

Lincoln at Gettysburg: The Birth of the Modern Constitutional Order

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Introduction

Lincoln is best known for defending the Union against the threat of disintegration. My topic today, however, is not on how Lincoln defended the existing constitutional order. Instead, I would like to talk about how he helped transform our constitutional order into its modern form. In a very real sense, Lincoln completed the work of the Founding Fathers and gave us the constitutional system that we have today.

The Gettysburg address can be seen as the fulcrum of this story. Lincoln's speech only took place because of a constitutional crisis that split the country and the unprecedented powers assumed by the federal government during the crisis. But the speech was not only a response to these past developments, it also articulated a vision for the future – a vision that undergirded crucial amendments to the Constitution in the years ahead.

I'll talk first about the constitutional issues that were posed on the way to fighting and winning the battle of Gettysburg. Then I'll talk about the constitutional vision embodied in the speech itself.

II. Getting to Gettysburg

A. The Nature of the Union.

The leaders on both sides of the Civil War had very different visions of America, both in terms of the place of slavery in our society and in terms of the very nature of the Union. The Southern vision was encapsulated in a speech shortly after Fort Sumter, in which Jefferson Davis defended the constitutionality of secession. During the American Revolution, Davis said, the British threat to American liberty led to a close alliance – something like NATO today -- under which each state expressly retained its sovereignty. The war was won by this “contract of alliance.” In 1787, the states then appointed delegates to the Constitutional Convention, and those delegates negotiated what Davis called “a compact between independent States.” State sovereignty, Davis said, was then reaffirmed in the Tenth Amendment. But a heresy arose in the North, according to Davis – a heresy that viewed the Constitution not as a compact of states but rather as “in effect a national government.” Despite the Constitution’s support for slavery, according to Davis, the Republicans sought to stamp it out, in violation of the original compact, and the Southern states were forced to secede.²

Lincoln’s view of the Constitution was very different, and it was this view that undergirded the Union war effort. Lincoln insisted that the “Union is older than any of the States; and, in fact, it created them as States. Originally, some dependent colonies made the Union; and, in turn, the Union

threw off their old dependence, for them, and made them States. . . .” For, Lincoln said,

Much is said about the “sovereignty’ of the States; but the word, even, is not in the national Constitution; nor, as is believed, in any of the State constitutions. . . . The states have their *status* IN the Union, and they have no other *legal status*. If they break from this, they can only do so against law, and by revolution.”³

Similarly, in his First Inaugural, Lincoln said:

I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuation is implied, if not expressed, in the fundamental law of all national governments . . .

Lincoln traced the Union back to 1774 and then to the Declaration of Independence. Then, Lincoln said, the Union was strengthened by the Articles of Confederation, which were declared to be perpetual, and by the Constitution, which sought a “more perfect Union.” Next comes the critical point: “But if the destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity.”⁴ If the Articles of Confederation was perpetual, and the Constitution created an even more perfect union, then the Constitution also had to provide for a perpetual bond.

How was it possible for intelligent people to hold such diametrically opposing views? The problem was that the Framers of the Constitution themselves were never completely clear about the nature of the “more perfect Union” they were creating. Even during the Constitutional

Convention, the Framers debated whether separation from England had created “separate sovereignties,” which had then confederated, or whether independence was a collective action. And indeed, the historical record is not unambiguous. The Declaration of Independence speaks in the plural, declaring the colonies to be “Free and Independent States.” But no colony declared independence or adopted its own constitution without being authorized first by the Continental Congress. The Articles of Confederation spoke in terms of a league between independent states. But Madison viewed this as one of the main flaws of the Articles: the Union being regarded as a “league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power.”⁵ One purpose of the Constitution was to establish a firmer national bond, but just how firm was less than crystal clear.

In Federalist 39, Madison emphasized the messy, mixed nature of the new government. The proposed Constitution,” he said, “is, in strictness, neither a national nor a federal Constitution, but a composition of both.” (By “federal” he meant the states acting in federation; by “national” he meant the independent sovereignty of the country as a whole.) As Madison explained, the Constitution combined some features of each. “In its foundation,” Madison said, “it is federal, not national.” But “in the sources from which ordinary powers of the government are drawn, it is partly federal and partly

national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national.” Finally, according to Madison, the amendment process “is neither wholly federal nor wholly national.” Thus, as Madison recognized, the Constitution provided no simple answer about the location of sovereignty in the states versus the federal government.

After the Constitution went into effect, these highly theoretical disputes about the location of sovereignty were reflected in very practical disputes about federal supremacy. In particular, did the Supreme Court or state officials have the last word on Constitutional issues? Under the leadership of Chief Justice Marshall, the Supreme Court took the position that it had the final word regarding the validity of state laws under the Constitution. Beginning with the Virginia and Kentucky Resolutions, Southern constitutionalists sought to create a space for independent constitutional judgments by states. But equally striking is the insistence of some leading state courts that the Supreme Court had no power to review their judgments. For example, the Virginia Supreme Court insisted long before the Civil War that, because the state and federal governments are “separate from, and independent of, each other,” each “must act by *its own* organs: from no other can it expect, command, or enforce obedience, even as to objects coming within the range of its powers.”⁶ Not too surprisingly, the U.S. Supreme Court

said it begged to differ with this view.⁷ But the extent of the Supreme Court's authority over state officials remained controversial in a way that is hard to understand today.

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

These debates may seem very remote from today's world, but the nature of the federal government and the status of state sovereignty remain very much under debate today. In the courts, these debates often involve abstruse question of state immunities from being sued. But states' rights still form a battle cry for those who oppose new federal initiatives, whether in the form of Obamacare or action against climate change. Lincoln and his

generation established that the United States is indeed a nation, but the nature of American nationhood remains in dispute.

B. Presidential Power

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

Indeed, Lincoln’s own staff was minimal. He had two secretaries and the White House doorman at his command, compared to the bustling West Wing of today.⁸ The customary scope of presidential activity is indicated by the fact that Congress did not appropriate funds for White House staff until 1857. It was well after Lincoln’s death that the size of the White House staff reached six!⁹ It’s little wonder that Lincoln’s predecessor felt powerless to halt secession.

After the fall of Fort Sumter, Lincoln took decisive action. He issued a proclamation calling out the militia, based on a finding that the execution of the laws was blocked by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by law” – an understatement if there ever was one!¹⁰ Lincoln called for 75,000 troops, and just over a week later proclaimed a blockade of Southern ports. Lincoln also took other bold steps. He expanded the regular army by ten regiments and ordered the enlistment of 18,000 additional sailors. He directed the Navy to obtain and arm fifteen steamboats. Finally, he authorized the Treasury to advance \$2 million to private citizens for use in recruiting troops. Later, of course, Lincoln would make the boldest use of executive power in history in the form of the Emancipation Proclamation, freeing millions of slaves and thereby striking a deathblow at an institution that the Constitution itself acknowledged.

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

But these were isolated examples. Nothing like the current activist presidency persisted on any regular basis.

This was little wonder, because the Constitution itself was tight-lipped if not cryptic about the scope of presidential powers. When we look at the modern presidency and then look at the text of the Constitution, it seems amazing that so much should have grown from so little. I realize that the Constitution isn't most people's idea of light reading. But it's worth taking a close look at exactly what the Constitution had to say about the powers of the president.

Article II of the Constitution is devoted to the presidency. It begins by saying that the "executive power" is vested in the president, which would be more illuminating if the Framers had offered a definition of the executive power. Almost half of Article II is devoted to the mechanics of the office: election procedures, qualifications for office, salary, and so forth. The first section of Article II ends with the oath of office, calling upon the president to "preserve, protect and defend the Constitution of the United States." The next two sections of Article II combined are about half as long and contain a laundry-list of presidential powers, most notably the commander-in-chief power and the duty to "take Care that the laws be faithfully executed." Also listed are the power to make treaties and appoint key officials (but only with Senate approval), to issue pardons, to give the State of the Union address, to

receive ambassadors, and to demand the opinions of cabinet officers in writing. Lest these powers be unchecked, Article II closes with a section establishing procedures for impeachment.

That's about it: you could read the whole of Article II aloud in about two minutes. From that small acorn sprang the might oak of the modern Presidency.

How *did* the Framers envision the presidency? On the one hand, Article II, vests the presidency with the “executive power,” which sounds weighty, not to mention the power to command the armed forces (though the military is subject to a good deal of congressional control elsewhere in the Constitution). On the other hand, one might question whether the presidency was such a big deal. Apparently, the framers felt that they had to give the president express authority just so he could get his subordinates’ written opinions or recommend legislation to Congress. Without that express authority, apparently, his subordinates could have thumbed their noses at his requests for written advice and he would have been unable to address Congress. The implication seems to be that the general powers of the office were considered to be less than awesome.

Statesmen and scholars alike have been debating the scope of the office ever since. Robert H. Jackson, one of the great Supreme Court Justices of the mid-Twentieth Century and a former Attorney General under Frank D.

Roosevelt, once summarized the debate as follows: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.” Justice Jackson added that “a century and a half” – now it’s been over two centuries – “of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.”¹¹

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

I do not mean to say that the modern presidency is a pure invention by Lincoln or anyone else. But as originally described in the Constitution, the office of the presidency was an ambiguous potentiality rather than a defined instrument. Lincoln was far from being the only president who helped shape the modern presidency, but he was among the earliest and the greatest. It was he who first made the full potential of the office manifest. For better or

worse, then, he bears much of the responsibility for what the presidency has become today.

In the past few years, there has been a great debate over whether the current President has stretched the powers to the breaking point. But no one doubts that presidents rightfully exercises far greater powers than any of Lincoln's predecessors would have dreamed of. The modern presidency is a key part of Lincoln's legacy.

This is not to say that the scope of presidential power has faded from public debate. Just as Lincoln was called a dictator by his critics, so too today. Liberal critics said that President Bush was usurping power with his signing statements, his authorization of waterboarding, and his use of Guantanamo. Conservative critics say the same thing about the Obama's actions on climate change and his immigration order.

C. The Scope of Congress's Power

During the Civil War, Congress expanded its use of its authority dramatically, far more than ever before. Some of this was due to the needs of the war, other parts were simply because of the political situation. Back then, the Democrats were the party of small government, and the Republicans and their predecessors, the Whigs, favored a muscular federal government. Before the War, Congress was gridlocked, much as it is today, and didn't pass much significant legislation. But with so many Democrats absent from

Congress due to secession, the Republicans were free to enact their own program.

One of the achievements of the Lincoln years was the passage of the National Banking Acts of 1863 and 1864. Until then, the national currency supply was a mess: a hodgepodge of bank notes issued by state-chartered banks. The many different notes caused create confusion, and their value depended on the varying creditworthiness of the banks involved. The country needed a unified monetary system. The new national banks were authorized to issue national bank notes, backed by U.S. government bonds. The old state bank notes were wiped out a couple of years later when Congress imposed a tax on them.

The Legal Tender Act of 1862 had already authorized the issuance of paper money, so-called greenbacks. Over \$400 million in greenbacks were issued to help finance the war. The constitutionality of paper money was hotly disputed, and in 1870 the Supreme Court held it unconstitutional before quickly changing course the following year. Ironically, the 1870 decision was written by Chief Justice Salmon Chase, who had helped create the greenbacks as Lincoln's Secretary of Treasury. Paper money, as it turned out, was here to stay. Thus, the contents of wallets today are a historical product of the Lincoln years.

Congress also took steps to support the growth of the West. It opened the West to public settlement with the 1862 Homestead Act. Settlers could receive 160 acres of federal land by investing five years in farming and building a house on the land. By the end of the decade, tens of thousands of new farms would be created. The year 1862 also saw the creation of the Department of Agriculture, which distributed new types of seeds and circulated scientific information to farmers.

The government also finally made a move, after years of debate and discussion, to connect the West and East by railroad. The builders of the transcontinental railway were awarded over 25 acres of public lands for every mile of track. Government bonds were also issued to the companies to help finance their construction. In short, the transcontinental railroad was built with massive federal subsidies. Lincoln signed the authorizing legislation on July 1, 1862

In 1862, Congress also stepped into the area of education with the passage of the Morrill Act. The land-grant universities were financed by giving each state a thirty thousand acres of federal land for each of the state's members of Congress. The land could then be sold to pay for creating the universities, making the funding roughly proportional to population. The main purpose of the universities was to promote practical education in agriculture and industry. Over seventeen million acres of land were

distributed, adding up to over \$7 million. A previous version of the law had been vetoed by President James Buchanan, a Democrat who argued that the law exceeded Congress's enumerated powers and invaded the constitutional prerogatives of the states. Universities such as Cornell, Rutgers, Illinois, Michigan, Minnesota, and Cal, among others, were supported by this initiative.

Another innovation was the creation of the federal income tax. It applied to all incomes over \$300 per year, later raised to \$600. The latter figure was about the average income of urban workers, so most people did not have to pay the 3% tax. More money was actually raised from a massive excise tax that applied to the manufacturers and sellers of a huge range of goods and services, from agriculture to the professions. This 1862 law was the longest, most detailed law passed by Congress till that point.

The railroad system was crucial to the war effort since it allowed troops and supplies to be quickly moved around the country. Lincoln obtained legislation authorizing him to take control of the railroads. He was able to get enough leverage through the law that he never actually had to take formal control. When he and other officials met with railroad executives to discuss the need to standardize operations and keep rates low, a casual chat about the government's power was enough to make sure that the railroads got the message.

The creation of the Civil War pension system was also a notable accomplishment. Pension were originally granted to disabled veterans and the widows and children of war casualties, but the system gradually expanded over the next forty years until it provided retirement and survivor's benefits.

Civil War pensions were the Social Security system of their day. At its peak, the Civil War pension system accounted for nearly half the federal budget and was the largest department of government. The last Union veteran receiving a pension died in 1956. There is still one surviving recipient of a Civil War pension, Ms. Irene Triplett, who was born in 1930 to the second marriage of a Civil War veteran to a much younger second wife. Modern historians see the Civil War pensions system as providing an important precedent for Social Security.

These measures set the precedent for a great deal of modern legislation. Some of them, like the income tax law and the use of paper money, were also essentially to successfully running the war effort. Without them, it might have been Jefferson David, not Abraham Lincoln, speaking at Gettysburg that day.

III. Protecting Rights

A. The Human Rights Gap in the original Constitution

The original Constitution contained very little in the way of express guarantees of liberty. The states and the federal government were forbidden to engage in the impairment of contracts, or to pass ex post facto laws. The rights of jury trial in federal criminal case and of federal habeas corpus were established. Religious tests for office were forbidden. That was about all.

When the first ten Amendments were added to the Constitution soon after Washington took office, the list of rights was expanded. The Bill of Rights added important rights such as free speech, the right to remain silent, and freedom from unreasonable searches. But these rights applied only to the federal government. I have learned from experience in teaching constitutional law that this comes as news to most people; that in itself is a sign of how far constitutional law has come since the founding era. So let me emphasize this point. As far as the original Constitution and Bill of Rights were concerned, states were largely free to do whatever they wanted to their own citizens: suppress speech, establish a state religion, authorize unlimited searches, utilize torture, or whatever. The assumption was that the states generally could be trusted to police themselves; federal law provided little restraint.

Madison himself felt keenly that this was a mistake. During the Philadelphia Convention, he was deeply mistrustful of the states. He pressed hard but unsuccessfully for a federal veto over state laws. When the

Constitutional Convention ended without including such a federal veto, he was pessimistic about its future prospects. He predicted to Thomas Jefferson that the Constitution would “neither effectuate its national object nor prevent the local mischiefs which everywhere excited disgust against state governments.”¹² Madison’s initial version of the Bill of Rights tried to remedy this gap by protecting key rights from the state governments. His proposed language was that “No state shall infringe the right to trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press.”¹³ To his great disappointment, the restriction on the states failed to make it into the final version of the amendment.

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

B. The First Step: Lincoln and the Thirteenth Amendment

The Thirteenth, Fourteenth, and Fifteenth Amendments finally remedied this situation and completed Madison's Constitution by providing legal protection for human rights against state government. Lincoln was alive only for the initial step of this process, the passage of the Thirteenth Amendment. Certainly, much of this process had nothing to do with Lincoln and was not even envisioned by him. But he did play a pivotal role. He was deeply involved in the critical first step of passing the Thirteenth Amendment. And he articulated a vision of American freedom that would underlie later constitutional changes.

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

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

III. The Fourteenth Amendment and the Gettysburg Vision

The Thirteenth Amendment was only an initial step in the campaign to make freedom national. Lincoln’s *practical* role was a limited but significant one, at the early stages of the process.

In the end, Lincoln’s role as a constitutional visionary may have been more important than his specific efforts on behalf of the Thirteenth Amendment. The later amendments came after his death, but they reflected a vision that he had championed, a vision of the rebirth of freedom in a house no longer divided.

He encapsulated that vision at Gettysburg, and it is instructive to line up some of his words at Gettysburg with the later constitutional amendments. I want to start just with the key language of the Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Let's look at how Lincoln anticipated these key concepts.

- Lincoln emphasized the American nation (“a new nation,” “this nation”). Correspondingly, the first sentence of the Fourteenth Amendment conveys *national* citizenship on all who are born here, making *state* citizenship a mere byproduct. The immediate effect of the first sentence was to overrule the *Dred Scot* case.
- Lincoln spoke at Gettysburg of the nation as “conceived in Liberty.” Likewise, the due process clause of the Fourteenth Amendment forbids the deprivation of life, property, or *liberty* without due process of law. The due process clause’s protection of liberty has been the basis for all the Supreme Court decisions protecting specific rights like free speech or the right to a fair trial from state governments.
- Lincoln also spoke of that nation as “dedicated to the proposition that all men are created equal.” The Fourteenth Amendment guarantees all citizens alike “the privileges or immunities of citizens of the United States” and the “equal protection of the laws.” The Equal Protection

Clause was the basis for declaring racial segregation to be unconstitutional and for imposing the “one person, one vote” principle on the states.

- Lincoln spoke of a “new birth of freedom,” and the Thirteenth Amendment abolishes slavery; he spoke of government “by the people,” and the Fifteenth Amendment guarantees the right to vote. The similarities are unmistakable.

In short, the Gettysburg Address was not only a great piece of oratory, a soaring rhetorical performance. It was also a vision that prefigured the new constitutional amendments that came out of the Civil War. Those amendments are at the heart of modern constitutional law. Lincoln’s reminder that the nation was conceived in liberty and dedicated to the proposition that all men are created equal, was echoed a century later in Supreme Court decisions ending racial segregation and defending the right of free speech. His Gettysburg proclamation of government of and by the people found reality when the Supreme Court proclaimed the doctrine of “one person, one vote.”

In his opening words at Gettysburg, Lincoln portrayed the nation as dating to the Declaration of Independence “four score and seven years ago.” He thus re-centered American nationhood in the Declaration rather than in Madison’s Constitution of 1787 (which would have been three score and

sixteen years earlier). Lincoln thereby reoriented our vision of nationhood from being a purely utilitarian bargain to a solemn commitment to liberty and equality. The Constitution aims at practical and often mundane ends, ranging from national defense to the post office. But standing behind these practical purposes, Lincoln saw a deeper goal of promoting human rights.

In this vision of America, the germ of future constitutional change was already present at Gettysburg. Lincoln had already presided over some major constitutional developments, including the defeat of secession, the expansion of presidential power, and the exercise of broad legislative authority by Congress. Lincoln surely did not foresee the constitutional developments that were to come after his death. Yet, he helped set the stage for a transformation of the constitutional order. The upshot was to be a new constitutional regime, one that fulfilled Madison's dream of constitutional protection against human rights abuses by state governments. Many people contributed to the realization of that constitutional regime in the century after Lincoln's death. But Lincoln deserves credit for his part in setting the process in motion.

Today, nearly everyone accepts the idea of racial equality. But the meaning of that ideal remains hotly contested, with some viewing it as a mandate for affirmative action and others as a prohibition. Yet, in Lincoln's time, many would have rejected the mere idea of racial equality. Lincoln's

achievement was to begin to redeem the promise of the Declaration of Independence that “all men are created equal.”

Conclusion

It is hardly an arresting new insight to see Lincoln and his era as a turning point in American constitutional law. What is striking, however, is the extent to which Lincoln’s accomplishment was more than just a defense of the existing constitutional order. Instead, Lincoln took the lead in filling critical gaps and ambiguities in the Constitution bequeathed by Madison and his generation. Our pledge of allegiance speaks of “one nation . . . indivisible, with liberty and justice for all.” But neither the true nationhood of the United States, nor its indivisibility, nor its commitment to “liberty and justice for all,” were obvious when Lincoln took office. It was similarly unclear whether the one significant, nationally elected officer of the federal government, the president, would play a decisive role in government.

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

Lincoln at Gettysburg

NOTES

¹ Sho Sato Professor of Law, University of California at Berkeley. More background on many of the issues discussed in this lecture can be found in Daniel Farber and Suzanna Sherry, *A History of the American Constitution* (3d ed. 2013).

² Jefferson Davis, Message of April 29, 1861, to the Provisional Congress.

³ Special Message to Congress, July 4, 1861 in Don E. Fehrenbacher (ed.), *Lincoln: Selected Speeches and Writings* (Vintage Books 199), p. 3109 (hereinafter SSW).

⁴ SSW 286-287.

⁵ Daniel A. Farber, *Lincoln's Constitution* (University of Chicago Press 2003), pp.35-36. (hereinafter LC).

⁶ *Hunter v. Martin*, 18 Va. 1, 4-9 (1814) (Cabell, J.)

⁷ *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

⁸ LC 145.

⁹ LC 118-119.

¹⁰ Proclamation Calling Militia and Convening Congress (SSW 296).

¹¹ *The Steel Seizure Case*, 343 U.S. 579, 634-635 (1952).

¹² Quoted in Michael P. Zuckert, *Completing the Constitution: The Thirteenth Amendment*. 4 Const. Comment. 259 (1987).

¹³ Zuckert 261.

¹⁴ SSW 440-441.

¹⁵ Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (2001), p. 198.

¹⁶ Vorenberg, 198-206.

¹⁷ Response to Serenade, Washington, D.C., SSW 446.

¹⁸ Speech on Reconstruction, April 11, 1865, SSW 458.