and his partner, “were constantly looking for misplaced letters and documents, and there were times when they had to confess frankly that papers were ‘lost or destroyed and cannot be found . . . ’” The people he represented were poorly educated and the client letters were often ungrammatical. In contrast, Lincoln’s work product as an attorney was clear and well-written. Consider a few opinion letters:

19. See KING, supra note 10, at 71-98.
20. HENRY C. WHITNEY, LIFE ON THE CIRCUIT WITH LINCOLN 146 (1892); see also Henry Clay Whitney interview with William H. Herndon, (c. 1887) in HERNDON’S INFORMANTS: LETTERS, INTERVIEWS AND STATEMENTS ABOUT ABRAHAM LINCOLN 647 (Douglas L. Wilson & Rodney O. Davis eds., 1998).
21. KING, supra note 10, at 91.
22. See generally FREDERICK TREVOR HILL, LINCOLN THE LAWYER 19-26 (1906).
23. KING, supra note 10, at 71.
To John D. Swallow

[c. June 15, 1854]

Both your questions are the same. After you sold and deeded your property to Edmons, for a consideration which is worthless and fraudulent, any person who buys or takes a mortgage from Edmons, without Notice of the fraud, will hold the property against you; but whoever buys or takes a mortgage after your Bill is filed, is conclusively presumed to have had notice of the fraud, and therefore can have no better right against you than Edmonds himself had. This is the whole law of the case.

Yours truly
A. LINCOLN

Hon:  H. E. Dummer---    Springfield
My dear Sir:      Feb. 8, 1860

I have examined and considered the question propounded in your letter accompanying copy of contract in relation Lard Tanks, apparatus &c, and my opinion is that Messrs H. C. Chadsey & Co, would, as a general proposition, have the right to continue to use the Tanks, apparatus &c, which they have on hand.

The reason why I say “as a general proposition” is that I fear the particular phraseology of their contract, deprives them of it. The language of the contract is so explicit, and so oft repeated, that the right to use, “shall be until the expiration of said patent” that I fear it will be held that by their contract, they can not have the benefit of the extension.

Much may be said on the other side; and I only mean to say that in my mind the question, on the phraseology of the contract is doubtful, and perhaps is worth trying.

Yours as ever
A. LINCOLN
Joseph Means

Dear Sir

Springfield, May 11, 1858

The statements made within, if true are evidence of fraud on the part of the executor in selling the land. Fraud by the principles of law, invalidates everything. To get rid of this sale, a bill in chancery is to be filed, charging the fraud, and then, if the fraud can be proved, the sale will be set aside. This is all that can be said. Any lawyer will know how—to do it.

Yours &c

A. LINCOLN

The quality of Lincoln’s prose in legal documents and in letters to clients is impressive. Historians overlook them and analyze only the presidential letters and speeches, but Lincoln’s legal documents reveal that he was also a good draftsman before he became President. Just the same, he was capable of making mistakes. Bear in mind that Illinois lawyers had no bar association, there was no requirement for attending law school (or any school for that matter) and there were no written ethics rules to follow. Lincoln himself wrote down a few of his personal rules in the famous “Notes for a Law Lecture”. What Lincoln wrote was an early version of ethics rules. It is interesting to see whether Lincoln lived up to his own principles.

The first rule he proclaimed in his “Notes for a Law Lecture” is that lawyers should “Discourage litigation.” He said, “Persuade your neighbors to compromise whenever you can.” There is no direct counterpart to that statement in the Model Rules, but it is accepted wisdom that lawyers should avoid going to court whenever possible. In the 19th century, when commentators were first starting to write about legal ethics, there were a number of people who argued that lawyers should seek to avoid lawsuits as an ethical matter. Of course, this sprang from the common law idea that fomenting lawsuits was bad: champarty, barratry, and maintenance were the common law crimes of those who sought to stir up and profit from lawsuits. Today the rules tell us that the lawyer has a duty to keep the client informed, and that the client gets to decide whether to settle, but that the lawyer may refer to non-legal factors in

26. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 517.
27. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 446.
29. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 81.
30. Id.
32. MODEL RULES OF PROF’L CONDUCT Rule 1.2 (2007).
counseling the client.33 Taken together, these rules make clear that lawyers must counsel clients about the benefits and costs of litigation and then let them decide.34

Lincoln easily passes his own test. John Lupton of the Papers of Abraham Lincoln writes that Lincoln preferred to settle a case rather than go to trial. Lincoln’s friend, Judge David Davis, before whom Lincoln practiced for many years, tells us that Lincoln hated long trials and was fond of settlements. A clerk who read law in Lincoln’s office said, “I have heard him tell would-be clients again and again—You have no case; better settle.”35 Lupton says about 33 percent of Lincoln’s cases were dismissed, many of them because they settled.36

One means of resolving a dispute is through arbitration. Arbitration is popular today; it was also popular in Lincoln’s day and he took advantage of it at many times. He and opposing counsel would ask the court to appoint a panel of three arbitrators. Lincoln himself was appointed an arbitrator at least three times.37 In addition Lincoln was a mediator. A client named Abram Bale hired Lincoln to sue the firm of Wright and Hickox which had not paid Bale for $1,000 worth of “good, merchantable, superfine flour.” After he dutifully filed suit Lincoln wrote a letter to Bale, advising him to settle. He said “I sincerely hope you will settle it. I think you can if you will, for I have always found Mr. Hickox a fair man in his dealings.” Lincoln then told Bale that as to his fees, “I will charge nothing for what I have done, and thank you to boot.” He reassured Bale, “By settling, you will most likely get your money sooner; and with much less trouble and expense.”38

Lawyers are always alert to a conflict of interest.39 There was no written ethics rule on conflicts in Lincoln’s Illinois, but there was an unwritten conflicts rule, as Lincoln recognizes in this letter:

R. E. Williams, Esq.
Dear Sir
Springfield,
Aug: 15.1857.

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34. E-mail from John M. Bickers, Professor of Law, Salmon P. Chase College of Law, to Roger Billings, Professor of Law, Salmon P. Chase College of Law (October 1, 2008) (on file with author).
36. Id. at 42.
37. LAW PRACTICE OF ABRAHAM LINCOLN, supra note 1, Henry for the use of Logan v. Spear, 11/1842, assumpsit, File ID L03425; Saltonstall v. Saltonstall et al. 03/1857 partition, fee dispute, File ID L01820; Webster v. Rhodes & Angell 04/1856, File ID L00982; see generally MODEL RULES OF PROF’L CONDUCT Rule 2.4 (2007) (In Model Rule 2.4 there are rules for a “Lawyer Serving as Third-Party Neutral.” That is a rather awkward phrasing but the rule authorizes lawyers to be arbitrators).
38. LAW PRACTICE OF ABRAHAM LINCOLN, supra note 1, Lincoln to Abraham Bale, Feb. 22, 1850, Doc. ID 94155.
Yours of the 12th. in relation to a suit of Bakewell vs Allin, was received a day or two ago. I well remember the transaction; but as Bakewell will need no lawyer but you, and as there is likely to be some feeling, and both the parties are old friends of mine, I prefer, if I can, to keep out of the case. Of course I will not engage against Mr. Bakewell.

Yours truly
A. LINCOLN

In another letter Lincoln reassured his client, Mason Brayman, who was counsel for a railroad, that he would not take a case against the railroad. He wanted Brayman to be confident that he was aware of conflicts of interest. An old man wanted Lincoln to sue the railroad for breach of a promise to make fences, but Lincoln told Brayman not to worry, “as I have sold myself out to you.” The letter reads in part:

Springfield, March 31.1854

M. Brayman, Esq.
Dear Sir,

I write this to inform that the people, (or some of them) of McLean and DeWitt county, through whose farms the I. C. R. R. passes are complaining very much that the Co. does not keep its covenants in regard to making fences – An old man from DeWitt was down here the other day to get me to bring a suit on the account; but as I have sold myself out to you, I turned him over to Strait, who, I understand, will bring the suit – A stitch in time may save nine in this matter –

A. LINCOLN

In his “Notes for a Law Lecture” Lincoln said, “The matter of fees is important . . . An exorbitant fee should never be claimed . . . never take your whole fee in advance . . . settle the amount of the fee and take a note in advance . . . never sell a fee note.” Lincoln’s recommendation for modest fees and collection of them only after legal services are rendered anticipates the modern rule. The Ohio Rules of Professional Conduct say that “A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee.” The rule is found in similar form in all states. Some biographers have written that Lincoln charged such modest fees that other lawyers believed he was depressing the market! In one of his best known fee letters Lincoln wrote:

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40. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 413.
41. LAW PRACTICE OF ABRAHAM LINCOLN, supra note 1, AL to Mason Brayman, Doc. ID 130031.
42. Id.
43. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 82.
44. OHIO RULES OF PROF’L CONDUCT Rule 1.5(a).
Mr. George P. Floyd  
Springfield, Illinois  
February 21, 1856

Dear Sir: I have just received yours of 16th, with check on Flagg & Savage for twenty-five dollars. You must think I am a high-priced man. You are too liberal with your money. Fifteen dollars is enough for the job. I send you a receipt for fifteen dollars, and return to you a ten-dollar bill. Yours truly,

A. LINCOLN

There is doubt that Lincoln’s fees were any lower than those of other lawyers. Albert Woldman, an excellent biographer of Lincoln’s career, wrote that “for the most part [his fees] were normal and compared favorably with the compensation received by other lawyers of the same region.” One thing is certain: once a fee was negotiated, Lincoln did not allow himself to be denied it, as the following letter shows:

Andrew McCallen  
Springfield, Ills  
July 4, 1851

Dear Sir:

I have news from Ottawa, that we win our Galatin & Saline county case. As the dutch Justice said, when he married folks “Now, vere ish my hundred tollars”

Yours truly
A. LINCOLN

Lastly, a rule Lincoln proclaimed in his “Notes for a Law Lecture” is “Never let your correspondence fall behind.” Lincoln freely admitted that his law practice was often interrupted by politics and he apologized to clients and colleagues for his absence. Neglect of clients is one of the most common problems that lead to ethics violations. A typical ethics rule today says, “A lawyer shall act with reasonable diligence and promptness in representing a client.” No Supreme Court ethics committee was supervising lawyer conduct

45. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 332-33.  
46. ALFRED A. WOLDMAN, LAWYER LINCOLN 212-13 (1936).  
47. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 106.  
48. Id. at 81.  
49. STEINER, supra note 3, at 26-29.  
50. OHIO RULES OF PROF’L CONDUCT Rule 1.3.
in Lincoln’s day, however, and Lincoln often began letters with a comment on his tardiness. He could well have been the subject of complaints to a bar association ethics committee had he been in practice today.

In 1838, Lincoln’s second year of practice, we find the first of many letters where Lincoln begs his client’s pardon for neglecting business. Here is what he wrote the client.

Levi Davis
Springfield
Dear Sir:
March 15- 1838

We received yours of the 2nd. Inst. by due course of mail, and have only to offer in excuse for not answering it sooner, that we have been in a great state of confusion here ever since the receipt of your letter; and also, that your clients can not suffer by the delay. The suit is merely instituted to quiet a title…

We beg your pardon for our neglect in this business; if it had been important to you or your client we would have done better.

Yours sincerely
STUART & LINCOLN

Recall that Lincoln stored legal documents inside his stovepipe hat. In 1850 he wrote this letter:

Richard S. Thomas
Springfield
Dear Thomas:
June 27. 1850

I am ashamed of not sooner answering your letter, herewith returned; and, my only apologies are, first, that I have been very busy in the U.S. court; and second, that when I received the letter I put it in my old hat, and buying a new one the next day, the old one was set aside, and so, the letter lost sight of for a time…

Yours as ever,
A. LINCOLN

Using the same language in two successive letters, Lincoln suggests that he is a little slow.

E. W. Bakewell, Esq
Springfield,
Dear Sir:
Augt. 1. 1850

51. 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 116.
52. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 25, at 80.
I have at last found time to draw up a Bill in your case. Inclosed you have it…

A. LINCOLN

Hon: William Martin: Springfield, Feb: 19. 1851

The Legislature having got out of the way, I at last find time to attend to the business you left with me on behalf of the Alton and Sangamon Railroad Company…

A. LINCOLN

Sometimes Lincoln explained that he was too busy in the courts. In the following letter he admits that he missed a chance to get a corporate charter from the state legislature for his client.


My dear Sir: I have failed to get your Coal Mining Charter. Being very busy in the Courts when your letter reached me, I let a few days slip before attending to it. A little more than a week before the close of the Session, I got a Bill for the Charter howsoever into the Senate, which Body it passed in about five days. It then went to the H.R. and was lost for want of time…

If you continue to desire it, I will get it passed at the next Session—it being borne in mind that at a called Session the door may not be opened for such business.

Your obt. Servant,
A. LINCOLN

The following letter is a candid admission that the reason for neglect of business was politics.

Messrs. Sandford, Porter & Striker Springfield, New York March 10. 1855

Gentlemen: Yours of the 5th. is received; as also was that of 15th. Decr. Last, inclosing bond of Clift to Pray. When I received the

53. Id. at 91.
54. Id. at 98.
55. Id. at 190-91.
bond, I was dabbling in politics; and, of course, neglecting business. Having since been beaten out, I have gone to work again…

Very Respectfully

A. LINCOLN

Every lawyer knows that one of the biggest malpractice nightmares is to let the statute of limitations run before filing a client’s lawsuit. After a certain number of years the law says it is too late to file suit and this law is called the statute of limitations. Lincoln had a healthy respect for the statute, as this letter shows:

To Elihu N. Powell
Springfield
Dear Powell:
Feb. 15. 1856

When you wrote me from Chicago about our Aspinall case, I had done nothing with it. But being thereby stirred up, I looked into it, and took fright, lest the Statute of Limitations had matured against it, since the papers were in my hands. To make sure, if it had not, that it should not, I brought the suit at once in our Sangamon Circuit Court, --- not knowing where Aspinall lives, so as to sue in the Federal court…

A. LINCOLN

Lincoln lived up to his reputation for honesty in the practice of law. His stovepipe hat filing system and his love of politics, however, forced him to the brink of neglecting clients’ business.

56. Id. at 308.
57. Id. at 331.
Abraham Lincoln was born in and spent the first seven years of his life in Kentucky. In 1816, his father, Thomas Lincoln, moved his family north across the Ohio River from what was then Hardin County, Kentucky and settled on a wooded, 160-acre claim in what was then Perry County, in southern Indiana. Lincoln later attributed his father’s move north to his dislike of slavery and his efforts to establish an uncontested claim to property—a problem that plagued Thomas and many other yeoman farmers in early Kentucky. In migrating north of the Ohio River, the Lincolns joined thousands of other pioneers of the upland south moving into the so-called Old Northwest during the early decades of the nineteenth century. There, they sought cheap federal land on which to practice subsistence, or pre-market economy, agriculture. Soon, relatives from Kentucky joined the Lincolns in Indiana, settling on nearby claims and establishing a small community of security and exchange. This sort of pattern migration characterized the great exodus north and west from the upland south to the new territories or states of Indiana, Illinois, Missouri and Iowa. In early 1830, Thomas Lincoln sold his farm and again moved his family, including twenty-one-year-old Abraham, to establish a farm in Macon County in central Illinois.

By the 1830s central Illinois contained a mix of settlers from both the north and south. Settlers from the upland south (Kentucky, Tennessee, Virginia and the Carolinas), represented the largest group of immigrants. The Lincolns settled on land in a part of Macon County on the north side of the Sangamon River, alongside a “Yankee” settlement. Kentuckians were the first large immigrant group to take up residency in Illinois, first settling in southern Illinois then, during the 1830s, settling further north colonizing the fertile soil of central

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*Christopher A. Schnell is an assistant editor with the Papers of Abraham Lincoln.
2. Id. at 10-11.
4. WINKLE, supra note 1, at 10.
5. Id. at 13; WARREN, supra note 3, at 20.
6. WINKLE, supra note 1, at 13.
8. WINKLE, supra note 1, at 22.
9. Id. at 24.
10. Id. at 26.
Illinois. In 1850, the first year the federal census recorded nativity, male, native-born Kentuckians were the second largest immigrant group in Illinois, and one of the largest immigrant groups in central Illinois. They settled east to west across central Illinois; in the Sangamon valley, in the west and center, and along the Embarrass and Vermilion Rivers in the east, a region that composed the heartland of Lincoln’s law practice.

Using nativity as a guide, central Illinois in 1850 was a crossroads of the country. Northernners spread south from Chicago and northern Illinois to encroach on central Illinois. Southerners moved south to north, halting as far north as the military tract in western Illinois and the Sangamon valley of central Illinois. Settlers from the Mid-Atlantic and Ohio also settled in central Illinois. Despite this diversity, a large proportion of the population in central Illinois, as late as 1850, was born in Kentucky. Native-born Kentuckians were the core population in several of the counties that formed the eighth judicial circuit, Lincoln’s home-circuit. These counties included Sangamon (his home-county), and McLean, in the central part of the state, and Vermilion and Edgar, on the Indiana border in the east-central part of the state.

From this, it is natural enough to form a corollary that because of the preponderance of native-born Kentuckians in central Illinois, Lincoln’s clients were also mostly from Kentucky. A sampling of Lincoln’s clients supports this corollary. Ten of Lincoln’s twenty-nine most frequent clients were either native Kentuckians or had lived there for a substantial amount of time before moving to Illinois. Those ten clients include 26 percent of the cases represented in the study. Thus, approximately one-third of Lincoln’s top clients were born in or had lived in Kentucky and these clients gave him about one-quarter of his caseload from his top clients.

Settlers from the upland south brought their cultural and economic models with them and implanted them in Illinois. Likewise, settlers from other regions brought with them their own way of doing things. These cultural differences

12. Id. at 141.
14. MEYER, supra note 11, at 141.
15. Id. at 143; WINKLE, supra note 1, at 24.
16. MEYER, supra note 11, at 143-44.
17. Id. at 144, 166-68; WINKLE, supra note 1, at 25.
18. MEYER, supra note 11, at 144.
19. Id.; especially map at 143.
21. FARRAGHER, supra note 7, at 44-51; MEYER, supra note 11 at 98-99.
affected, in small ways, Lincoln’s law practice. Yeoman farmers from the upland south populated the countryside surrounding Lincoln’s homes, first when he lived in New Salem, and later after he moved to Springfield. While subsistence farming gave way to increased farm production for market under steadily maturing economic conditions during the 1830s and 1840s, old habits died slowly, so many of Lincoln’s clients were farmers of small holdings with little means. Characteristic of this agriculture-based economy, Lincoln’s law practice included a great deal of small debt collection, property law, and inheritance law. Urban settlement also characterized the 1830s and 1840s as more and more single men left farming for work as artisans, mechanics, merchants, or in nascent industry in town. A small minority, like Lincoln, left the farm to engage in training for a limited spectrum of professions. Most of these men apprenticed themselves for a brief period before starting out on their own, usually in a new location; perhaps a growing place like Springfield. As such, many of Lincoln’s colleagues and clients were small businessmen and members of the professional class from Kentucky. Lincoln also labored to meet the needs of his urban clients and this is reflected in the wide variety of debt collection (for both creditor and debtor) and contract law in his law practice.22

For the most part, however, nativity probably had very little to do with Lincoln’s success as a lawyer. By necessity Lincoln had to take all comers to foster his practice; this openness brought him into contact with a broad spectrum of transplanted people. It did not make business sense to exclude from his practice, because of sectional prejudices, the greedy “hawk billed yankee,” as he once referred to a creditor from Chicago.23 Nor could he afford to refuse the cases involving $5 fees or clients who had little personal wealth, such as those from the upland south who had not advanced much beyond subsistence farming. This openness benefited his political career as well as provided him with a high volume of clients throughout his twenty-four years as a lawyer.24

Kentuckians who were professionals or businessmen figured heavily among Lincoln’s friends and associates during the early years of his residence in Illinois, in both New Salem (1831-1837) and after he moved to Springfield in 1837. Lincoln’s one-time employer, county surveyor Thomas M. Neale, studied law in Kentucky before moving to Sangamon County where he served as a

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justice of the peace in addition to his official duties.\textsuperscript{25} One of Springfield’s founders, Elijah Iles, came from Kentucky to Illinois with a stock of goods to sell. When his mercantile business languished, he speculated in land, and he profitably purchased one-quarter of the land that would later become Springfield.\textsuperscript{26} Dr. Richard F. Barret, a leader among Springfield’s Whigs, and occasional client of Lincoln’s, was born in Green County, Kentucky, where he began his medical practice before moving to Springfield in 1833.\textsuperscript{27} Beyond Sangamon County, Lincoln encountered Kentuckians among the leaders in communities throughout central and southern Illinois. This can be seen by looking at the attendees of the 1847 state constitutional convention. Included among this elective body were at least 28 delegates who called Kentucky their native state, the most delegates from a single state. Half of these native-Kentuckian delegates were either lawyers or physicians.\textsuperscript{28}

During the early decades of the nineteenth century, Louisville and Lexington were economic and cultural centers for the west and many of Lincoln’s colleagues and clients from the entrepreneurial and professional classes were trained and educated in Kentucky before establishing themselves in Illinois. Merchandise and merchants from Louisville began arriving in the Illinois marketplace during the 1830s. Lexington’s exported to Illinois many learned men and professionals trained in its cultural institutions.\textsuperscript{29} According to Horace Holley, who became president of Transylvania University in 1820, “This whole Western country is to feed my seminary, which will send out lawyers, physicians, clergymen, statesmen . . . who will make the nation feel them.”\textsuperscript{30}

Although most lawyers learned their craft through apprenticeship or self education, many of Lincoln’s colleagues at the bar were well educated.\textsuperscript{31} Transylvania, early on, had a law department, one of only two west of the Appalachians during the middle decades of the Nineteenth Century.\textsuperscript{32} At least twelve lawyers and judges with whom Lincoln worked, attended Transylvania for a liberal arts education or for legal education.\textsuperscript{33} Some attorneys, like

\textsuperscript{26} Winkle, supra note 1, at 31-32.
\textsuperscript{27} 1 Encyclopedia of the History of St. Louis, A Compendium of History and Biography for Ready Reference 106-07 (William Hyde & Howard L. Conard eds., The Southern History Co. 1899).
\textsuperscript{30} Id. at 235.
\textsuperscript{31} Steiner, supra note 24, at 31.
\textsuperscript{32} Id. at 29-30.
\textsuperscript{33} See biographies of Orville Hickman Browning, Ninian W. Edwards, Thomas Ford, Joseph Gillespie, James Haines, John J. Hardin, Gustavus P. Koerner, Josiah Lamborn, Thomas A.
Lincoln’s friend John J. Hardin, emerged from their Kentucky home with a degree from Transylvania and settled in Illinois to practice law. Most, however, were residents of Illinois who were drawn to Transylvania to obtain a higher education whereupon they returned to Illinois to practice law. Quincy, Illinois, attorney, Orville Hickman Browning, a longtime friend of Lincoln’s, attended Augusta College in his native Kentucky before coming to Illinois.

John Todd Stuart had a lasting influence on Lincoln’s career as a lawyer. Stuart was born in Walnut Hills, Kentucky, the son of a Presbyterian minister. He was well educated, having attended Centre College, in Danville, Kentucky, and after he studied law in a Richmond, Kentucky law office. In 1828, he moved north to Springfield, Illinois, where he began to practice law. A few years later, in 1832, Stuart met Lincoln while they were both serving in a Sangamon County militia company that took part in the Black Hawk War. After they were discharged from duty, both men traveled home together and Stuart suggested Lincoln take up the study of law. A few years later, Lincoln borrowed law books from Stuart to begin his self-education in law and in 1837, Stuart took Lincoln as his junior partner. As such, Lincoln’s legal education was more full-time employment than apprenticeship and after Stuart went to Congress in 1839, Lincoln took over as the lone member of the firm. With Stuart, Lincoln had the advantage of an established and growing clientele and he was able to avoid the sparse practice faced by many aspiring lawyers. Indeed it would have been unlikely for Lincoln to have succeeded in a place like Springfield, a steadily growing state Capitol, without being sponsored by an established member of the local bar like Stuart. The firm was busy, and, in addition to their work in the crowded Sangamon County Circuit Court, Lincoln visited some, or occasionally all, the courts of the circuit to gather more clients. Still, lucrative appellate work was sparse and most likely their federal practice was minimal. With Stuart in Washington, or deeply involved in running for

34. STEINER, supra note 24, at 30.
35. Id. at 29.
37. Id.
38. Id.
39. Id. at 378.
40. Id.
42. Id.; See also 4 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 378.
43. 4 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 378.
44. Townsend, supra note 41, at 83.
office, the practice suffered, and in early 1841 they amicably ended their partnership.45

Stephen Trigg Logan was born in Kentucky where he received his education and served a legal apprenticeship with his Uncle.46 When he moved to Springfield in 1832, he commenced the practice of law and only three years later became judge of the First Judicial Circuit.47 He later resigned this post to return to the practice of law, and in 1841 he joined with Lincoln in a partnership that would last until 1844.48 During these years Lincoln apparently learned much about law, as it was Logan who later reminisced that “Lincoln’s knowledge of law was very small when I took him in.”49 As Logan’s junior partner, Lincoln benefited much from his large clientele and vast legal knowledge.50 While they were partners, Lincoln became more active in the Illinois Supreme Court and in the federal courts. In the division of labor, Lincoln traveled the circuit while the senior partner tended to business at home.51 Logan’s political ambitions were more muted than Stuart’s, and as a result he was a much more active lawyer and the firm prospered.52

In 1844, when Logan wanted to take on his son as a partner, Lincoln broke away and formed a partnership with a younger lawyer.53 This time he joined with William Henry Herndon, who was born in Kentucky, but came to Springfield at a young age with his father.54 In the early 1840s he studied law in the Logan & Lincoln law office.55 Lincoln took Herndon in as a junior partner and it was Lincoln’s turn to help a younger member of the bar get started.56 The partnership worked out so well that even after Herndon exhibited excellent skills as a lawyer, he remained on as Lincoln’s partner until the latter left for Washington in 1861. As with his earlier partnerships, Lincoln attended courts on the circuit, but he also did much of the trial work in the federal courts and appellate work before the Illinois Supreme Court.57 Herndon managed the

45. 4 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 378.
46. Id. at 364.
47. Id.
48. Id.
49. Paul M. Angle, Stephen T. Logan Talks about Lincoln, 12 LINCOLN CENTENNIAL ASS’N BULL. 3, (Sept. 1, 1928), available at http://quod.lib.umich.edu/cgi/t/text/pageviewer-idx?c=alajournals;cc=alajournals;q1=stephen%20t.%20logan%20talks%20about%20lincoln;rgn=full%20text;idno=0524890.0012.001;didno=0524890.0012.001;view=image;seq=00000001.
50. Id.
51. Id.
53. 4 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 364.
54. Id. at 356.
55. Id.
56. Id.
office, conducted research, and received walk-in clients.\textsuperscript{58} He also attended to probate matters and maintained the firm’s cases in nearby Menard County after the state legislature removed it from the eighth judicial circuit.\textsuperscript{59} Like Stuart and Logan before him, Herndon was an ardent Whig, but he represented perhaps a younger point of view on the political questions of the day.\textsuperscript{60} During the 1850s Herndon was much more vocal about his anti-slavery feelings than the politically savvy Lincoln ever allowed himself to be publicly.\textsuperscript{61} Herndon, acting alone, represented fugitive slaves in two Habeas Corpus hearings in Springfield during the 1850s.\textsuperscript{62}

Lincoln’s Kentucky family and friends influenced his law career by affording him both business and, at times, grief. Joshua Frye Speed was perhaps Lincoln’s closest friend and confidant. When Lincoln first arrived nearly penniless in Springfield from New Salem, he took Speed’s offer to share sleeping quarters above the store Speed co-owned.\textsuperscript{63} Their friendship lasted even after Speed returned to his native Louisville in the early 1840s. Speed, who had arrived in Springfield in 1835, sold his part of a dry goods partnership and left several accounts in the hands of the Logan & Lincoln partnership for collection.\textsuperscript{64} In cash-poor Illinois, most mercantile firms either took agricultural goods as payment or gave credit to conduct sales.\textsuperscript{65} In taking goods as payment, these firms often served as clearinghouses for market produce in the years before cheap rail and river transportation.\textsuperscript{66} Likewise, by offering credit, these firms served their clients as a proto-bank, in advance of reliable banking institutions.\textsuperscript{67} Speed’s firm largely gave credit in the form of promissory notes bearing 10 percent interest.\textsuperscript{68}

When he sold out, his partner agreed to assign to Speed full interest in several unpaid notes.\textsuperscript{69} These notes went to Logan & Lincoln for collection and led, eventually, to fifteen litigated cases in which they represented Speed’s interests.\textsuperscript{70} Speed’s collection work typified the sort of work Lincoln would continue to do throughout his career in law. In court, Lincoln and his partners sued debtors using a wide variety of remedies including such actions as

\textsuperscript{58} Id. at 45.
\textsuperscript{59} Id.
\textsuperscript{60} DAVID DONALD, LINCOLN’S HERNDON, supra note 57, at 29.
\textsuperscript{61} Id. at 134-35.
\textsuperscript{62} Id. at 105-07, 134-35.
\textsuperscript{63} 1 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 251-52.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 251.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 252-53.
\textsuperscript{69} 1 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 252.
\textsuperscript{70} Id.
assumpsit, debt, or in an uncontested case, petition and summons, a speedy, creditor-friendly action borrowed directly from Kentucky law.  

As Lincoln became more established among Springfield’s professional elite, a benefit of his partnership with Stuart, he came to know Ninian W. Edwards, the leading Whig lawyer in Springfield during the early 1840s. Edwards was the son of Ninian Edwards a Kentuckian and early Governor of Illinois. The younger Edwards was born in Frankfort, Kentucky, and studied law at Transylvania University. While there, he met Elizabeth Todd, the daughter of an influential and well-to-do Lexington businessman, and they soon married. Edwards moved to Illinois to begin practicing law, but later established himself as a merchant in the budding prairie town of Springfield. He soon thereafter met Lincoln while campaigning for the legislature. The Edwardses soon became the leading family of Springfield, and Elizabeth began inviting her sisters in Lexington to visit her and enjoy the society of the young town. While Lexington, once the cultural hub of the west, was in decline, Elizabeth’s many siblings began to migrate away from Kentucky. In a sort of chain migration, several of her sisters joined Elizabeth at her home in Springfield over the next few years. During this time, Lincoln, with the encouragement of friends, fitfully entered the Edwardses’ social circle, and it was there that Lincoln met Mary Todd, one of Elizabeth’s immigrant sisters.

Mary Todd Lincoln was the most influential Kentuckian in Lincoln’s life. Other than a lifelong dislike of Lincoln’s partner William Herndon, however, Mary had very little influence over Lincoln’s law practice. Their marriage, rather, cemented the separation of Abraham’s professional and domestic spheres. Even before marriage, he had always maintained a law office, a dedicated space for business separate from his sleeping quarters with Speed or other friends. Separating work from home was still a fairly new concept among lawyers during the early decades of the nineteenth century, and after they

71. Id. at 251-58.
73. Id.
74. Id.
75. Id.
76. Id. at 26.
77. Id. at 27.
78. BERRY, supra note 72, at 29-30.
79. Id.
80. Id. at 32-33; I THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 22, at 347-48.
wed the Lincolns continued to meet with this middle-class, domestic rule.\textsuperscript{83} To Mary, Abraham ceded all power over domestic doings.\textsuperscript{84}

After they married in 1842, Lincoln entered a world further from his humble beginnings and closer to the middle-class ideal to which so many other young lawyers like him aspired.\textsuperscript{85} From her he learned rudimentary social skills and refinements he lacked because of his rough frontier upbringing and rustic, self-made adulthood.\textsuperscript{86} As one scholar noted, Mary provided Lincoln with “a marriage-long course in middle-class etiquette.”\textsuperscript{87} As unlike as they were in appearance and background, they shared an intellectual bond and a deep streak of ambition. In marriage they complimented each other in a variety of ways so that they led, according to Mary, “eminently peaceful” domestic lives.\textsuperscript{88} As Lincoln became more successful in law and politics he moved further from the frontier ideal of manhood and closer to the still developing Victorian ideal, an ideal which required the social skills and personal refinements Mary brought to the marriage. While Lincoln would never iron out his rough edges, much to Mary’s sometimes volatile chagrin, he became more middle class with help from Mary.\textsuperscript{89} Their collective ambition helped to ensure that he would succeed in his professional calling.\textsuperscript{90}

The marriage also brought Lincoln new connections to his native state, and as one scholar has noted, for the rest of his life, Lincoln was “awash in a sea of Todds.”\textsuperscript{91} Lincoln’s marriage to Mary also brought debt collection work from his father-in-law’s Lexington business. Furthermore, in 1843, Lincoln represented Robert Todd in \textit{Todd v. Ware}, litigation arising from a contract Todd signed to purchase land in Sangamon County. \textit{Todd v. Ware} stipulated that Todd had to pay off his promissory notes with “current” banknotes. Todd made the first two payments with paper currency printed by the State Bank of Illinois, a failing institution in Springfield. When he tried to pay the balance with the same paper a few months later, after the bank had failed, Ware refused the payment since the value of the State Bank’s paper had declined so far. After a year of litigation, the Sangamon County Circuit Court sided with Ware and ordered Todd to pay the contract off with currency on par with banknotes issued by banks in Kentucky, Missouri, and Indiana. Although Lincoln lost this case, his father-in-law deeded the land to his family in Springfield, including Abraham and Mary.\textsuperscript{92}

\begin{itemize}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} BAKER, \textit{supra} note 81, at 132-33.
\item \textsuperscript{85} \textit{Id.} at 133.
\item \textsuperscript{86} \textit{Id.} at 132-33.
\item \textsuperscript{87} \textit{Id.} at 132.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.} at 132-33.
\item \textsuperscript{90} BAKER, \textit{supra} note 81, at 130-33.
\item \textsuperscript{91} BERRY, \textit{supra} note 72, at ix-x.
\item \textsuperscript{92} 1 \textsc{The Papers of Abraham Lincoln: Legal Documents and Cases}, \textit{supra} note 22, at 301-37.
\end{itemize}
Robert Todd asked Lincoln and Edwards to collect some debts on behalf of his Lexington-based cotton manufacturing firm. The firm maintained a slave-powered factory in Sandersville, Kentucky, and a wholesale business in Lexington, and they sold their products to several merchants in Illinois. When some of these merchants could not pay, Lincoln and Edwards were called upon to collect. In 1853, four years after Todd’s death, his former business partners, Oldham & Hemingway, sued Lincoln and Edwards, for payment on two promissory notes that had allegedly been given to them by Robert Todd to collect during the 1840s. The surviving members of the firm sought to prove that Lincoln and Edwards had collected the debts on behalf of the firm yet never paid the firm its due. Lincoln was greatly troubled by the case and when he wrote his attorney in Lexington he found it “difficult to suppress my indignation towards those who have got up this claim against me.” Perhaps suspecting his litigious brother-in-law, Levi O. Todd, as being behind the lawsuit, he fumed that, “This matter harasses my feelings a good deal” and complained that the time needed to find evidence in the case would cost him time away from his active law practice. Despite being busy with work on the circuit, Lincoln doggedly found evidence in his favor and wrote several times to his lawyer assuring him that despite any claim made under oath he would “disprove it.” Eventually, the plaintiffs dismissed their case when Lincoln produced the necessary evidence to show that he had never collected the debts, either because they were never sent to him in the first place, or because the debtors were too destitute to warrant process. Lincoln did admit to obtaining $50, a fractional amount on one claim, but Robert Todd had allowed Lincoln keep the proceeds.

When Robert Todd died in 1849, he left a will and a modest estate to his widow and fourteen children. One of Mary’s siblings successfully challenged the will because it was only signed by one witness causing the estate to be tied up in litigation for several years. In the end, Mary and Lincoln had to pay money back into the estate to equalize the distributions based on the court’s

93. Id. at 357.
94. Id.
98. 2 The Papers of Abraham Lincoln: Legal Documents and Cases, supra note 22, at 371; see Berry, supra note 72, at 45 (discussing Levi’s “litigiousness”).
100. Berry, supra note 72, at 41; Townsend, supra note 99, at 206.
Apparently they had received more money or property than several other heirs. Lincoln and Edwards alternately represented the Springfield Todds in this litigation through correspondence with their Lexington attorney George B. Kinkead. After their father’s death, the Todd siblings also tried to nullify one of Robert Todd’s land conveyances, claiming the deed was defective. This and other similar protracted schemes inspired by Lincoln’s in-laws kept the Lincolns in Lexington’s Fayette County Circuit Court throughout much of the 1850s.

Lincoln’s most notorious Kentucky client was Robert Matson, a planter who owned property both in Bourbon County, Kentucky, and in Coles County, Illinois. He owned a few slaves who worked on his Kentucky farm, and at some point after establishing “Black Grove,” his Coles County farm in 1836, he began using slave labor on his farm in Illinois. Matson was a member of an entrepreneurial family that spread west from Bourbon County to Illinois, western Kentucky, Missouri, and Texas. During the War of 1812 he served as a Lieutenant in his brother’s militia company and fought bravely at the River Raisin. He was a staunch Henry Clay Whig and served in the Kentucky House of Representatives. Matson had a creative business sense, perhaps even of such a quality as to make him unique in his unfettered times, and he scrambled his whole life in the attempted creation of wealth. His scheme in Coles County was just part of this effort.

At first, he made a show of rotating slaves between his farms in a nod to Illinois law which prohibited slavery but allowed slave owners to move their property through the state. As long as Matson could argue his slaves were technically in transit he could get away with his scheme. Unfortunately for Matson, he lived in an area heavily populated by yeoman farmers from the upland south who had moved north to get away from slavery. Eventually, locals caught on to Matson’s charade and when his slave, Jane Bryant, emancipated herself and her four children in mid-August 1847 and showed up at a local abolitionist’s home she found support for her efforts.

Illinois law required African Americans to certify their free status with their county of residence. Since Jane and her children were not certified, they were
assumed to be fugitives from labor, and at Matson’s request the county sheriff arrested them. Abolitionists, Hiram Rutherford and Gideon Ashmore, a local doctor and tavern keeper respectively, hired attorneys and applied for a writ of Habeas Corpus. Matson, in turn also hired attorneys, including Lincoln, in order to fight in court for the return of his slaves. Four of the five attorneys known to have participated in the case were Kentucky natives.

Upon arriving in the Coles County seat of Charleston in time for the hearing, Lincoln was approached by Rutherford to represent him, since Matson was also pursuing civil penalties against Rutherford and Ashmore, of $500 per slave (the maximum fine allowed under Illinois law for harboring fugitive slaves). Reluctantly, Lincoln informed Rutherford of his having previously been obligated to represent Matson. During the habeas corpus hearing Lincoln argued that the Bryants were in transit, they were going back to Kentucky and thus, rightfully Matson’s property. Illinois courts were bound to honor the Kentuckian’s rights under the doctrine of interstate comity. The judges however ruled in favor of the Bryants and gave them their freedom. Chief Justice of the Illinois Supreme Court William Wilson concluded that Matson had held the Bryants in a condition of slavery for over two years at Black Grove, and in doing so he had manumitted them from service under the Illinois Constitution. The right of rendition in the U.S. Constitution, the supporting federal fugitive slave law and subsequent federal court rulings all concluded that a fugitive from labor must escape from the state in which he or she owed service into another state. The Bryants never escaped from Kentucky, they were brought voluntarily by their master into Illinois. In doing so he forfeited any federal protection, and by all but establishing their residency on Illinois soil for two years, Matson perhaps unknowingly freed his slaves under a provision of the Illinois Constitution.
Matson moved back to Kentucky and started a new farm operation in Fulton County after marrying his longtime housekeeper and overseer.\textsuperscript{123} He still owned several slaves who worked his farms and he also employed them in the building of a local railroad venture.\textsuperscript{124} The other Kentuckians in this story, the Bryants, fared less well.\textsuperscript{125} Jane and her children left the United States not long after they gained their freedom.\textsuperscript{126} Representatives of the American Colonization Society prevailed upon them to immigrate to Liberia along with hundreds of other freed slaves.\textsuperscript{127} So it was that early the following year the Jane and her family, along with her freedman husband, Anthony all left New Orleans for Liberia on a ship chartered by the Colonization Society.\textsuperscript{128} Some time later an African American minister from Springfield, Illinois, visited Liberia and spoke with Anthony.\textsuperscript{129} Reverend Ball found Anthony distraught over his family’s destitute circumstances in the new African republic and Bryant begged Ball to work for their return to the United States. There is no further information about the fate of the Bryant family.\textsuperscript{130}

What was Lincoln’s attitude toward these representatives of Kentucky, both the Bryants and Matson? Lincoln had well formed, negative opinions about slavery by 1847, some of his strongest feelings came from seeing it in person while visiting the south. However, he also had a lot in common, politically, with Matson and certainly had high opinions about Kentuckians of the Matson stripe. They were largely men with whom Lincoln worked as a lawyer, worked for as a lawyer, and looked up to as politicians. In taking up Matson’s cause, Lincoln challenged his personal aversion to slavery because Matson asked him to; Matson retained Lincoln before Rutherford had a chance to request his services.\textsuperscript{131} Lincoln did not discriminate among clients seeking his services and held himself professionally dedicated to his clients no matter the issue. It also appears, however, he wished to see this vital issue well argued in court.\textsuperscript{132} Because he was close to both judges involved, he understood from them the unusual nature of this case. The Bryant case, a habeas corpus hearing before a county circuit court, was not only unusual for the fact that two judges presided, but because an opinion was to be issued and published in a national law journal. All involved in the case, the lawyers and the judges intended this case to stand as

\textsuperscript{123} 2 The Papers of Abraham Lincoln: Legal Documents and Cases, supra note 22, at 27.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} 2 The Papers of Abraham Lincoln: Legal Documents and Cases, supra note 22, at 27.
\textsuperscript{130} Id.
\textsuperscript{131} Steiner, supra note 24, at 113.
\textsuperscript{132} See id.
precedent—a bellwether of the Illinois Courts’ attitude toward the growing slavery question.133

While the legal issue of slavery rarely surfaced in Lincoln’s law practice, Lincoln himself only participated in three such cases, he did share his feelings about slavery with his legal brethren. Reminiscences by two lawyers with whom Lincoln traveled the circuit, John T. Stuart and Theophilus Lyle Dickey, both of whom were born and educated in Kentucky, contain evidence that Lincoln struggled with the politically charged issue.134

Stuart and Lincoln debated the issue on horseback while traveling the circuit.135 The debate concluded with Stuart declaring that soon everyone will be either abolitionists or Democrats.136 Lincoln answered that if such were the case, his mind was made up, “the Slavery question can’t be compromised.”137 Stuart also made his choice, and they steadily followed separate political paths thereafter.138 Stuart eventually won a seat in Congress in 1862 endorsed as a Democrat and a critic of Lincoln administration policies including the preliminary emancipation proclamation.139

Judge Dickey also maintained a critical view of anti-slavery rhetoric. While sharing a hotel room in Bloomington, Illinois, during the mid-1850s Lincoln and Dickey debated the night away, arguing over the future of slavery in the United States.140 Finally, Dickey went to bed, and when he woke in the morning he found Lincoln hadn’t slept at all and had continued to brood over the question until morning. Without missing a beat, Lincoln continued the debate and insisted that it was “not possible for slavery to continue to exist in the nation.” By 1858, Dickey, a life-long Henry Clay Whig, left Lincoln’s political sphere and joined with the Democrats out of fear that the Republican Party was dominated by abolitionists.141 While Lincoln clearly respected both of these lawyers, and probably even respected their conservative views on emancipation, he broke with his fellow Kentuckians over the morality of slavery. The slavery issue separated him from many of the lawyers and judges that he knew and respected throughout his career.142

133. For an excellent discussion of why Lincoln represented Matson, see Id. at 103-36.
134. The three cases were Bailey v. Cromwell & McNaghton (File ID L01213), Ex parte Warman (File ID L05867), and In re Bryant et al. (File ID L00714), in THE LAW PRACTICE OF ABRAHAM LINCOLN, supra note 13.
136. Id. at 64, 482, 519.
137. Id.
139. Id.
140. See HERNDON’S INFORMANTS, supra note 136, at 504.
141. Id. at 643.
142. Letter of William Pitt Kellogg to James R. B. Van Cleave, Secretary of Lincoln Centennial Association (February 8, 1909) (on file with Abraham Lincoln Presidential Library and Museum); Leonard Swett, In Memoriam, T. Lyle Dickey PROCEEDINGS IN THE SUPREME COURT OF ILLINOIS AT
The Civil War all but tore the Todd family in half and two of Lincoln’s brothers-in-law fought for and died for the Confederacy. Mary’s brother-in-law, Hardin Helm, a Confederate Brigadier General, died at Chickamauga. While Lincoln and Joshua Speed’s strong friendship of the late 1830s and early 1840s faded with time and distance, the slavery issue also helped to form a wedge between them. Speed, himself a slave holder, was not an active slavery advocate, but he could not bring himself to accept Lincoln’s movement toward emancipation. Despite these political differences, Speed actively worked in support of the Union in Kentucky during the Civil War and served as Lincoln’s confidant on political conditions in the Commonwealth.

In Illinois, Lincoln was sometimes referred to as a Kentuckian, even after he had been in the state for twenty-five years. Indeed, in notes for a speech he intended to deliver to Kentuckians in 1861 (but never did), he referred to himself as a Kentuckian. During the years Lincoln practiced law, however, he developed into his own man, shedding some of the traditional Kentucky motifs that made him popular among his Illinois friends and colleagues. Over time he moved steadily away from the quiet acceptance of slavery exhibited by so many moderate Kentuckians, a process that ended with the passage of the Thirteenth Amendment.

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143. Berry, supra note 72, at xi.
144. Id.
146. Id. at 61.
147. Id. at 58-60.
“THE SOBER JUDGEMENT OF COURTS”: LINCOLN, LAWYERS, AND THE RULE OF LAW

Mark E. Steiner

I. LINCOLN’S IMAGE AS A LAWYER

An opinion poll a few years back revealed that Abraham Lincoln was one of the five most admired lawyers in America. Lincoln’s status probably has more to do with how Americans view Lincoln the president than what they actually know about Lincoln the lawyer. The lawyer in popular biographies, movies, and children’s books is a virtuous and heroic lawyer. Early biographers, aware of the distrust and hostility toward lawyers, glossed over Lincoln’s law practice. These writers were content with somewhat superficial depictions of Lincoln as a virtuous, heroic country lawyer. The treatment of Lincoln’s law practice improved somewhat with the professionalization of history in the twentieth century, but, until recently, Lincoln biographers have tended to write about the same handful of cases. Historians’ lack of interest in his law career, their apparent belief that their lack of legal training precluded study of Lincoln’s law practice, and the inaccessibility of documents had stymied a thorough examination of the law practice.

Lawyers, on the other hand, have written a lot about lawyer Lincoln. Lawyers have wanted to use the image of Lincoln to clean up their own. They have been invested in an image of Lincoln as a country lawyer who is above the fray and who seeks justice only. Lawyer Lincoln has become even more popular with the advent of alternative dispute resolution as lawyers and law professors often turn to Lincoln’s advice to lawyers to “discourage litigation.”

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1. MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 5 (2006). This section encapsulates the first chapter and freely incorporates material from that chapter. All material from my book is used with permission of Northern Illinois University Press.

2. See, e.g., YOUNG MR. LINCOLN (Twentieth Century-Fox Film Corporation 1939); MARTHA BRENNER, ABE LINCOLN’S HAT (1994).

3. STEINER, supra note 1, at 5-6.


Treatment of Lincoln’s law practice has been anecdotal. While Lincoln handled thousands of cases, most biographers settled on discussing the same four or five cases. These cases became canonical: the Duff Armstrong murder case (the “Almanac Trial”); the Effie Afton case; the Matson case (sometimes paired with Bailey v. Campbell); the McLean County taxation case; and the Manny Reaper case. All five were discussed by Albert J. Beveridge in 1928. They remained the only law cases mentioned by Benjamin Thomas in his 1952 biography and by Stephen Oates in his 1977 biography. William E. Gienapp in a 2002 biography mentioned four of the five cases. The canonical cases were the only law cases mentioned by Gienapp, Oates, and Thomas.

The best known of this handful is the Duff Armstrong murder case, which is also known as the Almanac trial. There, a witness testified that he could see Armstrong strike the fatal blow because the moon was high overhead. Lincoln, who defended Armstrong, helped secure an acquittal for his client by producing an almanac for the year that showed the moon was near the horizon at that time of night. Duff Armstrong was the son of Jack and Hannah Armstrong, friends of Lincoln from his early days in New Salem. The typical account tells how the widow Armstrong begged Lincoln to represent her son, how Lincoln emotionally argued Armstrong’s innocence, and how Lincoln refused to charge a fee. The typical account of Lincoln’s defense of Duff resonates with the positive cultural image of the heroic criminal defense lawyer winning against the odds, the acquittal of an innocent person. The case was first mentioned in campaign biographies written in 1860 and continues to be featured in books about Lincoln. This case is so well-known that I was told by a dean at a Chinese law school that he decided to become a lawyer after reading about the Almanac trial in elementary school.

Lincoln in early biographies emerges as a country attorney who was uninterested in fees, who protected the poor and defenseless, who would not defend unjust causes, and who would not take advantage of legal technicalities.

6. The canonical status of these cases is further indicated by their inclusion as the only law cases with entries in Mark E. Neely, Jr., The Abraham Lincoln Encyclopedia 8, 96, 202-04, 207-08 (McGraw-Hill Book Co., 1982).
12. Steiner, supra note 1, at 11.
This view of Lincoln’s law practice first appeared in campaign biographies published in 1860 and 1864. They devoted little space to Lincoln’s law practice, and they barely concealed the attempt to combat the negative cultural stereotype about lawyers. John Locke Scripps, for example, asserted that Lincoln often represented poor clients for free when justice and right were on their side. 13 While the Duff Armstrong case appeared in at least six biographies, Lincoln’s association with the Illinois Central Railroad was not mentioned once. 14 These campaign biographies set the tone for later ones. J.G. Holland wrote in 1866 that lawyer Lincoln’s “desire for the establishment of exact justice always overcame his own selfish love of victory . . . .”15

The negative cultural image of lawyers and the positive cultural image of Lincoln were the two primary reasons that biographers generally paid little attention to lawyer Lincoln. The image of lawyer Lincoln clashes with the images of Lincoln as frontier hero or great emancipator. Within these images, there is little room for a successful lawyer.

The lack of attention to Lincoln’s law practice changed with the Lincoln Legal Papers project. The problem with lack of access to documents disappeared when the Law Practice of Abraham Lincoln: Complete Documentary Edition was published in 2000. 16 This state-of-the-art electronic collection of over 100,000 legal documents culminated a decade-long project by the Illinois Historic Preservation Agency. 17

The impact of the Lincoln Legal Papers project on Lincoln studies was felt before the publication of the electronic edition. 18 In 1995, David Donald became the first Lincoln biographer to use the materials from the Lincoln Legal Papers project, which he hailed as “perhaps the most important archival investigation now under way in the United States.” 19 Although Donald finished his biography several years before the Lincoln Legal Papers project was complete, the book shows the influence of the project. One chapter on Lincoln, “At the Head of His Profession in This State,” 20 was based on “the hundreds of [then] unpublished

14. STEINER, supra note 1, at 11.
20. Id. at 142-52.
documents in the files of the Lincoln Legal Papers . . .” Donald gave a fuller sense of the breadth of Lincoln’s practice. Donald included cases that previous biographers had ignored and he gave examples of cases in circuit courts “of no great interest or consequence to anyone except the parties involved in the litigation.”

Since the publication of Donald’s book, the impact of the Lincoln Legal Papers project has been easy to see. Four books about aspects of Lincoln’s legal career have been published since 2002. Moreover, recent books on Lincoln’s presidency show a greater awareness of the possible influence of the law practice. For example, Burrus M. Carnahan probed the legal context of the Emancipation Proclamation because Lincoln had “earned his living by practicing law” and Lincoln would have viewed the issues raised by the Proclamation by “his practical knowledge of American law.” Phillip S. Paludan began an essay on Lincoln and the limits of constitutional authority with the deceptively simple sentence: “Abraham Lincoln was a lawyer.” Ronald C. White, Jr. recently considered how the law practice influenced how Lincoln structured arguments and established tone in his major speeches.

II. A PORTRAIT OF LAWYER LINCOLN

But what do we learn about lawyer Lincoln from these thousands of documents? And what does lawyer Lincoln tell us about President Lincoln? I am sympathetic to those Lincoln scholars who complain that legal documents yield information grudgingly. It’s practically impossible based on what is left in any particular file—declaration, defensive pleadings, docket entries—to answer the simplest questions about the case. We now know with remarkable precision the results in Lincoln’s litigation. It is harder to answer other

21. Id. at 620.
22. Id. at 148.
questions. Was this a case that Lincoln should have won? Or a case he should have lost? We really do not know.

We do know that Lincoln was a very busy lawyer. Cullom Davis, who directed the Lincoln Legal Papers Project, noted the major finding of the accession process was that “Lincoln had a much larger and more active law practice than anyone had previously estimated.”29 The portrait of a man who was fundamentally disengaged from the practice of law, a man who really was a politician first and a lawyer second, is hard to reconcile with over 5,000 cases Lincoln or his partners handled in his twenty-five year career. Lincoln’s pre-presidential political career has received more attention than his law practice; however, Davis also has convincingly argued that Lincoln’s twin careers of law and politics had a symbiotic relationship.30

Lincoln was not just a trial lawyer who swayed local juries.31 Lincoln’s law practice reveals him to be a very sharp tactician. Leonard Swett, one of Lincoln’s colleagues, once described Lincoln’s method of trying cases:

As he Entered the Trial, where most lawyers would object, he would say he “reckoned” it would be fair to let this in or that and sometimes, where his adversary could not quite prove what Lincoln Knew to be the truth he would say he “reckoned” it would be fair to admit the truth to be so & so. . . .When the whole thing is unravelled, the adversary begins to see that what he was so blandly giving away was simply what he couldnt get & Keep. By giving away 6 points and carrying the 7th he carried his case and the whole case hanging on the 7th he traded away everything which would give him the least and in carrying that. Any man who took Lincoln for a simple minded man would very soon wake [up] with his back in a ditch.32

He was also an excellent appellate lawyer, and argued hundreds of cases to the Illinois Supreme Court, where he developed sophisticated (and technical) legal arguments. He, or his partners, handled over 5,000 cases during his nearly twenty-five year career—and over 400 of those were appeals to the Illinois Supreme Court, and in nearly 200 of those appeals Lincoln was hired for the appeal.33 Lincoln being hired for appeals meant he was a “lawyer’s lawyer.”

William Herndon thought Lincoln was a better appellate lawyer than trial lawyer: “He was greatest in my opinion as a lawyer in the Supreme Court of

31. For a good overview of Lincoln’s practice, see John A. Lupton, A. Lincoln, Esquire: The Evolution of a Lawyer, in SPEIGEL, supra note 22, at 18–49.
33. 1 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, supra note 27, at xxxvi.
Illinois. There the cases were never hurried. The attorneys generally prepared their cases in the form of briefs, and the movements of the court and counsel were so slow that no one need be caught by surprise.” Lincoln handled so many appeals that he often established the precedent that would later defeat him in a subsequent appeal; in several appeals his most formidable opponent was himself. He took advantage of legal technicalities when he could, arguing that appellants had failed to follow the formal requirements of pleadings and appeal bonds in order to obtain dismissals.

On Lincoln’s oral advocacy, let’s hear again from Herndon describing Lincoln arguing before the Illinois Supreme Court:

I heard him once argue a case and it was argued extremely well, it was logical, eloquent. In making his argument he referred to the history of the law, a useless part as I then thought. I know better now. After the speech was through and Lincoln had come into the law library room where the lawyers tell stories and prepare their cases, I said: “Lincoln, why did you go so far back in the history of the law as applicable to this case?” and to which he instantly replied: “I dare not trust this case on the presumptions that this court knows all things. I argued the case on the presumption that the court did not know anything.”

Lincoln’s argument in that appeal would have been several hours long. It wasn’t until 1853 that the Illinois Supreme Court limited the argument of counsel to two hours (each lawyer had two hours), except by special permission opening argument could be up to three hours. In 1858, the time allotted for each argument was restricted to one hour and the court noted that “counsel may file in addition, such written arguments as they shall think proper.”

Briefs in Lincoln’s Illinois were not like modern briefs, but were “points and authorities,” which meant a sentence or two of black-letter law and then some citations. The appellant or plaintiff in error had to file its brief of points and authorities the day before oral argument and the appellee’s duty was to furnish

37. The Hidden Lincoln: From the Letters and Papers of William H. Herndon 428 (Emanuel Hertz, ed. 1940).
38. Rule of the Illinois Supreme Court Adopted December Term, 1853, reprinted in 15 Ill. vi.
39. Rule of the Illinois Supreme Court Adopted at Springfield, January Term, 1858, reprinted in 18 Ill. vi.
40. For an early example of “Points and Authorities” written by Lincoln, see Report of Attorney’s Argument (8 July 1841), in 1 The Papers of Abraham Lincoln: Legal Documents and Cases, supra note 28, at 36-37.
its brief to the judges and opposing counsel “at the commencement of argument.”41

III. LINCOLN AND WHIG LAWYERING

As a lawyer, Abraham Lincoln developed a distinctive Whiggish attitude toward law and the role of law in American society.42 Lincoln had begun his political career as a Whig. Politically, Whigs like Lincoln were modernizing conservatives who favored internal improvements such as railroads to foster economic growth.43 Whigs also believed that the rule of law provided a neutral means to resolve disputes. Lincoln was a Whig lawyer who embodied the Whig reverence for law and order.44

Lincoln, in his 1838 address on “The Perpetuation of our Political Institutions,” discussed recent incidents of civil disorder.45 Lincoln was worried by the example of lawlessness that mobs set. To prevent disorder, reverence for the law needed to become the “political religion of the nation.”46 Lincoln, after saying there was “something of ill-omen amongst us,” said he meant, “the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgement of Courts; and the worse than savage mobs, for the executive ministers of justice.”47

Lincoln historian Phillip Paludan concluded that Lincoln “spoke to perhaps the most compelling of the American traditions–that a country should be ruled by laws, and that legal-constitutional institutions should demand respect and devotion.”48 “What was to keep [American] society from flying apart?”49 Paludan said that Lincoln had the answer—“respect for legal institutions, for all laws, for the due legal process of doing things and for fellow citizens as lawmakers and law respecters.”50 Paludan elsewhere noted: “Lincoln’s commitment to the rule of law had deep foundations. It arose from personal experience, gained strength from his faith that reason must triumph over passion as the source of democratic government and personal growth, found nurturance

41. Rules XX-XXII, Rules, Supreme Court of the State of Illinois, December Term, 1839, reprinted in 2 Ill. xv. In 1858, the court began requiring printed briefs. Rule XIII, Rules of Practice in the Supreme Court of the State of Illinois, Adopted at November Term, 1858, at Mount Vernon, reprinted in 19 Ill. xiv.
42. See generally STEINER, supra note 1.
44. Id.
45. Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 5, at 108.
46. Id. at 112.
47. Id. at 109.
49. Id.
50. Id.
in his vocation as a lawyer, and was cemented in an environment where political rhetoric found its roots in constitutional debate.”

Lincoln’s essentially political conception of a lawyer’s role defined what a lawyer would do in his practice: represent clients faithfully. Lincoln possessed a service mentality; he was ready to represent any client. Part of this service mentality was the result of the economics of the law office in frontier Illinois. His partner Herndon remembered that there were not many retainers and that “the greatest as well as the least had to join the general scramble for practice.”

Whig politicians wanted to develop a commercial republic, but Whig lawyers were not the “shock troops of capitalism” as has been suggested by one historian. Lincoln, like many other Whig lawyers, was not an instrumentalist; he did not see law as an instrument for him to implement pro-development or pro-capitalist legal rules.

The legal ideology of the Whigs forestalled the adoption of a litigation strategy dedicated to commercial interests. Lincoln’s practice is often portrayed as becoming increasingly one-sided as he aligned with business corporations and railroads; but he also was regularly fighting against corporations and railroads throughout his career. For example, Lincoln is sometimes identified as a railroad lawyer, but he regularly represented six railroads (including the Illinois Central) and he regularly sued seven. Lincoln took business as it came.

IV. LAW AND COMMUNITY

As a Whig lawyer Lincoln saw his role initially as representing one side—it didn’t matter which side—so long as the dispute was settled peacefully. In his 1838 address Lincoln mentioned the “executive ministers of justice.” But judges and juries would not always be necessary. Lincoln, as most antebellum lawyers, believed that lawyers should serve as peacemakers. Lincoln famously wrote, “Discourage litigation. Persuade your neighbors to compromise whenever you can . . . As a peacemaker the lawyer has a superior opportunity of being a good man.”

52. HERNDON & WEIK, supra note 34, at 124.
54. STEINER, supra note 1, at 64.
55. THOMAS, supra note 8, at 158.
57. Fragment: Notes for a Law Lecture (ca. 1850), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 5, at 81.
58. Id.
Antebellum lawyers like Lincoln celebrated the justice system as a means to maintain social order. At the same time, however, they also believed that they should serve as peacemakers preventing disputes from going to court. This peacemaking role is best shown in his slander cases, where Lincoln often took advantage of opportunities for mediation and compromise. He was able to resolve many cases by repairing the damage to the plaintiffs’ reputation. In several cases, the defendant attested to the good reputation of the slandered plaintiff, which settled the case. In some cases, the defendant consented to a large judgment, which the plaintiff then agreed to reduce to a much smaller sum. In others, the plaintiff, after a jury had awarded damages, agreed to remit most or all of the award.

Slander cases in frontier Illinois were community-oriented, regulating acceptable forms of behavior in small communities. Standing in a small community was based on reputation and reputations were built or destroyed through gossip. Lincoln recognized the importance of reputation; he confessed in 1832 that his “peculiar ambition” was “being truly esteemed of my fellow men.”

Slander cases were different that other cases. One striking statistic is the relative lack of default judgments in slander cases. In all of Lincoln’s slander cases, plaintiffs only obtained two default judgments, and one of the two was reversed on appeal to the Illinois Supreme Court. Thus, by my count, in all of Lincoln’s slander cases, default judgments were obtained in roughly two percent of the cases. About one-third of Lincoln’s other cases ended with default judgment. Successful resolution of slander cases, however, apparently required some kind of formal appearance by the defendant. The goal of a plaintiff suing on a promissory note was to obtain a judgment that memorialized the debt; whether the defendant appeared in court was irrelevant. The goal of a plaintiff in a slander suit was to vindicate honor and repair reputation. That goal required the defendant to participate by appearing in court.

Even in slander cases where litigants were emotionally invested in their lawsuits, Lincoln valued mediation and compromise. He did not try every slander claim; he often was able to settle them. In several instances, the parties settled before trial when the defendant agreed to a large adverse judgment, which the plaintiff then agreed to remit in part or in total. For example, in an 1840 Livingston County lawsuit, Stuart & Lincoln represented William Popejoy, who sued Isaac Wilson because he had said Popejoy had stolen meat. The case settled when Wilson in open court confessed judgment “for the sum of Two

60. Communication to the People of Sangamo County (March 9, 1832), in 1 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 5, at 5, 8.
61. STEINER, supra note 1, at 92.
62. SPIEGEL, supra note 23, at 53-54.
Thousand Dollars, the amount of Damages claimed in Plaintiff Declaration”; the judge then ordered Popejoy recover the “Two Thousand dollars so confessed”; and “thereupon” Popejoy then agreed to remit the entire amount except court costs. 63  Popejoy only remitted the damages after Wilson in open court had confessed judgment for the entire claimed amount. The parties didn’t just announce a settlement where Wilson agreed to pay costs but instead acted out a set piece that restored Popejoy’s reputation. 64

Other cases were settled before trial in the same fashion. Lincoln settled an 1853 Vermilion County case by having the defendant withdraw her plea and consent to a 5,000 dollar judgment and having the plaintiff remit all but fifty dollars. The plaintiff, America Toney, had sued Emily Sconce for saying that after America had gone to her room with one Whitcomb late one evening the bed was “rattling and jiggling” and when America later came out of the room at three in the morning her clothes and hair were “rumpled,” her face was “very red,” and she “very much excited.” 65  In 1845, Lincoln and Herndon represented the plaintiff in a Sangamon County slander suit. The case was settled when the parties agreed to a 500 dollar judgment, which the plaintiff agreed to remit except for costs. Lincoln pursued an identical strategy when he helped represent Dr. Julius Lehman in an 1859 McLean County lawsuit. Lehman sued another doctor, Herman Schroeder, for slander. The case was settled when Schroeder agreed in open court to a 5,000 dollar judgment against him and Lehman agreed to remit all but 50 dollars and to stay execution for three months. 66

Henry Clay Whitney, an Urbana lawyer who was associated often with Lincoln on the circuit, recalled one slander case in which Lincoln, one of the defendant’s lawyers, “made most strenuous and earnest efforts to compromise the case, which was accomplished by reason, solely, of his exertions.” 67  The case arose in Kankakee County and involved a French Catholic priest named Chiniquy (from the French community of St. Anne’s) and Peter Spink, a French Catholic from a nearby community. In a sermon, Chiniquy apparently accused Spink of perjury and refused to recant. Whitney noted that, after the suit was filed, “preparations were made for a ‘fight to the finish,’ by, not only the two principals, but the two respective neighborhoods, as well: for all became involved as principals or partisans.” 68  When the case was transferred to Champaign County, “The principals, their lawyers and witnesses, and an immense retinue of followers, came to Urbana. The hotels were monopolized,

64. Id.
67. HENRY C. WHITNEY, LIFE ON THE CIRCUIT WITH LINCOLN 136-37 (Estes & Lauriat ,1892).
68. Id. at 54.
and a large number camped out.” The case was tried twice and resulted in a mistrial twice. At the next term of court, “All came to our county, camp-outfits, musicians, parrots, pet dogs and all, and the outlook was, that all their scandal would have to be aired over again . . . .” Lincoln then intervened; Whitney noted that Lincoln “abhorred that class of litigation, in which [there] was no utility, and he used his utmost influence with all parties, and finally effected a compromise . . . .” After convincing the parties to settle, Lincoln prepared the agreement of dismissal. The parties agreed to divide court costs and to dismiss the case.

The number of cases that Lincoln settled either before or after trial suggests that slander suits were intended more to restore or repair reputation than to collect damages, and the lawyers involved in these cases were well aware of that. Lincoln settled at least three slander cases by having his client affirm the good reputation of the plaintiff, thus repairing the plaintiff’s reputation in the community. As Lincoln later noted, “Truth is generally the best vindication against slander.”

V. LINCOLN AND THE MATSON CASE

These slander cases showed Lincoln resolving disputes without the “sober judgments of the courts”; what was important for the lawyers and the parties was that the dispute was settled peacefully. But let’s look at another aspect of Whig lawyering. What was important for Whig lawyers was the rule of law, the “sober judgement of courts;” the lawyer’s role was to represent one side and leave the rest to the “executive ministers of justice.” This conception of Whig lawyering—taking business as it comes, not worrying about what side you take—has real limitations, which is shown by Lincoln’s involvement in the Matson case.

In the Matson case, Abraham Lincoln represented a Kentucky slaveowner named Robert Matson in an unsuccessful attempt to assert property rights to an African American woman named Jane Bryant and her four children. This appears to be paradoxical for the man who would become the Great

69. Id.
70. Id. at 55.
71. Id.
73. STEINER, supra note 1, at 97.
74. Id.
75. Abraham Lincoln to Edwin M. Stanton (July 14, 1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 5, at 440.
76. WOESEMAN, supra note 4, at 30.
77. Id.
78. This section draws extensively from the fifth chapter of STEINER, supra note 1, at 103-36.
79. Id. at 103.
Emancipator. For those who doubt Lincoln’s antislavery convictions or believe him to be a hypocrite, this case does not present any mysteries. But I agree with those who take Lincoln at his word, that he had “always hated slavery.”

Matson had bought land in Coles County in 1843, and he apparently had brought slaves from Kentucky every year to work on his farm. Matson would put on a little show, affirming that he had no intent to change the domicile of these slaves. He did that because of how the law of freedom and slavery operated.

In the 1840s, American courts, both North and South, generally accepted the proposition that slavery needed positive law to exist. That principle had been established in a 1763 British case *Somersett v. Stewart* where Lord Mansfeld had famously stated that slavery was so odious it needed positive law to survive. If a slave was taken to England, where there wasn’t a law of slavery, that slave became free.

Massachusetts, probably the most influential state supreme court in this period, had accepted the *Somersett* principle in a case called *Commonwealth v. Aves*. Other states also adopted this viewpoint, but made a sectional accommodation: Northern states allowed slaveowners brief transit or sojourns with slaves. If a slave traveled through Illinois with his master, that didn’t operate to free the slave. Illinois accepted this principle in 1843.

Robert Matson had left Jane and her children on his farm in Illinois for two years. She was not part of his “annual migration.” At the time, every court in the Union would have ruled that she was free under those circumstances. The facts in the Matson case paralleled the facts in the Dred Scott case, where Dred Scott was taken to Illinois and the Wisconsin territory by his master for a period of some years. It was clear under Missouri precedent that Dred Scott would have been free, except the Missouri Supreme Court, citing sectional tensions, changed the law in his very case.

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81. STEINER, supra note 1, at 119.

82. See generally PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY (1981).


86. FEHRENBACHER, supra note 83, at 54-56.


88. STEINER, supra note 1, at 119.

89. Scott, a Man of Color v. Emerson, 15 Mo. 576, 592 (1852).
That would leave the question of why a Kentucky slaveowner would take five slaves to a free state and leave them there for two years. He may have counted on their ignorance. Lincoln in 1854 noted that it is good “book-law” that slaves became free when they entered a jurisdiction that didn’t have positive law that supported slavery. But, in actual practice, Lincoln questioned “who will inform the negro that he is free? . . . In ignorance of his legal emancipation, he is kept chopping, splitting and plowing.”

Robert Matson has been somewhat of a cipher in earlier accounts. I discovered lawsuits filed in Bourbon County, Kentucky courts that presented a portrait of a real person, albeit a detestable one. There were lawsuits against his brother, including a slander suit against his brother, and there were family squabbles over land. There were many debt cases. And there were lawsuits that showed his slaves had tried to escape from him while in Kentucky.

What precipitated the legal proceedings was Matson apparently returning to Illinois intending to take Jane and her children back to Kentucky and sell them. That’s when she ran away. Lincoln ended up representing Matson, alongside Charleston lawyer Usher Linder.

Some who have written about the case claim that Lincoln “threw the case away.” That’s not true. He gave the best argument he could, stressing Matson’s intent was to keep this slaves temporarily in Illinois. Co-counsel Linder gave a more extreme argument that would have protected slave property in free states. In 1858, when Lincoln warned of the next Dred Scott case that would make slavery national and make Illinois a slave state, the logic of that case would have been the same as Linder’s logic in the Matson case—slavery was a property right that had to be protected in all jurisdictions.

The case raises issues about the ethical roles of lawyers. Many who have written about the case seem to have assumed that the dominant legal ethic today—role morality—was dominant then. Lawyers today seem to have a particular problem with assuming that the legal culture of today is the same as Lincoln’s.

It’s not quite so simple. Different notions of legal ethics were being debated by antebellum lawyers. Treatise writer Timothy Hoffman argued in 1820s that what was immoral for a person to do individually would be immoral still if that person acted as a lawyer. Hoffman said that a lawyer acted unethically if he pled

91. STEINER, supra note 1, at 105-06.
92. Id. at 107-08.
93. Id. at 108-09.
95. STEINER, supra note 1, at 119-23.
the statute of limitations to a just debt. The statute of limitations did not change the character of the debt or the underlying obligation to pay it.\textsuperscript{97} Other lawyers responded it was not the lawyer’s job to be judge and jury. Modern legal ethics arose from the conception of the lawyers’ role advocated by Whig lawyers.\textsuperscript{98}

Abolitionists severely criticized Northern lawyers who represented Southern slave owners.\textsuperscript{99} Lincoln’s partner, William Herndon, only represented runaway slaves; Herndon never represented slaveowners. Lincoln and Herndon looked at the role of lawyers differently. Lincoln extolled the “sober judgement of courts” while Herndon was more of an abolitionist who would not have considered helping a slave owner.\textsuperscript{100}

These developing notions of professional responsibility which minimized a lawyer’s independence and moral autonomy, combined with Lincoln’s notion of Whig lawyering meant that it would not have been a quandary for him to represent Robert Matson. That is a problem for both Whig lawyering—and for Abraham Lincoln.

At some level the rule of law by itself isn’t enough. The rule of law becomes focused on procedure and process. Law professor Grant Gilmore once observed, “In Heaven there will be no law, and the lion will lie down with the lamb . . . . In Hell, there will be nothing but law, and due process will be meticulously observed.”\textsuperscript{101}

\textbf{V. LINCOLN AS LAWYER AND LINCOLN AS PRESIDENT}

Lincoln in 1838 emphasized the commitment to the rule of law. The Whig reverence for law and order was strengthened by Lincoln’s law practice. Phillip Paludan has noted that Lincoln’s “law practice required that he know the rules and the procedures that settled disputes and distributed resources.”\textsuperscript{102} But in the 1850s Lincoln realized a commitment to the rule of law was not enough.\textsuperscript{103} It was not until the Kansas-Nebraska act of 1854, which drew Lincoln back to politics, that Lincoln began to connect the ideal of equality (the Declaration of Independence) with its processes (the Constitution).\textsuperscript{104} Lincoln the Whig lawyer and Lincoln the Republican politician were quite different.

\textsuperscript{97}Steiner, supra note 1, at 133-34.
\textsuperscript{98}Id. at 131-34.
\textsuperscript{99}Id. at 131.
\textsuperscript{100}Id. at 127-28.
\textsuperscript{102}Phillip S. Paludan, Lincoln’s Prewar Constitutional Vision, 15 J. Abraham Lincoln Ass’n 1, 8 (1994) available at http://www.historycooperative.org/journals/jala/15.2/paludan.html. This paragraph depends heavily on Paludan’s article.
\textsuperscript{103}Id. at 14.
\textsuperscript{104}Id. at 13-14.
From his law practice, Lincoln developed certain habits of mind, ways for him to think about problems. He learned to think strategically. He learned to express himself with clarity and precision. He thought about the importance of the rule of law. From the constant interaction with clients, witnesses, juries, other lawyers, and judges, he sharpened his ability to read people. But what he gained from the law practice hardly predicts the end of slavery.

105. Phillip Shaw Paludan, “Dictator Lincoln”: Surveying Lincoln and the Constitution, 21 OAH MAG. OF HIST. 8, 10 (Jan. 2007) (“Thinking like a lawyer was a profound part of his makeup.”).
ABRAHAM LINCOLN: LESSONS FOR LAWYERS

Frank J. Williams

INTRODUCTION

Abraham Lincoln is remembered as one of America’s greatest leaders. In poll after poll, Lincoln is ranked as the greatest of American presidents.1 Lincoln’s life story is a large part of why he is so popular today. His rise from poor uneducated farm boy to president of the United States represents the quintessential American tale.2 Lincoln said of himself and his presidency: “I am a living witness that any one of your children may look to come here as my father’s child has. It is in order that each of you may have through this free government which we have enjoyed, an open field and a fair chance for your industry, enterprise and intelligence . . . .”3

In fact, the mythology surrounding Lincoln’s humble roots is so strong that a casual observer might believe that Lincoln was elected to the White House directly from a rustic log cabin.4 Nothing could be further from the truth. Through extensive self-education, Lincoln achieved the status of a well-respected lawyer in Springfield, Illinois.5 Moreover, Lincoln spent almost a

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2. THE AMERICAN FLAG FOUNDATION INC., supra note 1.
4. Lincoln’s campaign for the presidency in 1860 did much to encourage the myth.
quarter-century in the active practice of law, during which time he argued thousands of cases.\textsuperscript{6}

Despite Lincoln’s impressive legal career, the fact that Lincoln was a lawyer is probably \textit{not} a factor in his popularity today.\textsuperscript{7} The public’s esteem for lawyers has declined precipitously since Lincoln’s day.\textsuperscript{8} Consider the popularity of lawyer jokes at present.\textsuperscript{9} In fact, many of Lincoln’s admirers pay little attention to Lincoln’s years as a lawyer, choosing instead to focus on his years in the White House. But the fact remains, Lincoln was not just a great president, he was also a great lawyer. Moreover, the two facts are inseparable. Lincoln was a great president, at least in part, \textit{because} he honed his lawyerly skills as a young man and used them in the White House.

By exploring those lawyerly traits that contributed to Lincoln’s greatness as a president, I hope to achieve dual purposes. First, we can learn something about great leadership. Equally significant for these troubled times, we can learn something about great lawyers. In writing this piece, I am taking the advice of Charles Wirken, a past president of the State Bar of Arizona, who said, “Though our judicial system isn’t perfect and is subject to some abuse by lawyers and non-lawyers alike, we have earned the right to be proud of what we do. It’s a wonderful profession. Stand up for it whenever you can.”\textsuperscript{10}

I will support my argument primarily through anecdotes and examples of the way Lincoln lead his administration, the civil war, and his many subordinates both civilian and military. Before embarking on this discussion, it bears remembering, as I have argued elsewhere, that Lincoln’s ultimate ambition was always political.\textsuperscript{11} Lincoln’s skills as a lawyer were invaluable in supporting his political ambitions, and those political ambitions were always primary for Lincoln.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{6} \textit{Id.} at xi (“[H]e held national elected office for 1981 days, which constituted approximately ten percent of his entire life; he was a licensed, active attorney for 8,552 days, or about 40 percent of his life.”); Herbert Mitgang, \textit{Heritage of Lincoln, the Lawyer}, N.Y. TIMES, Feb. 11, 1988, at C29, \textit{available at} http://query.nytimes.com/gst/fullpage.html?res=940DE0D8123E932A25751C0A96E948260.
\item \textsuperscript{7} \textit{See} MARC GALANTER, \textit{LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE} 3-5 (University of Wisconsin Press 2005).
\item \textsuperscript{8} \textit{Id.}
\item \textsuperscript{9} Entire books have been written on this subject. \textit{See id.} at 3 (“Few who are exposed to American media and popular culture of recent decades will have missed the eruption of a great frenzy of joking about lawyers.”).
\item \textsuperscript{10} Charles Wirken, \textit{It’s a Wonderful Profession—Let’s Defend It!}, 41 ARIZ. ATT’Y 6, 6 (Jan. 2005).
\item \textsuperscript{11} FRANK J. WILLIAMS, \textit{Abraham Lincoln: Commander in Chief or ‘Attorney in Chief’?}, in \textit{JUDGING LINCOLN}, 36-37 (Southern Illinois University Press 2002) (“Lincoln did not practice law and then become a politician. Not only was he a politician first; he was always both a politician and a lawyer simultaneously.”).
\item \textsuperscript{12} \textit{Id.} at 34.
\end{itemize}
A. The Traits of a Good Lawyer

The traits that a good lawyer will possess are not mysterious. Judges, lawyers, and their clients observe those traits everyday in courtrooms, boardrooms, and law offices. I have compiled a short list of traits based primarily on my personal experience as a lawyer and a judge. Someone else would almost certainly compile a different list of words to express the same underlying virtues. The point I am making with this list is simply that a good lawyer will, through training and by his or her very nature, consistently act in accordance with the values and principles of the profession. In my experience, the following list captures the most significant virtues necessary for living out those principles. They are: (1) Honesty; (2) Industriousness; (3) Meticulousness; (4) Confidence; (5) Rhetorical Skill; (6) Courage; (7) Zealousness; (8) Persistence; (9) Fair-Mindedness; (10) Humility.

I argue that Abraham Lincoln possessed all of the aforementioned virtues, and he developed a reliance on these virtues in his everyday practice of law, and later as President and Commander-in-Chief. It is worthwhile at this stage to note that this list of attributes might just as easily describe any successful leader. This fact is not altogether surprising. As James Casner put it in his property law textbook, “It is an observable fact that through some combination of chromosomes and professional training lawyers tend to come to the top of the barrel in the shaking and jolting of competition for authority.” Abraham Lincoln is a specific example of a more general phenomenon, namely that good lawyers make good leaders.

B. Lawyer and President

1. Honesty

“[R]esolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.”

Lincoln was well known for his honesty and integrity, hence the stereotype “Honest Abe.” As Lincoln expressed in one of his now famous debates with Stephen A. Douglas, his approach to honesty was not complicated: “I do not

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state a thing and say I know it, when I do not.” 16 Even in his straight-forward approach to the world, Lincoln knew that honesty was in the details, an understanding he expressed in that same debate: “I mean to put a case no stronger than the truth will allow.” 17 Lincoln espoused a personal and professional philosophy that was based in forthrightness, and his legal career is replete with examples of this philosophy at work. 18

For example, Lincoln often traveled throughout Central Illinois on the Eighth Judicial Circuit, arguing in various county courthouses. 19 Lincoln and another attorney, Leonard Swett, were appointed to defend a man indicted for murder. 20 Although the defendant did not have the means to retain a lawyer, he had friends who managed to raise one hundred dollars for his defense. 21 Swett accepted the money and handed half of it to Lincoln. 22 When Lincoln and Swett consulted the defendant, Lincoln became convinced that the defendant was guilty. 23 He tried to convince Swett that the only way to save the defendant was to have him plead guilty and appeal to the court for leniency. 24 Swett, a rather talented criminal lawyer, would not agree to Lincoln’s suggestion, so the case came to trial. 25

During the trial, Lincoln did not participate. 26 He took no part in it further than to make an occasional suggestion to Swett in the course of the examination of witnesses. 27 Ultimately, the defendant was acquitted on technical grounds, largely due to Swett’s skillful lawyering. 28 When the jury rendered its verdict, Lincoln reached over Swett’s shoulder, with the fifty dollars in hand, saying: “Here, Swett, take this money. It is yours. You earned it, not I.” 29

Lincoln was proud of his reputation for honest dealing. He told a story, for instance, about a widow who had lost her cow when it was struck by a train. 30 The woman hired Lincoln to represent her and to bring suit against the railroad

17. Id.
18. DIRCK, supra note 5, at 3 (“Here was truly—in fact, unbelievably—‘an honest lawyer’ who separated himself from the pettifogging legalisms of the courtroom by displaying folksy charm and down-home common sense.”).
20. Lambert Tree, Side-Lights on Lincoln, 81CENTURY ILLUSTRATED MONTHLY MAG. 592 (1911).
21. Id.
22. Id.
23. Id.
24. Id.
25. Tree, supra note 20, at 592.
26. Id.
27. Id.
28. Id.
29. Id.
30. IDA MINERVA TARBELL, BOY SCOUTS LIFE OF LINCOLN 87 (Macmillan Co. 1921).
for damages. Before Lincoln could commence the suit, the railroad company approached him with an unsavory proposition. If he would refuse to represent the widow, the railroad promised to remunerate him handsomely. Perhaps even more significant, the company promised to give him legal work connected with the railroad. Lincoln was not impressed. Not only did he take the case despite the pressure, he won it.

Lincoln’s honesty should not be taken for that of a simpleton. Lincoln knew that the world was full of competing interests, and he understood the necessity of choosing between those interests. One story in particular, the case of Melissa Goings, illustrates Lincoln’s savvy.

Lincoln defended Melissa Goings against a charge of murder. She was accused of killing her husband, and the trial was proceeding poorly for Mrs. Goings. During the trial, Lincoln asked for a recess to confer with his client, and subsequently led the defendant from the courtroom. When court reconvened, Mrs. Goings could not be found. Lincoln himself was accused of advising her to flee, a charge he vehemently denied. He explained however, that the defendant had asked him where she could get a drink of water, and he had pointed out that Tennessee had darn good water. Apparently Mrs. Goings agreed, for she was never seen again in Illinois.

Lincoln understood that honesty is complicated in the practice of law. Even so, the Goings story does not involve deception or the violation of any code of ethics, which didn’t exist at that time. Lincoln was forthright in his dealings with the court, but we must realize that concepts of ethics shift over time like sand. As he so eloquently stated, “resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.” Lincoln’s reputation for honest fair-dealing served him well as a lawyer and imbued him with a reputation that he took with him to Washington.

31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
37. Id.
38. Id. at 349.
39. Id.
40. Id. at 348-50.
41. DUFF, supra note 36, at 349.
42. Abraham Lincoln, Fragment: Notes For a Law Lecture (ca. July 1, 1850), in 2 COLLECTED WORKS, supra note 3, at 82.
2. Industriousness

“Leave nothing for to-morrow which can be done to-day.”

Hard work is what it takes to succeed in any endeavor. This is true in the legal profession, and surely it is no less true for a president. Lincoln could not have risen to greatness without a good honest work ethic, which he gained first as a prairie laborer and then as a prairie lawyer.

There is little more, if anything, that I can add to this subject. Lincoln put it quite directly:

The leading rule for the lawyer, as for the man of every calling, is diligence. Leave nothing for tomorrow which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done.

This is an apt description of what Lincoln called “the drudgery of the law.” Being a lawyer is hard work.

Of course, being president is hard work as well. As president, Lincoln put his ideals into practice. For instance, Lincoln had nearly boundless energy for keeping track of events at the war front. “During particularly active days, Lincoln might send a dozen or more messages to generals in the field, and as a battle unfolded he would often spend the night reading message traffic describing it.” At times, Lincoln practically moved into the telegraph office.

No greater tribute exists to Lincoln’s industriousness than the Collected Works of Abraham Lincoln edited by Roy P. Basler. In his fifty-six years of life, Lincoln produced an enormous quantity of correspondence and speeches, enough to fill eight volumes and two supplemental volumes. Of course, each letter and each draft of every speech was written by hand. There is no doubt that Lincoln took to heart his own advice concerning diligence.

3. Meticulousness

“[N]o good thing has been, or can be enjoyed by us without having first cost labor.”

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44. Id.
45. Id.
46. Id.
47. ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 28 (Anchor 2003).
48. Id. at 28.
49. See COLLECTED WORKS, supra note 3.
50. Id.
Meticulousness, like industriousness, involves the day-to-day drudgery with which all professionals must contend. Lawyers in particular must have the ability to focus on detail and accuracy in their professional activities. Lincoln was particularly meticulous in his writing, often producing multiple drafts over several days.52

Lincoln’s meticulous writing was probably a reflection of his slow and steady way of thinking. Lincoln said of himself, “I am slow to learn and slow to forget,” he said, “my mind is like a piece of steel, very hard to scratch anything on it and almost impossible after you get it there to rub it out.”53 What Lincoln described as mental slowness might well be considered meticulousness.

Lincoln brought his attention to detail with him to the White House. He rarely gave extemporaneous speeches, preferring instead to write his speeches out in draft form so that he could pour over the language.54 This was true with his voluminous correspondence as well. Lincoln understood the both the power and the danger of communication, as any good lawyer should. Lincoln’s meticulous nature gave us such masterpieces as the Gettysburg Address and the Second Inaugural Address. His speeches and letters are the best kind of literature.

4. Confidence

“He who does something at the head of one Regiment, will eclipse him who does nothing at the head of a hundred.”55

Lincoln was active as both a politician and a lawyer during his years in Illinois, allowing him to develop confidence as a leader.56 Lincoln practiced his craft before judges and juries in countless cases all around the Illinois Eighth Judicial Circuit.57 Like any successful trial lawyer, Lincoln had to express command and confidence in his arguments before the judge and jury. The ability to make decisions on one’s feet and with confidence is a key trait of any successful lawyer in the courtroom, and all accounts are that Lincoln mastered the art. In the words of Leonard Swett, “Any man who took Lincoln for a simple-minded man . . . would very soon wake up with his back in a ditch.”58

52. EDWARD STEERS, JR., LINCOLN LEGENDS: MYTHS, HOAXES, AND CONFABULATIONS ASSOCIATED WITH OUR GREATEST PRESIDENT 112 (University Press of Kentucky 2007) (“Lincoln was a meticulous writer who took great care with his words whether giving a formal speech or writing a letter.”).
53. DIRCK, supra note 5, at 20.
54. See STEERS, supra note 52, at 112.
55. Letter from Abraham Lincoln to David Hunter (Dec. 31, 1861), in 5 COLLECTED WORKS, supra note 3, at 85.
56. FRANK J. WILLIAMS, ABRAHAM LINCOLN: COMMANDER IN CHIEF OR ‘ATTORNEY IN CHIEF’?, IN JUDGING LINCOLN 37 (Southern Illinois University Press 2002).
57. FRANK, supra note 19, at 18-23.
58. DAVID HERBERT DONALD, LINCOLN 149 (Simon & Schuster 1995).
During his time in the White House, Lincoln constantly was faced with hard decisions. As chief executive, he sat atop a large, complex, and often conflict-ridden political organization that was charged with enforcing the law during a nationwide rebellion. As commander-in-chief, Lincoln sat atop a likewise large, complex, and often conflicted military organization charged with defeating an army composed entirely of fellow countrymen. He could not have functioned in either role without a great deal of confidence, and the ability to project that confidence to his subordinates and his critics around the country.

As a military leader, Lincoln showed a willingness to make hard decisions based on his own assessments. Occasionally he even felt it was necessary to disregard his professional military advisors. Both General Winfield Scott, who headed the Army, and General Irwin McDowell, Lincoln’s field commander, advised against fighting the first battle of Manassas on the ground that more time was required for disciplining and drilling the troops.林肯认为, however, clamped for action, and Lincoln, always in tune with political necessity, overruled the generals. The battle was fought, but with disastrous result. Not daunted, the following night, Lincoln prepared a detailed plan of strategy. He knew the political necessity of action and he had the confidence to push-on, even in the face of often terrible losses.

As the war developed, Lincoln became even more concerned with questions of strategy. He was greatly troubled by his inability to stir into action General George B. McClellan, the commander of the Army of the Potomac. The ever serious commander-in-chief went so far as to educate himself on military strategy. The autodidact read Henry W. Halleck’s translation of Jomini and held long conversations with officers on the art of war. In December 1861, he presented an elaborate memorandum to McClellan, which asked technical questions and made suggestions about an advance. The over-confident McClellan returned it with penciled replies and a note rejecting all the suggestions.

Lincoln could bear McClellan’s diffidence no more, and he replaced him with Ambrose E. Burnside late in 1862 when he could not get McClellan to

60. Id. at 31.
61. Id. at 31-33. See also DONALD, supra note 58, at 307-08.
63. HENRY WAGER HALLECK, ELEMENTS OF MILITARY ART AND SCIENCE (New York 1861).
64. COHEN, supra note 47, at 42; see also Frank J. Williams, Abraham Lincoln and the Changing Role of Commander In Chief, in LINCOLN RESHAPES THE PRESIDENCY 13 (Charles M. Hubbard ed., Mercer University Press 2003).
65. Memorandum from President Abraham Lincoln on Potomac Campaign to George B. McClellan (Dec. 1, 1861), in 5 COLLECTED WORKS, supra note 3, at 34-35.
66. Id. (see annotations).
advance after the battle of Antietam. McClellan was very popular among his troops, and later ran against Lincoln in the 1864 presidential election. Lincoln knew that McClellan could make a formidable political enemy, but he also knew that McClellan was not capable of taking the steps needed to win the war. Lincoln’s confidence in his own understanding of military strategy allowed him to make the decision to relieve McClellan with confidence.

5. Rhetorical Skill

“[T]hat government of the people by the people for the people, shall not perish from the earth.”

The ability to express ideas clearly and convincingly is essential to good lawyering. Likewise, a president must possess the ability to persuade the people, the Congress, and his subordinates through both written and spoken language. In this regard, Lincoln’s eloquence and humor is legendary, and his words speak for themselves in that regard.

When Abraham Lincoln spoke about the issue of equality, for instance, he did it with passion and conviction:

Let us discard all this quibbling about this man and the other man, this race and that race and the other race being inferior, and therefore they must be placed in an inferior position. Let us discard all these things and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal.

Lincoln had the power to express the idea of universal liberty with both logic and beauty. “When we were the political slaves of King George, and wanted to be free, we called the maxim that ‘all men are created equal’ a self-evident truth, but now when we have grown fat, and have lost all dread of being slaves ourselves, we have become so greedy to be masters that we call the same maxim ‘a self-evident lie.’”

In debates with his long-time rival Stephen A. Douglas, Lincoln honed his skills as a worthy adversary in the art of debate. Moreover, he learned to connect with an audience on a human level, “nobody has ever expected me to be

68. Id. at 170.
69. President Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 COLLECTED WORKS, supra note 3, at 23 (all the prior drafts by Lincoln contain this language).
72. DONALD, supra note 58, at 224.
President. In my poor, lean, lank face nobody has ever seen that any cabbages were sprouting out.”73

Lincoln understood the power of simple language and metaphor, and he often used it humorously to great effect. For instance, in responding to a letter from the dilatory General McClellan after Antietam, Lincoln said, “I have just read your dispatch about sore tongued and fatigued horses. Will you pardon me for asking what the horses of your army have done since the battle of Antietam that fatigue anything?”74 In another famous incident, General Joseph Hooker sent a dispatch to the president datelined “Headquarters in the Saddle.”75 Lincoln quipped, “The trouble with Hooker is that he has got his headquarters where his hindquarters ought to be.”76

Lincoln knew how to joke about serious issues as well. Judge George W. Shaw says that during the Lincoln Douglas Debates, Lincoln would sometimes exclaim:

They tell me that if the Republicans prevail, slavery will be abolished, and whites will marry and form a mongrel race. Now, I have a sister-in-law down in Kentucky, and if any one can show me that if Fremont is elected she will have to marry a negro, I will vote against Fremont, and if that isn’t an argument ad hominem it is an argument ad womanum.77

Likewise, Lincoln could be self-deprecating with his humor. A popular story involves Judge Joseph Baldwin, a Southerner who sought permission to cross into Virginia during the war to visit his family. Lincoln told Judge Baldwin to apply to General Halleck or to Secretary of War Stanton. Judge Baldwin replied that his request had already been denied by both Halleck and Stanton. Lincoln replied, with a smile, “I can do nothing; for you must know that I have very little influence with this Administration.”78

Lincoln often used his rhetorical skill to communicate with the people during the crisis. On the way to Washington to be inaugurated, Lincoln stopped along the way and made speeches in many towns and cities.79 In Lawrenceburg, Indiana he displayed his skill as a speechmaker:

I have been selected to fill an important office for a brief period, and am now, in your eyes, invested with an influence which will soon pass

74. Letter from Abraham Lincoln to George B. McClellan (Oct. 24, 1862), in 5 COLLECTED WORKS, supra note 3, at 474.
75. CLIFTON FADIMAN & ANDRE BERNARD, BARTLETT’S BOOK OF ANECDOTES 347 (Little, Brown, and Co. 2000).
76. Id.
78. Id. at 43.
away; but should my Administration prove to be a very wicked one, or what is more probable, a very foolish one, if you, the people, are but true to yourselves and to the Constitution, there is but little harm I can do, thank God!  

He was equally eloquent in his messages to Congress during the long crisis, “If there ever could be a proper time for mere catch arguments, that time surely is not now. In times like the present, men should utter nothing for which they would not willingly be responsible through time and eternity.” Lincoln expressed great ideas and passion in simple language. His words were filled with both power and substance, a trait we often find missing in the empty political rhetoric so often associated with contemporary politics.

I would be remiss if I did not mention the now famous Gettysburg Address. Lincoln’s two minute—272 word address to a crowd gathered on the occasion of the dedication of a cemetery at the site of the great battle at Gettysburg is the most famous speech by any American president. The speech expresses the greatest ideals of the nation in the sparsest and most eloquent terms.

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 here gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation shall have a new birth of freedom—and that this Government of the people, by the people, for the people, shall not perish from the earth.

6. Courage

“[U]ntil every drop of blood drawn with the lash shall be paid by another drawn with the sword.”

Courage is a difficult quality to define. To quote a famous United States Supreme Court decision, “I know it when I see it.” At its most basic level, courage is the willingness to act or to refuse to act in the face of potential harm to oneself. Whether it involves advancing unpopular ideas or facing danger on the battlefield, courage is a key ingredient in greatness. This true for lawyers, and it is true for presidents.

80. Abraham Lincoln, Remarks at Lawrenceburg, Indiana (Feb. 12, 1861), in 4 COLLECTED WORKS, supra note 3, at 197.
82. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 COLLECTED WORKS, supra note 3, at 17-23.
83. Id. at 23.
84. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 8 COLLECTED, supra note 3, at 333.
As an attorney, Lincoln showed political courage when he was called upon to defend progress in 1857. At that time, transportation technology was at a cross-roads—old riverboat technology was pitted against new railroad technology, and bridge building was a big piece of the new railroad system. Whenever entrenched power faces a challenge from an upstart, there is danger in advocating for the upstart. Legal careers and reputations can be made and lost in the struggle for progress.

It was in this context that the Rock Island Railroad Company hired Lincoln as lead counsel to defend it in the case of *Hurd v. Rock Island Railroad Company*, in which a river boat, the *Effie Afton*, smacked into an abutment of the railroad bridge that crossed the Mississippi river, setting the bridge afire. Lincoln tried the case before the United States Circuit Court in Chicago, and rested on a central, key point: the steamboat’s crew was to blame for the accident, not the Rock Island Bridge Company—and surely not railroads in general. Ultimately, Lincoln won the case by a hung jury, and the case was never retried. This *de facto* victory effectively advanced the cause of commerce in the United States, with both railroad and river transportation, ensuring that both would become the country’s prevailing mode of transportation.

As president during a civil war, Lincoln faced almost daily opportunities to display his courage. Lincoln’s evolving stand on the issue of emancipation, however, stands out by far as the most impressive example of his courage as president. Lincoln believed from the very beginning of his political career that the institution of slavery opposed the principles and vision embodied in the Declaration of Independence. Initially, however, he was primarily opposed to the expansion of slavery into the newly emerging Western territories. As a candidate in 1860, Lincoln did not run as an abolitionist, but rather as a compromise candidate seeking to limit the expansion of slavery. Even so, his views on slavery were controversial, and he was attacked by both Northerners and Southerners for his views.

During the Civil War, slavery quickly became a central issue as Lincoln and his administration contemplated what to do about the millions of slaves living in the South and in loyal border-states. Over time, however, Lincoln became convinced that the Union could not survive with slavery. Undeterred by the earlier criticism he had faced, Lincoln issued a preliminary proclamation on September 22, 1862—effective January 1, 1863, giving freedom to black slaves

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86. *Dirck*, *supra* note 5, at 96-97; *see also* *Duff*, *supra* note 36, at 332-45.
87. *Id.*
88. *Id.*
89. *Id.* at 97.
90. *Lawanda Cox, Lincoln and Black Freedom* 5 (University of South Carolina Press 1994) (“In championing a moderate program of denying slavery expansion in the territories rather than joining with abolitionists in calling for a more immediate solution, Lincoln did not disguise his immoderate goal.”).
and changing the war’s aim from reunion to reunion and freedom for the blacks.91

Consider for a moment the courage it took to issue this executive proclamation freeing slaves in the Southern states, a move that was widely unpopular in both North and South and, almost unheard of, changed the war’s objective in the middle of the conflict. Lincoln explained his motivation directly in his second inaugural address delivered March 4, 1865:

Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still must be said “the judgments of the Lord are true and righteous altogether.”92

Lincoln stood before the American people and spoke truth to power, laying the suffering and pain of the Civil War at the doorstep of America itself. Nothing could be more courageous.

Lincoln’s dedication to the cause of ending slavery did not cease with the emancipation proclamation. Lincoln recognized that his executive proclamation was susceptible to a constitutional challenge, and further that the Chief Justice of the United States, Roger Taney, was hostile towards his position on slavery.93 Lincoln understood that the only permanent solution to the problem of slavery was a constitutional amendment to end slavery. In another act of great courage, Lincoln risked his reelection to advocate such an amendment. At the 1864 Republican nominating convention in Baltimore, Lincoln insisted on a plank calling for an amendment to end slavery permanently throughout the Union.94 Lincoln ran on that platform, and ultimately helped advocate for the passage of the Thirteenth Amendment which ended slavery forever.95

92. Abraham, Lincoln, Second Inaugural Address (Mar. 4, 1865), in 8 COLLECTED WORKS, supra note 3, at 333.
93. GOODWIN, supra note 59, at 686-87.
7. Zealousness

“Are all the laws, but one, to go unexecuted, and the government itself
to go to pieces, lest that one be violated?”

Zealousness is the energy it takes to put principle into practice. Principles
are of little use without the necessary zeal to make a change. It is often stated
that lawyers must be zealous advocates, which simply means that they must
argue with passion and strength. Presidents, if they are to be great, must do the
same. President Lincoln was zealous in many ways during his tenure, but his
zeal is best exemplified in the actions he took to secure the Union during the
early days of the Civil War.

Throughout his presidency, Lincoln asserted an expansive view of the
President’s independent authority based on the commander-in-chief Clause of
the Constitution and on the duty to, “take care that the laws be faithfully
executed.” In the ten weeks between the outbreak at Fort Sumter and the
convening of Congress in special session on July 4, 1861, Lincoln employed
these clauses to sanction measures whose extraordinary magnitude suggests
dictatorship to some.

In that ten-week interval, Lincoln added 23,000 men to the regular Army and
18,000 to the Navy, called 40,000 volunteers for three years’ service, summoned the state militias into a ninety-day volunteer force, paid two
million dollars from the treasury’s unappropriated funds for purposes
unauthorized by Congress, closed the Post Office to “treasonable
correspondence,” imposed a blockade on Southern ports, suspended the writ
of habeas corpus along the railroad from Washington to Philadelphia, and
caused the arrest and military detention of persons “who were represented to

96. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 COLLECTED
WORKS, supra note 3, at 421-41.
97. I have written more extensively on this subject elsewhere. See Frank J. Williams, Nicole J.
Dulude, & Kimberly A. Tracey, Still A Frightening Unknown: Achieving a Constitutional Balance
Between Civil Liberties and National Security During the War On Terror, 12 ROGER WILLIAMS U.
100. HENRY J. RAYMOND, THE LIFE AND PUBLIC SERVICES OF ABRAHAM LINCOLN 181 (University
102. Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), in 4 COLLECTED WORKS, supra note 3, at 332-33.
103. RAYMOND, supra note 100, at 380.
104. Id.
him” as engaging in or contemplating “treasonable practices.” He later instituted conscription, the first draft in U.S. history, when voluntary recruiting broke down and extended the suspension of the habeas corpus privilege nationwide for persons “guilty of any disloyal practice,”—but this time with Congress’s approval. Lincoln did not intend to fight a rebellion with a powder puff.

8. Persistence

“[T]he promise being made, must be kept.”

Persistence brings zealous action to fruition. A short burst of zealous action is often too little when faced with a problem of any great magnitude. Great lawyers are persistent, and so are great presidents. One illuminating example was Lincoln’s persistence in pushing his army to fight during the darkest days of the Civil War.

Several presidents have faced major crises either in bringing their field generals to engage in battle or in keeping them within bounds, not simply on the battlefield but within the framework of constitutional government. General McClellan, the most lagging of field generals, was a great trial to Lincoln in both spheres. Bold in his strategic conceptions, McClellan nevertheless dreaded the actual execution of his plans. A repetitive pattern for him was to demand more reinforcements after overestimating the enemy’s strength and depreciating his own. He was a wonderfully imaginative procrastinator. If McClellan had Robert E. Lee at a disadvantage, he almost invariably failed to exploit it. He must wait, McClellan would report to his impatient superiors in Washington, until the Potomac rose, to be sure that Lee would not re-cross it; he must finish drilling new recruits, reorganize his forces, and procure more shoes, uniforms, blankets, and camp equipment.

McClellan compensated for battlefield inaction by spending his idle time pouring his irrepressible arrogance into his letters, including one to Lincoln on July 7, 1862, pointing out that it was high time the government established a civil and military policy to cover the full canvass of the nation’s troubles and

107. Id. at 37.
110. MILLER, supra note 67, at 186-88.
111. Id. at 186-92.
“generously” informed the President what precisely that policy should be.113 McClellan’s reticence became was more than a simple irritation, especially after his refusal to pursue General Lee after the Union victory at Antietam.114 Had McClellan chosen to pursue Lee’s fleeing army, he could have decimated the Southern army clinching victory for the Union.115 Lincoln worked mightily, as his secretary John Nicolay put it, at “poking sharp sticks under little Mac’s ribs.”116

After serious deliberation, Lincoln relieved McClellan on November 5, 1862 and appointed General Ambrose E. Burnside in his place.117 Upon reading the President’s order, McClellan exclaimed, “Alas for my poor country.”118 Some among his officers even urged him to disobey the presidential order.119 McClellan later wrote that he could easily have marched his troops into Washington and taken possession of the government.120 If so, it would have been the first successful forward movement of the war! Instead, McClellan turned over the command of his 120,000 men in an elaborate ceremony.121 But this was by no means the last encounter between McClellan and Lincoln. In 1864, two years after his removal, McClellan met Lincoln on new terrain—as the Democratic nominee for the presidency.122 He lost that battle too.123

Perhaps Lincoln’s greatest persistence was in defending the emancipation proclamation in the face of strong opposition. That opposition was particularly intense during the campaign for re-election in 1864, when neither Lincoln nor his closest advisors were confident that Lincoln would be re-elected.124 Lincoln understood that persistent support of his decision to liberate Southern slaves was vital, so he stood behind his decision. In a letter to James C. Conkling, which Lincoln asked Conkling to read before a large pro-Union gathering in Springfield, Illinois, Lincoln made his case:

I thought that whatever negroes can be got to do as soldiers, leaves just so much less for white soldiers to do, in saving the Union. Does it appear otherwise to you? But negroes, like other people, act upon motives. Why should they do anything for us, if we will do nothing for them? If they stake their lives for us, they must be prompted by the

114. MILLER, supra note 67, at 186-87.
115. Id.
117. MILLER, supra note 67, at 190.
118. MCCLELLAN, supra note 113, at 520.
119. GOODWIN, supra note 59, at 484-86.
120. Id.
121. Id.
122. Id. at 654.
123. Id.
124. DONALD, supra note 58, at 456-57.
strongest motive—even the promise of freedom. And the promise being made, must be kept.  

Lincoln set his sights on victory, and he saw the emancipation proclamation as a key piece of the plan to achieve his goal. He also knew that once the proclamation was made, it could never be rescinded.

9. Fair-Mindedness

“As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

As an attorney, Lincoln was able to strike a balance between zealous advocacy for his clients and a good sense of civility and professional courtesy. One of Lincoln’s colleagues, when discussing Lincoln's courtroom demeanor, explained that “[Lincoln] never misstated evidence, but stated clearly and fairly and squarely his opponent’s case.” Indeed, as author Brian Dirck noted in Lincoln the Lawyer, “no one seems to have ever accused [Lincoln] of being an unethical attorney.”

Lincoln met with a potential client who was soliciting Lincoln’s legal expertise. After hearing the facts of the case, Lincoln replied:

Yes, there is no reasonable doubt but that I can gain your case for you; I can set a whole neighborhood at loggerheads; I can distress a widowed mother and her six fatherless children, and thereby get for you six hundred dollars which you seem to have a legal claim to; but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember some things that are legally right are not morally right. I shall not take your case – but I will give you a little advice for which I will charge you nothing. You seem to be a sprightly, energetic man, I would advise you to try your hand at making six hundred dollars in some other way.

Lincoln believed in alternative dispute resolution before that term was ever coined. He was a great advocate of settlement without litigation, and he tried whenever possible to pursue mediation or negotiated settlements.

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127. Dirck, supra note 5, at 43.
128. Id.
129. See id. at 146.
131. Frank, supra note 19, at 4.
whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, in waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man.”

Over the course of his legal career, Lincoln handled several slander suits, many of which contained accusations against women of adultery or fornication. An illustration of one of Lincoln’s typical slander cases involved a woman by the name of Eliza Cabot, who complained that Francis Regnier wrongly accused her of fornication. Lincoln represented Ms. Cabot and “delivered a ‘denunciation’ of Regnier that was ‘as bitter a Philippic as ever uttered.’” Lincoln ultimately secured a verdict of $1,600 for Ms. Cabot. In these matters, Lincoln was involved heavily in maintaining community reputations and relationships; he played the role of mediator in order to restore peace to the neighborhood and keep the charges out of the courtroom.

As commander-in-chief, Lincoln would carefully review the death sentences of sleeping sentinels, homesick Union soldiers, and deserters that he called his “leg cases.” In all of these instances, Lincoln acted as final judge and pardoned many of these soldiers. Although merciful in these types of cases, he was likely to sustain sentences for slave traders, those convicted of robbery, and those who committed sexual offenses.

Lincoln also displayed his fair-mindedness after the Sioux uprising in Minnesota that killed hundreds of white settlers in 1862. The military court had sentenced 303 Sioux to death. These cases came before Lincoln to review as final judge. Yet, despite great pressure to approve these verdicts, Lincoln ordered that the complete records of the trials be sent to him. Working deliberately, Lincoln reviewed each case individually. Even though he was in the midst of administering the government in the Civil War, Lincoln carefully worked through the transcripts for a month to sort out those who were guilty of serious crimes. Ultimately, Lincoln commuted the sentences of 265

133. DIRCK, supra note 5, at 113.
134. MARK E. STEINER, AN HONEST CALLING 87 (Northern Illinois University Press 2006).
135. Id.
136. Id. at 88.
137. Id. at 87-88.
139. Id.
140. Id. at 107.
141. Id. at 108-09.
142. Id. at 109.
143. Id.
144. Id.
145. See DONALD, supra note 58, at 394.
146. Id.
defendants, and only thirty-nine of the original 303 were executed.\textsuperscript{147} Although Lincoln was criticized for this act of clemency, he responded: “I could not afford to hang men for votes.”\textsuperscript{148}

Lincoln was likewise fair-minded in his attitudes towards free African Americans. He was under a great deal of pressure from both sides on the issue of whether to allow African Americans to serve in the armed forces.\textsuperscript{149} Having weighed the options, Lincoln came to a sensible conclusion. To a critic of emancipation, Lincoln wrote, “Why should they [the black soldier and sailor] do anything for us if we do nothing for them?”\textsuperscript{150} In the end, over 200,000 black soldiers and sailors served in the Union army and navy.\textsuperscript{151}

10. Humility

“Now, the undertaking being a success, the honor is all yours.”\textsuperscript{152}

It is difficult to overstate the significance of humility for great lawyers and great leaders alike. Great leaders pass along the credit where credit is due. Great lawyers recognize their weaknesses and work around them. Humility allows both great lawyers and great leaders to recognize their mistakes and move on.

Lincoln’s short military career in the Illinois militia likely played a key role in helping develop his humility.\textsuperscript{153} Indeed, Lincoln often joked about his brief Army career, which was comprised of three months’ service with several rag-tag militia companies in the Black Hawk War.\textsuperscript{154} Lincoln humorously said that his experience military experience during that war involved “a good many bloody struggles with the m[osquitoes].”\textsuperscript{155}

After he was elected a captain by his New Salem friends, Lincoln inspired more humor than gallantry as a leader.\textsuperscript{156} Once, when marching his company toward a narrow gate, he forgot the proper command to form his troops in a single column so they could advance. “Halt!” Lincoln finally shouted. “This company is dismissed for two minutes, when it will form again on the other side.

\begin{footnotes}
\footnote{147. Miller, \textit{supra} note 138, at 109-10.}
\footnote{148. \textit{Id.} at 110.}
\footnote{149. D\textsc{onald}, \textit{supra} note 58, at 429-31.}
\footnote{150. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), \textit{in} 6 \textsc{Collected Works}, \textit{supra} note 3, at 409.}
\footnote{151. D\textsc{onald}, \textit{supra} note 58, at 429-31.}
\footnote{152. Letter from Abraham Lincoln to William T. Sherman (Dec. 26, 1864), \textit{in} 8 \textsc{Collected Works}, \textit{supra} note 3, at 181.}
\footnote{153. C\textsc{ohen}, \textit{supra} note 47, at 19.}
\footnote{154. \textit{Id.}}
\footnote{155. Abraham Lincoln, Speech in U.S. House of Representatives on the Presidential Question (July 27, 1848), \textit{in} 1 \textsc{Collected Works}, \textit{supra} note 3, at 510.}
\footnote{156. D\textsc{onald}, \textit{supra} note 58, at 45.}
\end{footnotes}
of the gate." 157 In another incident, Lincoln fired his weapon in camp, a clear violation of regulations. As punishment, Lincoln’s sword was confiscated and he was forced to wear a wooden sword. 158

But 30 years later he remembered his election as captain of his company as, “a success which gave me more pleasure than any I have had since.” 159 Lincoln was a civilian by habit, experience, and vision. Yet, his background served him well when he led the citizen soldiers who fought in the Civil War.

Lincoln himself laid no claim to military genius and frankly admitted that his interference with his commanders was partly the result of their sheepishness and inaptitude, and partly the result of political pressure. 160 As capable commanders emerged, Lincoln interfered less and less. He became less inclined personally to direct the strategy of the various campaigns but he became more insistent upon generals who could work out a plan of campaign and fight. 161 When they did their jobs, Lincoln was happy to pass along the credit.

In some sense, Lincoln’s humility guided him through some of the hardest decisions of his presidency. Some of Lincoln’s acts as commander-in-chief may have been questionable, some unwise, and others of doubtful constitutionality, but in retrospect it seems clear that he was, in each instance, motivated not by any thought of personal aggrandizement but by his desire to save the Union.

Lincoln’s style of leadership reflected his humility. I have heard it described aptly thus, “Surround yourself with talented people and let them not only do their jobs but also take credit for a job well done.” 162 This is the ultimate expression of humility in leadership, to give credit where credit is due. Lincoln understood the importance of this simple maxim. He often expressed his humility and gratefulness directly to his subordinates. Lincoln said to Sherman after the General’s successful Georgia campaign, “When you were about leaving Atlanta for the Atlantic coast, I was anxious, if not fearful; but feeling that you were the better judge, and remembering that ‘nothing risked, nothing gained’ I did not interfere. Now, the undertaking being a success, the honor is all yours; for I believe none of us went farther than to acquiesce.” 163

When it comes to political leadership, Lincoln demonstrated that humility was a fundamental aspect of effective leadership in times of conflict and crisis. Recently, Doris Kearns Goodwin pointed out in her book Team of Rivals that

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161. Id. at 104.
162. Craig Gargotta, A Tough Act to Follow, 50-OCT FED. LAW. 5, 8 (October 2003).
good leadership sometimes requires bringing in your political enemies. Goodwin argues that

Lincoln’s political genius [is] revealed through his extraordinary array of personal qualities that enabled him to form friendships with men who had previously opposed him; to repair injured feelings that, left unattended, might have escalated into permanent hostility; to assume responsibility for the failures of subordinates; to share credit with ease; and to learn from mistakes.  

Lincoln chose to include political rivals in his cabinet, including William H. Seward as Secretary of State, Salmon P. Chase as Secretary of the Treasury, and Edwin M. Stanton as Secretary of War, because, he said, “[t]hese were the strongest men. I had no right to deprive the country of their services.” Through his humility, Lincoln was willing and able to concede that his political rivals were the best men for the job.

CONCLUSION

Author John J. Duff, noted in A. Lincoln Prairie Lawyer:

[ Lincoln’s ] intellectual integrity; his capacity for analysis and balanced decision; his practical, hardheaded approach to legal problems; his ability to strip away trivia and get to the heart of a matter; his sensitive consideration of others and his profound insight into the deep recesses of the human mind and heart, coupled with the gift of expressing himself in plain and pointed and unequivocal language, were precisely the essentials for success on the bench—in Lincoln’s or any other day.

Duff is referring to the same lawyerly traits that helped Lincoln guide the country through the Civil War and guide himself into history as a great leader.

I cannot, in all fairness, leave this topic without recognizing Lincoln’s uniqueness. I do not suggest in this article that anyone can become Lincoln. The traits I have discussed here are those that every good lawyer must possess, but Lincoln had something more. Put simply, Lincoln is still great today because he is remembered as a truly good person, especially through his writings. General Robert E. Lee conceded this fact, even in defeat, saying “I surrendered as much to Lincoln’s goodness as I did to Grant’s armies.” This “goodness” cannot be reduced to any simple list of attributes, it just is. As Mr. Wirken said in his article, which I quoted at the beginning of this one, “a trial lawyer named Abraham Lincoln gave us not only his courageous leadership in such forms as

164. GOODWIN, supra note 59, at xvii.
165. DUFF, supra note 36, at 301.
the Emancipation Proclamation, but also his life, during the most divisive period in our country’s history.” 167 I could not put it better myself.

ABRAHAM LINCOLN AND SALMON P. CHASE: DIFFERING BACKGROUNDS PREDICTIVE OF DISPARATE POSITIONS ON SLAVERY

Ashley England-Huff

INTRODUCTION

Abraham Lincoln and Salmon P. Chase were contemporaries who shared an opposition to the concept of slavery. However, the two men’s positions on slavery were not perfectly aligned. Along with many lawyers and politicians of the time, Lincoln and Chase shared similarities in their backgrounds and legal careers. There were, however, acute differences between the experiences of these two prominent figures from the time of early childhood through pre-Civil War politics. These differences are predictive of their positions on slavery and explain why Lincoln and Chase varied on the issue.

I. GENERAL BACKGROUND AND EDUCATION

Although Lincoln and Chase were born at nearly the same time in the United States, their experiences in early childhood varied greatly. Lincoln was born and reared as a poor pioneer, while Chase was born into a northeastern family of distinction and prestige. The differences in the experiences of these two figures began at their birth and continued through their early education.

A. Lincoln

Abraham Lincoln was born in 1809 into a modest, hard-working family. His family lived in a humble log cabin and farmed a small piece of land in Kentucky. In fact, commentators have described Lincoln during this period in his life as a child “of poverty-burdened pioneers.” Lincoln’s father believed
strongly in the value of hard manual labor. Lincoln moved with his family to Southwest Indiana in 1816, in pursuit of more prosperous farming conditions.

Lincoln endured great hardship as a child of a poor pioneer family. After only one year in Indiana, Lincoln’s mother died of illness. Very soon after her death, his father left Lincoln and his sister alone in their log cabin and traveled to Kentucky to remarry. He returned to Indiana with Sara Bush Lincoln and her three children from her first marriage. In 1830, shortly after his twenty-first birthday, Lincoln moved once more with his new family to Illinois, again settling in a modest log cabin.

Lincoln did not receive a formal, structured education early in his life, as did many lawyers and politicians of the time. Instead, Lincoln attended small, poor schools and relied heavily on the direction of learned individuals he met during his childhood and young adulthood. As a very young child in Kentucky, Lincoln attended a small, dirt floor pioneer school for less than a year. After moving to Indiana, Lincoln attended another small pioneer school. Although his father insisted that Lincoln focus his energies on manual labor, his stepmother encouraged him to pursue learning, encouraging him to continue his modest education in Indiana and Illinois. As a young man, Lincoln acquired a great deal of knowledge under the tutelage of Mentor Graham, the schoolmaster in New Salem, Illinois. Graham introduced Lincoln to the study of grammar and mathematics, focusing Lincoln on the intense study of books, such as *Columbian Orator*, *Webster’s Speller*, and Kirkhams *Grammar*. Although Lincoln did receive some limited structured education in his early years, it was not equivalent to a structured, formal education. Therefore, Lincoln’s entrance into the legal profession was not a direct result of formal education and general grooming for the profession.

Unlike many in the legal profession, law was not Lincoln’s first career. Lincoln was a politician well before he became a lawyer. Lincoln first decided to run for state legislature at the young age of twenty-three, although he was

8. Id.
9. Id. at 16; see also SANDBURG, supra note 5, at 15.
10. ANGLE, supra note 2, at 19.
11. Id.; see also SANDBURG, supra note 5, at 20.
12. ANGLE, supra note 2, at 20-21.
13. Id. at 36-37.
15. Id.
16. ANGLE, supra note 2, at 11; see also SANDBURG, supra note 5, at 12.
17. ANGLE, supra note 2, at 23; see also SANDBURG, supra note 5, at 23.
18. ANGLE, supra note 2, at 22.
20. Id.
22. Id. at 26.
ultimately defeated. Two years later, however, he ran again and easily won a seat in the state legislature. In fact, it was amidst the 1834 campaign that Lincoln, surrendering to encouragement from a fellow Whig legislator, decided to pursue the legal profession. Lincoln was a successful politician from the very beginning, relying on his modest upbringing to focus on internal improvements in the state legislature. Lincoln had experienced the difficult life of a subsistence farmer and had worked as a hired hand and on a flatboat on the Sangamon River. Accordingly, he used these experiences as a representative for the people.

Although he was not groomed to be a lawyer as a child, Lincoln was surrounded by the law from an early age. His father was involved in legal proceedings while Lincoln was young, including jury membership, filing deeds and legal disputes involving land. While living in Indiana, Lincoln spent time watching proceedings in three courthouses near his home and reading the Revised Statutes of Indiana. Lincoln was introduced to legal documents, legal books and the legal process in general as a result of his friendship with Bowling Green, a local Democratic leader, justice of the peace and former member of the state legislature.

Lincoln’s background and general experience as a child and young adult differed from many of his later contemporaries, who were born into wealthy families and had the benefit of formal education. Furthermore, Lincoln did not enter the legal profession until after he began a life-long career in politics.

B. Chase

Salmon P. Chase was born in New Hampshire into a large family of distinction in 1808. His father was a successful farmer and justice of the peace and his ancestors were notable men, including several uncles who attended Dartmouth College, a lawyer, a United States senator, and an Episcopalian bishop. His family cherished the value of work, self-improvement and religion. Chase’s mother required that each of her children improve on the natural gifts they had been given by God, instilling in Chase a determination to

24. GOODWIN, supra note 2, at 87.
25. Id. at 88.
27. GOODWIN, supra note 2, at 90.
28. Id.
29. Id.
31. See id. at 15; DUFF, supra note 19, at 5-6.
32. DUFF, supra note 19, at 12-13.
33. GOODWIN, supra note 2, at 34.
34. Id.; JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 5 (Oxford University Press, 1995).
35. NIVEN, supra note 34, at 6.
improve himself.\textsuperscript{36} Considered a child prodigy, Chase was handpicked by his father to enjoy a better education than his siblings.\textsuperscript{37} Although extremely well-versed in literature and writing, he was feeble and uneasy with public speaking, much unlike Lincoln who, even as a young child, enjoyed enchanting his family and friends with eloquently delivered stories.\textsuperscript{38}

Early in his life, Chase began a pious dedication to religion.\textsuperscript{39} He was baptized Episcopalian into an extremely religious family that strictly adhered to the Lord’s day of rest.\textsuperscript{40} After his father died when Chase was young, and partly because his mother believed that he deserved a better education than he was receiving, Chase went to study at a school in Vermont run by a friend of his deceased father, Josiah Dunham.\textsuperscript{41} Under Dunham’s tutelage, Chase studied Latin, among other classic subjects.\textsuperscript{42} Soon after, Chase went to study with his uncle, the Episcopal bishop Philander Chase in Ohio.\textsuperscript{43} While living with his uncle, Chase attended his uncle’s religious boys’ school.\textsuperscript{44} During this period in his life, Chase engaged in intense study, as well as hard physical work on his uncle’s farm.\textsuperscript{45} When Chase was thirteen, Philander became president of Cincinnati College and Chase was admitted as a freshman at the college.\textsuperscript{46} He easily completed his first year and was beginning his second when his uncle resigned as president of the college and returned to England.\textsuperscript{47} At the age of fifteen, Chase returned home to his mother\textsuperscript{48} and entered Dartmouth College as a third year student, following in the footsteps of his ancestors.\textsuperscript{49} He graduated from Dartmouth with distinction and as a member of Phi Beta Kappa.\textsuperscript{50} After graduation at the age of nineteen, Chase established a school for boys in Washington D.C., which educated the sons of the cabinet members of President Adams and Attorney General William Wirt, a respected lawyer and literary scholar.\textsuperscript{51} Wirt befriended Chase and they developed a social relationship.\textsuperscript{52} It was at this time in his life that Chase began to contemplate a career as a lawyer.\textsuperscript{53}

\begin{enumerate}
\item[36.] \textit{Id.} at 7.
\item[37.] \textit{Goodwin, supra} note 2, at 35.
\item[38.] \textit{Id.}
\item[39.] \textit{Id.}
\item[40.] \textit{Id.}
\item[41.] \textit{Niven, supra} note 34, at 8-9.
\item[42.] \textit{Id.}
\item[43.] \textit{Goodwin, supra} note 2, at 36; \textit{Niven, supra} note 34, at 9.
\item[44.] \textit{Goodwin, supra} note 2, at 36.
\item[45.] \textit{Niven, supra} note 34, at 12-13.
\item[46.] \textit{Goodwin, supra} note 2, at 37.
\item[47.] \textit{Niven, supra} note 34, at 14.
\item[48.] \textit{Goodwin, supra} note 2, at 37.
\item[49.] \textit{Id.} at 37-38; \textit{Niven, supra} note 34, at 17.
\item[50.] \textit{Goodwin, supra} note 2, at 38.
\item[51.] \textit{Id.} at 38-39.
\item[52.] \textit{Niven, supra} note 34, at 22-23; \textit{See Goodwin, supra} note 2, at 39.
\item[53.] \textit{Goodwin, supra} note 2, at 39.
\end{enumerate}
Even as a young adult, Chase was extremely religious, beginning and ending each day with a reading of Scripture\textsuperscript{54} and never indulging in drinking, using profane language or smoking cigars.\textsuperscript{55} His dedication to religion was reaffirmed after the death of his first wife, Catherine “Kitty” Garniss, because Chase feared that she had died without affirming her faith and blamed himself.\textsuperscript{56} Religion remained an important part of Chase’s life.\textsuperscript{57}

After already having been a member of the bar and practicing law in Cincinnati since 1829,\textsuperscript{58} Chase was elected the first Republican governor of the state of Ohio in 1855.\textsuperscript{59} Chase’s appearance typified the appearance of a statesman; he exceeded six feet in height, carrying broad shoulders and a massive chest.\textsuperscript{60} Aware of such qualities, Chase augmented his dignified appearance by dressing meticulously, unlike Lincoln who was frequently more casual when greeting guests.\textsuperscript{61} Chase was a fanatic for punctuality and despised tardiness, viewing it as an offense against the person left waiting.\textsuperscript{62}

Clearly, Chase’s early childhood and young adulthood differed tremendously from Lincoln’s experience as a poor pioneer. Chase was born into an extremely religious family and spent the majority of his childhood years acquiring formal education. These differences, among others, would later influence his position on slavery.

II. LEARNING THE LAW AND ADMISSION TO THE BAR

Because few formal institutions of legal study were available at the time that Lincoln and Chase were young men, the majority of antebellum lawyers prepared for their legal careers by studying in a lawyer’s office, working directly with an already established attorney.\textsuperscript{63} Clearly, the process of legal education for most lawyers at the time was far from the intense formal legal education of modern time. Not surprisingly, Lincoln and Chase, along with many of their contemporaries, took an individual approach to learning the law and studying for bar admission and their experiences were much the same.

\textsuperscript{54} Id. at 17.
\textsuperscript{55} Id. at 18.
\textsuperscript{56} Id. at 42-43.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 40.
\textsuperscript{59} Goodwin, supra note 2, at 19.
\textsuperscript{60} Id. at 17.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Steiner, supra note 14, at 29.
A. Lincoln

The same legislator who first encouraged Lincoln to enter the legal profession, John T. Stuart, later became Lincoln’s first partner. Before entering the practice himself, Stuart graduated from Centre College in Danville, Kentucky and studied law for over a year with Judge Daniel Breck. In fact, it was the “lack of all formal education” that “set [Lincoln] apart more severely from his fellow practitioners than did his lack of formal legal education.”

Although Lincoln did not receive any law school training, he prepared for the bar by reading law books which he borrowed from Stuart and Stuart’s partner Henry E. Drummer. However, unlike many of his contemporaries, Lincoln never actually clerked in a law office, nor studied under the tutelage of anyone, lawyer or layman; instead, he was entirely self-taught. After becoming a lawyer, Lincoln did not recommend law school to aspiring lawyers, but instead suggested his course of study, that of diligent reading. In order to prepare for the bar, Lincoln intensely studied a few legal treatises, including Blackstone’s Commentaries, Chitty’s Pleadings, and Greenleaf’s Evidence, which he readily recommended in the future to aspiring lawyers.

Lincoln’s minimal, and some might say lacking, education did not prohibit his entrance into the profession because he was admitted to the bar at a time when requirements were extremely lax in the United States. In order to be admitted to the bar, the Illinois statute in effect at the time required: (1) a certificate of good moral character from a county judge; (2) a license obtained from two of the justices of the Illinois Supreme Court; and (3) the taking of an oath before being enrolled by the clerk of the Illinois Supreme Court. No formal test, written or oral, was required. Accordingly, Lincoln fulfilled all of the requirements and was enrolled on March 1, 1837. However, his formal entrance into the practice is actually considered to be an earlier date, October 5, 1836, when John T. Stuart filed several documents for a case written by Lincoln. After being admitted to the bar, Lincoln’s legal education continued on a case-by-case basis rather than a continued dedication to reading law books.

64. Id. at 27.
65. Id. at 29.
66. Id.
67. Frank, supra note 23, at 11.
68. Steiner, supra note 14, at 31.
69. Id. at 31; Dirck, supra note 30, at 20-21.
70. Steiner, supra note 14, at 52-53.
71. Id. at 32; Dirck, supra note 30, at 17.
72. Steiner, supra note 14, at 39.
73. Id. at 37.
74. Dirck, supra note 30, at 21.
75. Steiner, supra note 14, at 37.
76. Id. at 38.
77. Frank, supra note 23, at 11.
B. Chase

Much like Lincoln, Chase designed his own course of preparation for the bar, imposing on himself severe discipline in his endeavor to become a great lawyer. Chase studied the law in the office of Attorney General Wirt, although Wirt offered very little actual instruction beyond the use of his books. Without any formal tutelage from a practicing lawyer, Chase immersed himself in works with which he was already familiar, such as Burlamaqui’s works on natural law and politics, Espinasse on pleadings, Cruise’s digest of the common law, Blackstone and Coke. In addition to reading diligently, Chase frequently observed proceedings and took notes in the galleries of the House and Senate. He also joined Washington’s Blackstone debating club. After studying for two years, as opposed to the three years formally required by the rules of the Maryland bar, at the age of twenty-two Chase presented himself for the bar in Washington D.C. in 1829 and was admitted.

The experiences of Lincoln and Chase were similar in that they both took a very individualized approach to learning the law. Both read diligently in preparation for the bar, while neither had any formal tutelage. Although this aspect of their backgrounds is extremely similar, their practice of law did differ.

III. PRACTICE OF LAW

Lincoln and Chase both entered the practice of law almost immediately after being admitted to the bar. Although they did share many of the same experiences as their legal contemporaries in the United States, there were notable differences that may have predicted their differing positions on slavery. Most notably, as an attorney, Lincoln represented slave owners and a slave, while Chase fervently argued the abolitionist cause in many fugitive slave cases.

A. Lincoln

Lincoln, although extremely self-sufficient and individualistic, was never without a partner throughout the duration of his legal career. Because Stuart’s law partner Dummer decided to leave the practice and move at approximately the same time Lincoln was presenting himself for admission to the Illinois bar, Lincoln entered Stuart’s practice almost immediately after being admitted to the bar.
Lincoln moved to Springfield and assumed the majority of the new firm’s work almost immediately after forming the partnership because Stuart was busy with his political office. The firm handled a wide range of cases, including assault, homicide, small collection claims and complex actions in chancery involving title to real estate. Because Lincoln was also very active in politics, he handled many cases without remuneration for political office holders during his time as Stuart’s partner. Lincoln and Stuart dissolved their partnership in 1841, but remained friends.

Lincoln next partnered with Stephen T. Logan in 1841, another established lawyer in the community, and moved into an office across the street from his former office with Stuart. During this period, Lincoln gained professional recognition of his trial skills after representing Thomas C. Browne, Justice of the Supreme Court of Illinois, in his removal trial before the Illinois House of Representatives in 1843. His short-lived partnership with Logan amicably dissolved shortly thereafter.

During this period in his practice, Lincoln had made a name for himself as an able lawyer with proficient courtroom skills. Instead of partnering with another experienced lawyer, as were his past partners, Lincoln chose William H. Herndon, a former clerk in the office of Logan & Lincoln. The Lincoln & Herndon office handled an extensive range of legal matters, including probate work and criminal defense. Lincoln made his last appearance in court approximately a month after his nomination for the presidency.

While practicing law and before running for President, Lincoln represented an assortment of clients. Lincoln participated as co-counsel in a trial, representing a slave owner. Lincoln’s client was the slave owner Robert Matson, who brought slaves from Kentucky every year to harvest crops on his land in Illinois. After one of his slaves and his family escaped Matson’s farm in Illinois, Matson brought suit under provisions of the “Black Laws” in Illinois.

87. Id. at 35.
88. Id. at 37.
89. Id. at 40-41.
90. Id. at 46.
91. Id. at 67.
92. DUFF, supra note 19, at 76.
93. Id. at 78.
94. Id. at 87, 90.
95. Id. at 94.
96. Id. at 97.
97. Id.
98. DUFF, supra note 19, at 325-26.
99. Id. at 365.
101. Id. at 299.
in order to obtain the return of the “fugitive slaves.” However, Lincoln did not exclusively represent slave owners. Before acting as co-counsel in the Matson case, Lincoln represented a slave in the case Bailey v. Cromwell and was successful.

Throughout Lincoln’s legal practice, he partnered with many experienced attorneys and fine-tuned his courtroom skills by litigating a number of different legal issues. Lincoln’s position on slavery is not entirely apparent from his legal practice, as he represented both slave owners and slaves as an attorney.

B. Chase

After being sworn into the bar in Washington D.C., Chase sold his school and moved to Cincinnati, Ohio. In order to adequately learn Ohio law, Chase participated in the moot court at Cincinnati College. He waited several months, developing his proficiency in Ohio’s laws and public speaking, before opening his own practice. Business was slow, but Chase capitalized on the opportunity to continue studying law, history and religious books. Chase quickly involved himself in the legal community, founding a lecture series, joining a temperance society, and working on a three volume collection of the then scattered Ohio statutes. After approximately a year as a solo practitioner, Chase formed a partnership with Edward King and Timothy Walker, experienced lawyers in Cincinnati. Shortly thereafter, one of his partners died unexpectedly and the short-lived partnership was dissolved in 1832. Chase did not waste much time in forming another partnership with Daniel T. Caswell, the solicitor for the local branch of the Bank of the United States. Although Chase had struggled for a few years, he soon developed a lucrative practice representing businesses and large banks, partly as a result of his partnership with Caswell.

While practicing in Cincinnati, Chase was involved in many fugitive slave cases. Because Chase volunteered his legal services in many such cases and was such a zealous advocate for fugitive slaves, his contemporaries began calling him the “Attorney General for the Negro.” In this role, Chase represented an old farmer who kindly offered his aid to some traveling slaves in a famous case

102. Id. at 300-01.
103. Id. at 308.
104. NIVEN, supra note 34, at 28; GOODWIN, supra note 2, at 40.
105. NIVEN, supra note 34, at 31.
106. Id.
107. Id. at 32.
108. Id.
109. Id. at 39.
110. Id.
111. NIVEN, supra note 34, at 39.
112. GOODWIN, supra note 2, at 41; NIVEN, supra note 34, at 39.
113. GOODWIN, supra note 2, at 112.
114. Id.
that later inspired a character in Harriet Beecher Stowe’s *Uncle Tom’s Cabin*. Chase defended the farmer against allegations of violating the 1793 Fugitive Slave Act by challenging the constitutionality of the law. Although Chase was unsuccessful, he argued the abolitionist case with zeal and commitment, foreshadowing his political position on slavery.

IV. DIFFERING IDEOLOGY CONCERNING SLAVERY

Lincoln and Chase, like all Republicans, shared a “belief that the expansion of slavery had to be stopped.” However, there was great disagreement concerning the particulars of the issue within the Republican Party. Republicans who had been affiliated with the abolition and Free Soil movements and who advocated immediate emancipation of the slaves held the radical view. On the opposite end of the spectrum were the conservative Republicans who believed that the Party should focus more on internal unity and avoid taking a position on slavery and the political status of blacks. In the middle were the moderate Republicans who held an ambiguous attitude toward the issue. Although the moderates denounced the cruelty of slavery, they opposed immediate emancipation and avoided discussion of racial equality. Lincoln and Chase held clearly differing positions on slavery and emancipation.

A. Lincoln

On the issue of slavery, Lincoln was a moderate. During his debate with Stephen Douglas in 1858, Lincoln espoused the moderate view towards slavery that both races were entitled to the rights enumerated in the Declaration of Independence. However, he repeatedly emphasized that he had no intention of introducing political and social equality. In fact, although Lincoln was “antislavery,” he did represent a slave owner as co-counsel in a suit to enforce the “Black Laws” of Illinois. It is clear that the slavery issue was not as strong an emotional commitment as in the case of certain of Lincoln’s contemporaries who adamantly opposed slavery.

115. *Id.* at 112-13.
116. *Id.*
119. *Id.*
120. *Id.* at 2156-57.
121. *Id.* at 2158.
122. *Id.* at 2159.
123. *Id.*
124. Forsythe, *supra* note 1, at 528.
125. *Id.* at 527-28.
126. *Id.* at 528.
After being elected to the presidency, Lincoln held fast to this moderate view.\textsuperscript{128} After the Civil War began, the Lincoln administration acted carefully in dealing with the issue of slavery, viewing the conflict more as a war against Southern expansion\textsuperscript{129} and being ever mindful of the potential secession of the border states.\textsuperscript{130} At first, Lincoln implemented a policy of gradual emancipation.\textsuperscript{131} Later, Congress enacted antislavery acts barring the military from returning fugitive slaves and prohibiting slavery in the territories and D.C.\textsuperscript{132} However, Lincoln, his administration and Congress avoided making slavery the main purpose of the Union’s participation in the War. It was not until fall of 1862 that the Lincoln relinquished his moderate view, realizing that adoption of the more radical abolitionist position was inevitable and had become a political requirement to win the war.\textsuperscript{133}

\textbf{B. Chase}

Chase devoted himself to the antislavery cause early, while living in Cincinnati, a city neighboring the slave state of Kentucky and home to a large population of freed slaves.\textsuperscript{134} In 1836, Chase called a meeting to protest a mob’s destruction of an antislavery publisher’s press.\textsuperscript{135} Afterwards, he represented the press owner in court, asking for damages for the losses he sustained in the mob riot.\textsuperscript{136} His commitment to antislavery continued to develop.\textsuperscript{137} Approximately one year later, Chase defended the freedom of a slave in court, arguing that all slaves coming into free territory were then free.\textsuperscript{138} In 1841, he entered politics and joined the Liberty party, continuing to take antislavery cases in his practice.\textsuperscript{139} In 1848, he campaigned for a seat in the United States Senate as a member of the Ohio Free Soil party.\textsuperscript{140}

Compared to Lincoln’s moderate position on slavery, Chase could not have been more radical.\textsuperscript{141} Indeed, Chase deserved a central position among the Radical Republicans of the time.\textsuperscript{142} He embodied the radical position that

128. Forsythe, \textit{supra} note 1, at 528.
129. Wang, \textit{supra} note 118, at 2168, 2164.
130. Forsythe, \textit{supra} note 1, at 529.
131. Wang, \textit{supra} note 118, at 2167.
132. \textit{Id.}
133. \textit{Id.} at 2168.
134. Maizlish, \textit{supra} note 1, at 65.
135. \textit{Id.} at 64.
136. \textit{Id.}
137. \textit{Id.} at 65.
138. \textit{Id.}
139. \textit{Id.}
140. Maizlish, \textit{supra} note 1, at 66.
141. Forsythe, \textit{supra} note 1, at 528.
freedom for slaves was a religious and moral issue.\footnote{143} Furthermore, he took on the formidable task of convincing the party majority to adopt Radical policies.\footnote{144}

Clearly, Lincoln and Chase differed strongly in their positions on slavery. Even though both essentially condemned slavery, Lincoln’s policies were extremely moderate, advocating gradual elimination of slavery, while Chase was a zealous advocate for the abolitionist movement and the rights of slaves.

V. EXPLANATION OF LINCOLN’S AND CHASE’S POSITION ON SLAVERY BASED ON BACKGROUNDS

Although Lincoln and Chase were both Republicans and opposed to slavery, their positions on slavery were clearly divergent. Based on the similarities and differences of their backgrounds, however, these differences can be explained and understood more clearly.

One of the most obvious explanations for the divergence of their positions on slavery is Chase’s extreme religious devotion. Chase was extremely religious throughout his life, having been reared in a family devoted to religious worship.\footnote{145} His commitment to religion remained central throughout his political career.\footnote{146} By contrast, although he was religious and had read the Bible,\footnote{147} Lincoln was not reared with the same strict adherence to religious mandates,\footnote{148} nor did he demonstrate a devotion to religious causes later in his political career.\footnote{149} As a result of his deeply-held religious conviction, Chase often focused his politics on morality and purity.\footnote{150} Chase’s passion for the abolitionist cause was fueled by his religious zeal\footnote{151} and his open embrace of religious idealism.\footnote{152} In fact, Chase worked tirelessly to encourage the Liberty Party to characterize its denunciation of slavery as a sin.\footnote{153} Therefore, Chase couched the politics of the slavery in moral terms. For Lincoln, however, the politics of slavery were just that, politics and he did not infuse religious references into his antislavery position. Therefore, it seems obvious that Chase would be associated with the Radical Republicans\footnote{154} while Lincoln was more moderate.\footnote{155}

Differences in the legal practices of Lincoln and Chase should have predicted Lincoln’s more moderate approach to the issue of slavery. As an

\footnote{143} Id. at 43.
\footnote{144} Id. at 44.
\footnote{145} See Goodwin, supra note 2, at 35.
\footnote{146} Maizlish, supra note 1, at 58.
\footnote{147} Goodwin, supra note 2, at 51.
\footnote{148} See Angle, supra note 2, at 4.
\footnote{149} See id. at 6.
\footnote{150} Maizlish, supra note 1, at 60.
\footnote{151} Id. at 66.
\footnote{152} Gerteis, supra note 142, at 45.
\footnote{153} Id. at 43.
\footnote{154} Id. at 43.
\footnote{155} Forsythe, supra note 1, at 528.
attorney, Lincoln took the cases as they came to him without consideration of the client’s orientation to the issue of slavery, representing both slaves and slave owners.\footnote{\textit{Goodwin, supra note 2, at 92.}} Chase, on the other hand, volunteered his representation readily in defense of slaves in fugitive slave cases in Cincinnati.\footnote{\textit{Id. at 112.}} With consideration of the fact that Lincoln represented slave owners and slaves alike, while Chase felt morally inclined to volunteer his legal services in defense of fugitive slaves, it appears obvious that Chase would take a more radical approach to the slavery issue.

Both Lincoln and Chase were involved with politics prior to the breakout of the Civil War and were both politically ambitious. Based on their backgrounds, however, it can be argued that Lincoln was more politically driven from the very beginning. Lincoln’s background, and its differences from Chase’s, explains Lincoln’s heightened sense of ambition, which influenced his moderate position on slavery.\footnote{\textit{Id. at 256.}}

Lincoln was a politician before becoming a lawyer and continued to be so through most of his life.\footnote{\textit{See Frank, supra note 23, at 10.}} Quite the opposite, Chase became a lawyer before entering into politics, although he did have a reputation for being extremely politically ambitious.\footnote{\textit{Maizlish, supra note 1, at 50.}} Indeed, in the short period of twenty years, Chase served as a United States senator, Governor of Ohio, Secretary of the Treasury and Chief Justice of the Supreme Court.\footnote{\textit{Id.}} Despite the obvious requirement of ambition to achieve such political notoriety, Chase continually denied interest in political office.\footnote{\textit{Id. at 60.}} In order to resolve feelings of guilt inspired by his strong religious beliefs concerning too much political ambition, Chase denied his desire for personal advancement and focused his motives on purity.\footnote{\textit{Id.}} For these reasons, Chase often initially turned down invitations for nomination to political office, only surrendering to repeated persuasion from his peers.\footnote{\textit{Id.}}

Lincoln did not appear to share the same moral reservations about political office that Chase held. Instead, he seemed comfortable in the political landscape of the time and had strong political ambition. Because Chase was weighed down by his religious and moral convictions and had to continuously balance those feelings with his political ambition, it seems more likely that he would couch the issue of slavery in moral terms and be unable to accept the more moderate position of Lincoln.

After Lincoln defeated Chase and won the Republican candidacy for President in 1860, his moderate position can be explained by the party politics of
the time, which required a moderate position. Just prior to the Civil War, the Republican Party was a coalition of different interests focused primarily on the goal of uniting the Party, as well as the Union, against Southern expansion. When the War broke out, many Republicans saw it as a war to end Southern expansion of slavery into the North and the West, and not as a war to abolish slavery, per se. Emancipation became more of a goal as the War progressed and the distinction between radicals, moderates and conservatives faded. Even conservatives realized its political necessity to win the War. Therefore, the fact that Lincoln supported emancipation later in the War does not say much for his fervor as an antislavery proponent. By contrast, Chase viewed the argument of political necessity for the moderate position with reservations because it lacked moral commitment to the abolitionist cause. He reluctantly accepted it, however, because he believed the War was a means to eventually abolish slavery. Furthermore, Lincoln was extremely aware of public opinion and the political power it carried. His political objectives were framed in the context of public policy.

Therefore, the politics of the times required the Republican candidate for President, the leader of the fragile Republican Party, and then the President of the United States, to hold a more moderate position on the issue of slavery in order to maintain the delicate coalition that embodied the Republican Party and the Union.

CONCLUSION

Although Lincoln and Chase shared many of the same experiences, along with their contemporaries of the time, the differences in their backgrounds explain their differing positions on slavery. Lincoln’s prominent involvement in politics, coupled with his ambition and individualism, should have predicted that he would not adopt a radical approach to abolition. As his political career developed, the dynamics of the Republican Party necessitated a moderate position on antislavery because the radical approach was not popular with all of the factions of the Party. It was not until later in the Civil War that such a view became essential to winning the war. Quite the contrary, Chase’s extreme devotion to religion foreshadowed his radical approach to abolition. He was reared in a tremendously religious family, attended religious schools and spent

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165. See Goodwin, supra note 2, at 249.
166. Wang, supra note 118, at 2163.
167. Id. at 2164.
168. Gerteis, supra note 142, at 43.
169. Id.
170. Id. at 48.
171. Id.
172. Forsythe, supra note 1, at 530.
173. Id. at 531.
time with his bishop uncle. This religious devotion clearly explains why Chase
would frame the slavery issue in moral and religious terms. Therefore, it seems
obvious that Chase would hold the radical view, as opposed to a moderate,
ambiguous view.

Even though these two prominent figures in American History shared a
common distaste for slavery, their positions on the issue differed exceedingly.
This divergence, however, is not without an explanation when one studies how
differently these two men traveled through their lives, from early childhood into
late adulthood.
INTRODUCTION

“And thus we see how labor could make men distinct titles to several parcels of property for their private uses, wherein there could be no doubt of right, no room for quarrel.”1 John Locke equated the pursuit of a person’s inherent right to live to that of a person’s right to own property.2 This concept has evolved into a deeply ingrained principle in the United States. However, how do we ensure “no doubt of right, no room for quarrel” when land changes ownership? The answer is a deed to evidence conveyance3 of a fee simple absolute estate.4

Prominent lawyers in the antebellum American legal culture, such as Abraham Lincoln, wrote deeds in order to transfer property for their clients, and the deed still dominates in today’s real estate environment as the mode to evidence land alienation. Moreover, Lincoln lived in a time when much of America was still rural country, and the general process of land transfer and land disputes consumed much of Lincoln’s practice. Therefore, the deeds Lincoln prepared illustrate how the law concerning fee simple deeds evolved from antebellum America to the present.

The objective of this article is to discover whether a person would find a Lincoln deed and a modern statutory short form of a warranty deed comparable in stylistic technique and elements, and to look at how the courts have handled interpreting these two forms of deeds. Furthermore, is the older common law or statutory short form preferable, and why might a legal practitioner follow the common law approach over the statutory form or visa versa? To understand the similarities and distinctions between a Lincoln warranty deed and a statutory

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2. Id. at 56.
3. The sale of land actually revolves around two legal documents: the contract for the sale of land and the deed. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 159 (3d ed. 1989). While the law regarding a contract of sale is equally as complex to that of a deed, this paper will focus only on the deed. However, keep in mind that before the deed, in the transfer of land, comes the contract between the parties where the terms of the sale should be decided.
4. A fee simple absolute estate (often shortened to fee simple) is an interest in land of indefinite or potentially infinite duration. BLACK’S LAW DICTIONARY 649 (8th ed. 2004). This article focuses on the transfer of this type of estate.
short form, one must first examine the evolution of land transfer. One must also comprehend the elements that make a piece of paper legally sufficient to constitute a valid deed. It will then be understood why state legislatures pushed for a more simplistic and straightforward warranty deed.

This article is divided into four parts. Part I briefly covers Lincoln’s career as a lawyer and the legal environment of his time. Part II chronicles the history of how the deed evolved as evidence of land ownership, and provides a general introduction to warranty and quitclaim deeds and the elements that must be present in both forms. Part III dissects clauses from deeds drafted by Abraham Lincoln compared to the drafting technique proposed in Blackstone’s Commentaries, and ends with a brief discussion of how Illinois courts interpreted these types of deeds. This part also contains the statutory short form version of a warranty deed used by the state of Illinois to contrast the simplified language used by the statute with the language in Lincoln’s warranty deeds. Part III concludes with judicial interpretation of these deeds. Part IV analyzes the major changes in the law from Lincoln’s time to today with reasons why a lawyer would use a particular type of deed.

I. LINCOLN: THE LAWYER

When asked to codify a brief autobiography for the Dictionary of Congress in 1848, Lincoln wrote, “Profession, a lawyer.” While much historical focus of Lincoln’s life rests on his time as president, Lincoln first made a career as an antebellum lawyer for almost twenty-five years in the state of Illinois. Lincoln’s legal work “ranged from actions in foreclosure, debt, replevin, trespass, partition, suretyship, to slander and divorce actions, personal injury actions, suits to compel stockholders to pay their assessments, will contests, and a few criminal cases.” Lincoln’s cases reflect the idea that lawyers in antebellum America did not focus on one area of law; rather, they litigated any dispute that arose within the community. Furthermore, the legal structure of antebellum America looked nothing like the legal profession of today because “this was the era of the office-taught lawyer” where young legal minds apprenticed for a firm or judge instead of attending law school.

9. See id.
Lincoln’s educational journey drifted off the beaten path, however, because he was entirely self-taught and never clerked for a lawyer or judge.\footnote{STEINER, supra note 7, at 31. While he may have borrowed books from the law office of Stuart & Drummer, Lincoln never clerked for the firm. \textit{Id.}} He learned the law by reading Blackstone’s \textit{Commentaries},\footnote{Legend has it that Lincoln found a copy of Blackstone’s \textit{Commentaries} at the bottom of a barrel which Lincoln purchased for fifty cents from another man. CARL SANDBURG, ABRAHAM LINCOLN, THE PRAIRIE YEARS 163 (1926). \textit{But see} STEINER, supra note 7, at 33 (declaring that Lincoln bought a copy at an auction).} among other legal treatises, and the Revised Statutes of Indiana.\footnote{Lueckenhoff, supra note 8, at 395. The Revised Statutes of Indiana had the Declaration of Independence and the United States Constitution within the prefix. \textit{Id.}} After reading Blackstone’s \textit{Commentaries}, Lincoln declared that he “never read anything which so profoundly interested and thrilled [him]”\footnote{James M. Ogden, Lincoln’s Early Impressions of the Law in Indiana, 7 NOTRE DAME L. 325, 328 (1932).} and “never in [his] whole life was [his] mind so thoroughly absorbed.”\footnote{STEINER, supra note 7, at 33 (quoting David C. Mearns, Mr. Lincoln and the Books He Read, in THREE PRESIDENTS AND THEIR BOOKS 61 (Arthur Bestor et al. eds., 1955)).} In a letter to a young man who wanted to apprentice for Lincoln’s law office, Lincoln advised him to: “Get the books, and read and study them till, you understand them in their principal features; and that is the main thing . . . The books, and your capacity for understanding them, are just the same in all places.”\footnote{COLLECTED WORKS, supra note 6, at 327; FRANK, supra note 10, at 10.} Lincoln simply did not perceive formal education or apprenticeships as a requirement for a lawyer in training; rather, he believed the ability to comprehend and absorb the letter of the law should be the main focus.\footnote{See COLLECTED WORKS, supra note 6, at 327.}

Lincoln was admitted to the Illinois bar in 1837,\footnote{STEINER, supra note 7, at 37. The Illinois statute had three requirements for admission to the bar: Lincoln had to acquire a “certificate of some county judge of his good moral character;” receive a license from two of the justices of the supreme court where an examination was given; finally, take an oath and be enrolled by the clerk of the supreme court. \textit{Id.} (citing An Act Concerning Attorneys and Counselors at Law, March 1, 1833).} at which time he left New Salem, Illinois, and moved to Springfield, Illinois to practice law.\footnote{JOHN J. DUFF, A. LINCOLN: PRAIRIE LAWYER 33 (1960).} During his law career in Springfield, Lincoln formed three separate partnerships.\footnote{DIRCK, supra note 6, at 24-30. The term “partnership” in the antebellum period meant a more relaxed and not as professional relationship as compared to today’s standards. \textit{Id.} at 24. No set guidelines existed on how lawyers behaved in their partnership, and it was not uncommon for legal professionals to have more than one partnership at a time in different cities within one state. \textit{Id.}} As a young and inexperienced lawyer, Lincoln had the good fortune to enter into his first partnership with John T. Stuart who already possessed an “established” practice with an extensive list of clients.\footnote{Id. at 24. Stuart’s firm was at that time the busiest law firm in Sangamon County. \textit{Id.}} However in April 1841, Stuart and...
Lincoln dissolved their partnership. 22 Shortly after, Lincoln formed a new partnership with Stephen T. Logan. 23 Lincoln and Logan’s law firm had a heavier workload than Stuart and Lincoln’s, and both he and Logan heavily litigated in front of the Illinois Supreme Court. 24 Nevertheless in December of 1844, Lincoln and Logan parted ways on amicable terms. 25

Lincoln’s decision to make William H. Herndon, his next and final partner, puzzles many Lincoln biographers due to Herndon’s inexperience and questionable character. 26 Despite their differences, Lincoln and Herndon successfully ran a law firm for twenty-one years. 27 However, Lincoln spent much of this time riding the circuit 28 while Herndon stayed in Springfield. Nevertheless, Lincoln trusted Herndon to take care of the business while he was gone, and Herndon said that Lincoln told him once, “Billy I can trust you, if you can trust me.” 29 For example, they always divided fees equally. 30 Because of their good working relationship and reputation, Lincoln and Herndon had one of the leading firms in Springfield by the 1850s. 31

Another reason for partnering with Herndon might have been Lincoln’s need for order in his law firm. 32 Unlike Herndon, who made a thorough study of legal treatises as a student of law, Lincoln was not a diligent reader of law books or very organized; rather, he focused his study of law to the “case before him.” 33 Lincoln’s approach was commonplace where lawyers read “to acquire knowledge with a specific end in sight . . . They [sought] to find the specific nuggets of information they require[d].” 34 Also, Herndon did much of the research for Lincoln regarding case law, 35 and Herndon claimed, “Lincoln knew no such thing as order or method in his law practice.” 36

22. DUFF, supra note 19, at 76. Stuart was heavily involved with politics at this point and spent much of his time in Washington D.C. See id. at 73.
23. Id. at 78.
24. Lueckenhoff, supra note 8, at 397.
25. Id. Logan afterwards went into a partnership with his son. DUFF, supra note 19, at 94.
26. E.g., DIRCK, supra note 6, at 30-31. At the time, Herndon was only twenty-six and clerked for Lincoln & Logan. Id. Herndon also had a reputation of being a “loose-cannon” and an alcoholic. Id. When someone once asked Herndon why Lincoln chose him as a partner, Herndon replied, “I don’t know and no one else does.” DUFF, supra note 19, at 97-98.
27. DIRCK, supra note 6, at 30.
28. Id. at 44. Lawyers and judges often rode the Circuit during this time in Illinois, and they traveled from place to place only stopping at county seats to litigate and hear cases.
29. Id. at 30.
30. Id. at 31.
31. DAVID DONALD, LINCOLN’S HERNDON 40 (1948).
32. STEINER, supra note 7, at 161.
33. E.g., id.
34. Id. at 41 (quoting M.H. Hoeflich, The Lawyer as Pragmatic Reader: The History of Legal Common-Placing, 55 ARK. L. REV. 87, 88-89 (2002)).
35. Id. at 41.
36. Id. at 161 (quoting WILLIAM H. HERNDON & JESSE W. WEIK, HERNDON’S LINCOLN 274-75 (Douglas L. Wilson et al. eds., 2006)).
Contrary to Lincoln’s unorganized law firm skills, he did have a reputation as a courtroom litigator.\textsuperscript{37} And, he was skilled in certain courtroom practices, such as examination of witnesses.\textsuperscript{38} Between the 1840s and 1850s, Lincoln became one of the primary lawyers trying cases before the Illinois Supreme Court,\textsuperscript{39} and the volume of cases he litigated before the federal trial court grew mostly due to his representation of the railroads and out-of-state businesses.\textsuperscript{40} However, he did discourage litigation as a solution to solving disputes for his clients, and he promoted compromise instead.\textsuperscript{41} Despite the fact he litigated an enormous number of cases, Lincoln continued to believe the role of a lawyer was that of a peacemaker.\textsuperscript{42}

In the last decade of Lincoln’s legal career, the antebellum America was growing fast due to the rise of capitalism and such enterprises as railroad companies.\textsuperscript{43} Lincoln never seemed to care much for the profit he made from a case and charged modest fees.\textsuperscript{44} Moreover, even though Lincoln represented the railroad companies, he had trouble adapting to the “new style of lawyering” where “bustling and restless men” made up a legal profession that was full of capitalistic aspirations.\textsuperscript{45}

While Lincoln may have earned his living “by picking up the pieces when things went wrong,” his honesty to himself and his profession is evident throughout his legal career.\textsuperscript{46} In his “Notes for a Law Lecture,” Lincoln advised lawyers in training to “resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.”\textsuperscript{47} Though Lincoln, the lawyer, was not much concerned with legal

\begin{footnotes}
\item[37] See, e.g., Lueckenhoff, supra note 8, at 402.
\item[38] See FRANK, supra note 10, at 27. Lincoln jumped to his main point quickly in examination of witnesses in order to not confuse the jury with an abundance of questions. \textit{Id.} Also, he never wrote down information during testimony. \textit{Lueckenhoff, supra note 8, at 401.}
\item[39] DUFF, supra note 19, at 243.
\item[40] See STEINER, supra note 7, at 137-38, 161. Lincoln represented the Illinois Central Railroad in about fifty cases. \textit{Id.}
\item[41] J. Robert McClure Jr., \textit{On the Practice of Law: A. Lincoln}, 76 A.B.A. J. 98 (1990). Lincoln wrote in his “Notes for a Law Lecture,” “Discourage litigation. Persuade your neighbors to compromise whenever you can . . . As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.” \textit{Id.}
\item[42] STEINER, supra note 7, at 84.
\item[43] \textit{Id.} at 160-61.
\item[44] \textit{Id.} at 70-71. The fee book from the partnership of Lincoln & Stuart ranged from $2.50 to $50 from their clients for their services. \textit{Id.} Lincoln’s estimated annual income in 1844 was $1,500. \textit{Duff, supra note 19, at 98.}
\item[45] STEINER, supra note 7, at 160. Herndon recalled that when Lincoln arrived at the office around nine every morning, “the first thing he did was to pick up a newspaper, spread himself out on an old sofa, one leg on the chair, and read aloud.” \textit{Id.}
\item[46] DIRCK, supra note 6, at 83.
\item[47] \textit{E.g., Collected Works, supra note 6, at 82.} The editors of \textit{The Law Practice of Abraham Lincoln: Complete Documentary Edition} propose that these notes might have been written for a lecture that Lincoln was going to give at Ohio State and Union Law College in Cleveland.
\end{footnotes}
research and organization, he remained “Honest Abe” to his clients and co-workers throughout his career.48

II. THE EVOLUTION OF LAND TRANSFER FROM LIVERY OF SEISIN TO THE DEED.

A. The Mode of Land Conveyance Before the Deed: Livery of Seisin

Because American law concerning the transfer of land traces its roots of land transfer to English common law,49 this section gives a brief history of English estate conveyance. Before deeds, “open and notorious” possession of the land embodied the only available and necessary evidence of land title.50 When one wanted to give possession (i.e. grant a present interest) of his land to another, a symbolic ceremony known as the livery of seisin took place where the grantor who was called the “feoffer,” the grantee, or “feoffee,” and their witnesses gathered on the land.51 Because a writing was not part of the ceremony, the witnesses’ testimonies acted as the only real proof that the feoffer sold or gifted his land to another.52 Even though written documents evidencing certain exchanges developed in early times, valid land transfer did not require a written text to help prove, along with the symbolic ceremony, such a conveyance until the advent of the Statute of Frauds in 1677.53 However, livery of seisin continued in England until the Statute of Uses in 1535, which abolished the ceremonial requirement and allowed a contract or deed to embody the seisin and possession of land without the symbolic ceremony.54

B. The Reign of the Deed in Illinois

For the most part, livery of seisin never made it across the Atlantic Ocean as a requirement to convey a present interest in real property in the American legal culture.55 In Illinois, the Conveyance Act of 1845 abolished the livery of seisin as a component of necessity in land conveyance.56 Instead, a written deed by

48. See, e.g., STEINER, supra note 7, at 3.
49. 1 JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES § 3, at 4 (3d ed. 2003).
50. WILLIAM HENRY RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE § 38, at 52 (5th ed. 1887).
51. 1 PALOMAR, supra note 49, at 4-5. The ceremony could also take place off the land but in sight of the premises where the feoffer would point to the land. Id.
52. See id. at 4.
53. Id. at 4-5.
55. 1 PALOMAR, supra note 49, at 8. Livery of seisin took place in a few instances in the early history of the American colonies. Id.
56. 765 ILL. COMP. STAT. ANN. 5/1 (West 2001) (formally ILL. REV. STAT. 1845, ch. 24, § 1); Witham v. Brooner, 63 ILL. 344, 346 (1872) (declaring that livery of seisin is abolished in the first section of Illinois Conveyance Act). The Conveyance Act of Illinois is discussed in more detail later in the article in part IV.
itself was sufficient to transfer real property. Before the Illinois Supreme Court in 1842, Lincoln attempted to test the waters of whether one could prove title without the evidence of a written deed in Mason v. Park. Lincoln argued for the appellee, Park, who claimed to be the owner of the land. Park accused Mason of cutting down timber on his property. Park wanted to recover damages for the loss of such timber from Mason. However, Lincoln did not proffer to the court a deed evidencing that Park owned the land; rather, Lincoln simply called a witness to prove Park’s good title. Because Lincoln failed to present a valid deed to the court, Mason requested that the lower court instruct the jury that the witness’s testimony, as to Park’s ownership of the land, was not competent evidence of title. However, the lower court refused to allow the instruction, and the jury found Mason liable for forty-eight dollars.

Mason appealed the lower court’s decision, which the Illinois Supreme Court reversed. Justice Treat wrote the majority opinion and laid out the general rule: A landowner needed to present the best evidence of title, which “is his deeds,” in order to be heard in a court of law. Justice Treat declared that a valid deed is “always presumed” to be “easily produced.” Therefore, it was reasonable to require a landowner to present such information, which remains true even today, and anything less than a deed is held as incompetent evidence of title. Thus, the Illinois Supreme Court ultimately found for Mason, and this case emphasizes that even Lincoln was subject to the superiority of the deed for land conveyance in the American legal system.

C. The Elements of a Deed in Illinois

The American legal system utilizes two basic types of deeds: the warranty and the quitclaim deed. While both warranty and quitclaim deeds are just as effective to transfer title from the grantor to the grantee, the warranty deed

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57. 765 ILL. COMP. STAT. ANN. 5/1 (West 2001) (formally ILL. REV. STAT. 1845, ch. 24, § 1).
58. See Mason v. Park, 4 Ill. 532 (1842).
59. Id. at 533.
60. Id.
61. Id.
62. Id.
63. Id.
64. Mason, 4 Ill. at 533.
65. Id. at 534.
66. Id. at 533-34.
67. Id. at 534.
68. Id.
69. Id.
70. CRIBBET, supra note 3, at 205. A hybrid form of these two types of deeds exists as well called a special or limited warranty deed. Id. A special or limited warranty deed basically contains either some of the “so-called usual” covenants, different covenants than the usual ones, or a combination of both. Id.
71. A grantor is one who conveys property to another. BLACK’S LAW DICTIONARY 720 (8th ed. 2004).
also offers promises called covenants of title made by the grantor as to the nature of the estate conveyed.\textsuperscript{73} No matter what type of deed one utilizes, the drafter must guarantee that the deed is legally enforceable. Unlike a contract for the sale of land that could be written or oral and still have the same effect,\textsuperscript{74} a written deed is indispensable, and therefore can never be oral.\textsuperscript{75} However, no formality that a deed even be called a “deed” is necessary in the writing.\textsuperscript{76} While the specificity of a deed might be a matter of the parties’ discretion, certain elements must be present in order to give the document legal effect. The general elements of a deed in Illinois are: identity of the parties,\textsuperscript{77} intent to convey the property by the grantor to the grantee,\textsuperscript{78} description, with certainty, of the property being transferred,\textsuperscript{79} and signature of the grantor.\textsuperscript{80}

III. CONSTRUCTION OF A LINCOLN DEED

A. Lincoln Deed

Blackstone’s \textit{Commentaries} on the drafting of a deed of land conveyance provides a good source of reference for the different clauses in the deeds Lincoln
wrote. 81 Blackstone first discussed the “premises” clause, which includes the names of the parties and the amount of consideration involved. 82 After the recital of consideration comes the “certainty of the grantor, grantee, and thing granted” (i.e. the granting clause and description of the land). 83 Lincoln also began a deed with this clause using very formal language such as “in the year of our Lord” and laying out the elements in the premises clause below:

This indenture made this twenty-seventh day of October in the year of our Lord one thousand, eight hundred and forty-eight, by and between Gershom Jayne and Sibyl Jayne, his wife, and Abraham Lincoln, and Mary Lincoln his wife, all of the city of Springfield, in the State of Illinois, party of the first part; and Pleasant Armstrong and John Yardly . . . party of the second part . . . That the said party of the first part, for, and in consideration of the sum of one hundred dollars to them in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold; and by these presents do grant bargain and sell unto the said party of the second part, the following described tract or parcel of land, towit: The North part of the North West fractional quarter of Section Three in Township Nineteen North of Range Seven West, of the Third Principal Meridian, situated in the county of Mason, and State aforesaid, containing forty-seven acres more or less. 84

This premises and granting clause actually encompass all of the essential elements described above needed to make a piece of paper rise to the level of a deed except for the signature of the grantor. 85 The habendum and tenendum clause follows, which translates literally from Latin “to have and to hold.” 86 The habendum clause sets forth the estate granted by this particular deed; thus, if the grantor intends to convey anything less than fee simple then this section operates to “le[ss]en, enlarge, explain, or qualify” the estate. 87 Lincoln used Blackstone’s language: “To have and to hold to the said party of the second part, their heirs and assigns forever, the above described tract of land, together with all and singular the privileges and appurtenances thereunto belonging.” 88 In this habendum clause, the words of limitation, 89

81. Even though there is no empirical evidence that Lincoln copied the structure of his deed directly after Blackstone, all Lincoln scholars agree that Lincoln’s legal education is derived from the teachings sketched out in Blackstone’s Commentaries. See generally SANDBURG, supra note 12, at 163.
82. 2 BLACKSTONE, supra note 75, at *298.
83. Id.
84. COLLECTED WORKS, supra note 6, at 13.
85. Since this deed is an indenture deed, both the grantee and grantor sign and seal the deed at the end. Id.
86. 2 BLACKSTONE, supra note 75, at *298.
87. Id.
88. COLLECTED WORKS, supra note 6, at 13.
“their heirs and assigns forever,” capture the intent of the grantor to divest a fee
simple interest to the grantee.90

A warranty deed ends with the clause of warranty where the grantor secures
to the grantee the condition of the estate granted.91 For example, Lincoln wrote,
“And the said Levi Davis . . . does covenant, grant bargain and agree . . . that at
the time of the insealing and delivering these presents well seized of the
premises above conveyed, as in fee simple . . . .”92 Finally, covenants of title
usually follow the warranty clause to provide title assurance, whereby the
grantor may stipulate to the veracity of statements made, which concern the
nature of the estate, and make further promises to perform certain tasks such as
repairing the property or defending the property if another attempts to argue he
has superior title to the grantee.93 Lincoln utilized the usual covenants94 by
assuring that the land was “free and clear of all incumbrances”95 . . . And that the
above bargained premises, in the quiet and peaceable possession of the said party
. . . heirs and assigns, against all and every person or persons, lawfully claiming
or to claim the whole or any part thereof, he will forever Warrant and Defend.”96

89. The words of limitation constitute the express words in the deed which indicate the
duration of the estate being conveyed. PETER T. WENDEL, A POSSESSORY ESTATES AND FUTURE
INTERESTS PRIMER § (3d ed. 2007). At common law, adequate words of limitation (“and her heirs”)
needed to be contained in the deed in order to convey a fee simple estate. Id.
90. Id.
91. 2 BLACKSTONE, supra note 75, at *300.
Abraham Lincoln wrote this deed dated October 6, 1851, to convey property from Levi Davis and
his wife to Abraham Lincoln in McLean County. Id.
93. 2 BLACKSTONE, supra note 75, at *304.
94. See CRIBBET, supra note 3, at 293 (listing the six usual covenants). At English common
law, the usual covenants were: against incumbrances, quiet enjoyment, good right to convey, and
further assurance. RAWLE, supra note 50, at 23. Unlike English common law, insertion of the
covenant of warranty both explicitly and in some cases implicitly is and has been commonplace in
American deeds. See id. at 39. For example, Illinois had and still has a statute referring to the
implied covenant of good title when the words “grant, bargain, sell” were used in the deed. 765 ILL
COMP. STAT. ANN. 5/8 (West 2001) (formally ILL. REV. STAT. 1845, ch. 15, § XI). Moreover, early
court decisions in Kentucky and Illinois seem to imply or require a covenant of warranty in the
deed even if the deed remained silent on such a promise. RAWLE, supra note 50, at 37-39 (citing
Steele v. Mitchell, 2 Ky. (Sneed) 37, 37 (1801); Clark v. Lyons, 25 Ill. 90, 91 (1860)).
95. The covenant against incumbrances promises freedom from any “right to or interest in the
land granted, to the diminution of the value of the land, but consistent with the passing of the fee.”
CRIBBET, supra note 3, at 294 (quoting Chief Justice Parson). Examples of what courts have
considered incumbrances: mortgages, judgment liens, taxes, life estates, etc. Id. at 295. Illinois
recognizes one’s outstanding dower rights as an incumbrance. McCord v. Massey, 39 N.E. 592,
593 (Ill. 1875) (citing Russ v. Perry, 49 N.H. 547 (1870)).
96. October 6, 1851 Deed of Conveyance to Abraham Lincoln, available at
http://www.lawpracticeofabrahamlincoln.org/Search.aspx at Document ID: 131207 (last visited
February 15, 2009). The covenants of quiet enjoyment and warranty are treated synonymously in
Illinois where the grantor promises to defend the grantee’s title against anyone who claims to hold
superior title. Biwer v. Martin, 128 N.E. 518, 522 (Ill. 1920); CRIBBET, supra note 3, at 295.
Lincoln wrote in another deed that the grantors “are lawfully seized, hav[ing] full right to convey.”

The seal and signature conclude the document, and Blackstone discussed the current trend at the time where “signing seems to be now as necessary as sealing, though it has been sometimes held that one includes the other.” This trend carried over and continued in Illinois until 1951, when the Illinois legislature finally abolished the seal. At the close of the document, the language “Signed, Sealed, Delivered” appears followed by the seal “LS” after the signatures.

Lincoln’s and Blackstone’s technique are similar in structure and language. Lincoln recited the formal language “in the year of our Lord” and “to have and to hold.” He also used the necessary common law words of limitation “heirs and assigns” throughout the deed. He began by setting out the names of the parties in the body of the deed and the property at issue in this conveyance using the government survey as a guide. He then concluded with the proper covenants of title, which served as title assurance to the grantee in the future.

If Blackstone ever wanted to sell Blackacre and hired Abraham Lincoln as the author of his deed, Blackstone would have felt secure that his intentions were properly executed and his deed contained formalistic phrases intertwined throughout the document.

B. Potential Problems with a Lincoln Deed

Lincoln occasionally litigated cases dealing with the issue of a conflicting granting and habendum clause. For example, in the case of Nave v. Bailey, the granting clause of the deed used the words of limitation “to their heirs and assigns,” which conveyed a fee simple absolute estate. However, the habendum clause stated “heirs and body forever,” so according to Illinois statutory law, the estate transferred was a life estate. The Illinois Supreme Court in Nave v. Bailey, 160 N.E. 605 (Ill. 1928), ruled that the words “heirs and body forever” created a fee tail at common law as conveying a life estate.
Court held that where the granting clause appears to transfer a fee simple absolute, and the subsequent clauses attempt to limit this intention, the granting clause prevails, and the court renders the subsequent clauses void. 108 This principle is known as the doctrine of repugnancy. 109 Nevertheless, the doctrine of repugnancy represents a doctrine of necessity, and it is only applicable in a very narrow setting when two clauses directly contradict each other. 110 Therefore, the intention of the parties should be found by looking at the deed in its entirety, and the courts will and prefer to harmonize and give effect to all the clauses if permissible. 111

IV. LEGISLATIVE SIMPLIFICATION: THE CONVEYANCE ACT PROMULGATING THE STATUTORY SHORT FORM

Before presenting the statutory short form, a brief history of the Conveyance Act in Illinois sheds light on the push to abridge the stylistic approach of the kind of deed Lincoln wrote. The Illinois legislature first adopted the Conveyance Act in 1827. 112 However, the Illinois Laws of 1845 repealed but it was readopted when the Illinois legislature passed the Conveyance Act of 1872. 113 Despite these repeals, the context of the Conveyance Act remained for the most part unchanged. 114 However, it was in the Illinois Laws of 1871-1872 that first codified this statutory short form of a warranty deed that is laid out below. 115 Therefore, Lincoln did not have the option to use or refer to this short form. 116

Illinois is not unique in creating a statutory short form of a deed. 117 Most state legislatures promulgated statutes similar in format to that of Illinois. 118 The statutory law acted as a response to the complexity and lack of uniformity of the common law. 119 However, statutory reform was not intended as a replacement of common principles; rather, the objective was to codify the common law in hopes

108. Welch v. Welch, 55 N.E. 694, 694 (Ill. 1899) (citing Riggin v. Love, 72 Ill. 553, 555 (1874)).
109. Smith v. Grubb, 84 N.E.2d 421, 425 (Ill. 1949). The courts will not use this doctrine if the granting clause neglects to include the words of inheritance. Id. Then, the court will give effect to every word in the deed. Id. at 425-26 (citing Noe. v. Moseley, 36 N.E.2d 240, 241 (Ill. 1941)).
110. Riggin, 72 Ill. at 556.
112. 765 ILL COMP. STAT. ANN. 5/1 (West 2001) (addressing the historical and statutory notes following the section).
113. Id.
114. Id.
115. 1872 Ill. Laws § 9, p. 282.
118. Id.; 1 PALOMAR, supra note 49, at 4-5; CRIBBET, supra note 5, at 1016.
119. NATIELSON, supra note 117, at 127.
of providing consistency and simplicity.\footnote{120}{Id.} Also, the legislatures wanted to promote effectuation of the parties’ intent better than the common law deeds that sometimes had contradictory language.\footnote{121}{See id.}

The format of the Illinois statute regarding the statutory short form is as follows: “[t]he grantor (here insert name or names and place of residence), for and in consideration of (here insert consideration), conveys and warrants to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the County of ________, in the State of Illinois.”\footnote{122}{765 ILL COMP. STAT. ANN. 5/9 (2001).}

Then there is a place for the date and the signature of the grantor.\footnote{123}{Id.} By utilizing this form of deed, the conveyance is automatically:

\begin{quote}
 deemed and held a conveyance in fee simple, to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was the lawful owner of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all incumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. Such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed.\footnote{124}{Id.}
\end{quote}

The effect of this statute is to grant a fee simple estate, yet the words of limitation “heirs and assigns” found in Lincoln’s deeds are not present.\footnote{125}{765 ILL COMP. STAT. 5/13 (West 2001) (formally ILL. REV. STAT. 1845, ch. 24, § XIII).} Illinois statutory law was based on the presumption that the grantor granted a fee simple estate even if he did not use the words “necessary to transfer” a fee simple estate at common law.\footnote{126}{Id.} Furthermore, the deed is not broken up into distinct clauses, each with its own objective; rather, the statutory short form deed sets out the necessary elements, which conclude the substance of the deed.\footnote{127}{See CRIBBET, supra note 5, at 1018.} Therefore the covenants of title, rather than explicitly stated as with the common law deed, are automatically read into the deed.\footnote{128}{See, e.g., id. at 1020.} While Lincoln gave his clients deeds containing formalistic and poetic language with separate clauses addressing a different matter concerning the type of estate conveyed, the statutory short form requires the author of a deed to get to the point. The
statutory deed only requires a recital of the essential elements, thus preferring simplicity and the effectiveness of each word over form. An example of how the shorter statutory form promotes effectiveness of the words more than a common law deed with multiple clauses is shown through the doctrine of repugnancy discussed above. This common law rule, regarding interpretation of conflicting clauses in deeds, is unnecessary when one uses a statutory short form deed. First, the granting clause and subsequent clauses of the common law deed use words such as “heirs and assigns forever;” statutory law does not contain such language. So the presumption is always that the deed is fee simple absolute unless there is a clear intention on behalf of the parties, by using express words to convey a lesser estate. Second, because the statutory short form is comprised of one clause instead of several broken up sections, conflict between clauses does not represent a source of potential litigation.

V. LEGAL CHANGES AND SIMILARITIES FROM LINCOLN’S TIME TO PRESENT

A. Abolition of the Seal

Besides a difference in form, have the elements of these two deeds changed from Lincoln’s time to the present? “Earlier writers have said that ‘law is reason’ and have gone further and said that ‘where the reason for the rule fails, the rule should also fail.” One difference between Lincoln’s deed and the statutory short form deed is the seal, which has been used as a mark of authenticity to written deeds and other written tools since ancient times. The presence of a seal in Lincoln’s deed was not a matter of discretion; rather, the seal represented an element that had to be within a deed for the sale of land to make it legally valid.

In 1951, the Illinois legislature changed the Conveyance Act abolishing the use of a seal after the signature in a deed, thus bringing the “long, long history of the private seal . . . to a close.” Logically, this change makes sense,
because, as stated above, the reason for the rule seems futile. If the objective of a deed is to show the parties’ intention to convey property, then how does a seal along with a signature emphatically solidify this goal any more than a signature alone? The seal and signature serve the same purpose, thus making the presence of both inefficacious and groundless. For example, the absence of a seal does not make a reasonable and objective reader question the viability of a deed if a valid signature already appears on the document.

B. Different Structure, Same Standard for Interpreting Deeds: The Parties’ Intentions

If a dispute arises between the grantor and the grantee as to what the deed grants, regardless whether the parties employ a deed resembling Lincoln’s style or a statutory short form, the standard the courts use has always been: the intention of the parties as revealed in the deed. Therefore, the courts will give meaning to each word and term within the deed and reject none as futile in order to establish the parties’ true intentions as long as two clauses do not contradict each other. If a word or condition is left out of a deed, the courts will construe from the silence of the deed that the parties did not want to subject themselves to that word or condition.

Some, in order to ensure the intent is clear, may go as far to use formalities that are no longer required. For example, lawyers in Illinois continued to use the seal even after the legislature abolished the requirement. “When there has been a statutory change there is no basis for the argument in such a situation that a lawyer should play safe by retaining the established commonly used form.” On the other hand, one runs the risk of causing ambiguity and even contradiction in a deed by the use of multiple clauses within the instrument. The lesson that one can learn from a Lincoln style of deed continues to hold true with drafters of deeds today: when an author of a deed wants to capture the intent of his client by

along with the signature in order for a deed sufficient and enforceable. , supra note 49, § 353, at 178-180.

140. A signature is loosely defined and can be any writing such as a seal that the grantor uses intending to bind him. 1 PALOMAR, supra note 49, § 353, at 178. Therefore, any mark or even seal that the grantor intends to legally bind him will suffice even if not signed by him. See White Eagle Laundry Co. v. Slaweck, 129 N.E. 753, 754 (Ill. 1921) (holding that when a grantor in a deed authorizes another to sign for him, it becomes binding on the grantor as if he had signed the deed himself).

141. Patton v. Vining, 150 N.E.2d 606, 607 (Ill. 1958) (“A deed speaks for itself and its construction is dependent upon the language used.”) (quoting Law v. Kane, 52 N.E.2d 212, 214 (Ill. 1943)).

142. Law, 52 N.E.2d at 214.

143. Id.

144. Id.

145. Ward, supra note 139, at 172.
reserving a condition or limitation within the deed, careful drafting was essential, and clear-cut and consistent language avoided litigation.146

VI. CONCLUSION

Abraham Lincoln had an accomplished career as an attorney dealing with real estate conveyances.147 Examination of Lincoln’s problems in drafting helps today’s lawyers under the movement to simplify the law regarding deeds. At common law, two clauses might contradict each other, and the legislative solution: make a deed that only has one clause.

Although the statutory short form deed lacks the eloquent and formalistic language used by Lincoln and taught by Blackstone, state legislatures have made an attempt to give each word more effect. The statutory short form also seems to hold judicial approval. The standard that courts in Illinois use in interpreting deeds has always been to derive the parties’ intent whether looking at a more formalistic deed or a statutory short form, and the argument is that the intent becomes clearer to the courts when dealing with fewer words and clauses to decipher. But even after creation of the short form deed, the elements of a valid deed have remained for the most part unchanged. The abolishment of the seal represents the only major legal change between the two deeds.

However, before one becomes caught up believing that any drafter of a deed who does not use the statutory short form an imbecile and should have a legal malpractice suit thrown at him, think about this: is not the objective of a lawyer to leave “no room of doubt, no room for quarrel”148 when drafting documents such as a deed for clients? A lawyer does not want to have the reputation as the one who could not properly embody his client’s intent, thus resulting in his former client losing time and money in a lawsuit. Therefore, perhaps not trusting the short form deed, some lawyers prefer to continue to use older language that the courts have given meaning to even if it is no longer a requirement.149 In doing this they have unwittingly preserved some of the same language Lincoln used.

146. 2 FriedmAn, supra note 74, § 8:15.
147. See Steiner, supra note 7, at 76–81.
148. Locke, supra note 1, at 31.
149. See Ward, supra note 139, at 172.