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Abstract

Like the business cycle, the reputations of great actors in history seem to go through alternating periods of boom and bust. Harry Truman was scorned in his day as an incompetent bumbler. A half-century later, he is regarded as a gutsy and principled president. Andrew Jackson was hailed as the champion of the common man and the enemy of power-mad bankers. Since the 1970s, he has become the champion only of the White man, a rancid hater of Indians, and a leering political monstrosity. John Quincy Adams was, for more than a century after his death, dismissed as a dyspeptic holier-than-thou; however, a single book, William Lee Miller's *Arguing About Slavery*, and a single movie, Steven Spielberg's *Amistad*, re-made him into an apostle of the American anti-slavery conscience. Perhaps this shows only that historical reputations may be made of the same stuff as markets, and that over-investment and over-extension always leads to collapse and recession. Or perhaps it shows that the only way the attention of a generation can be grabbed by historians is to contradict, as loudly as possible, the historical certainties of the preceding one. [*excerpt*]

Keywords

Abraham Lincoln, Civil War, Emancipation Proclamation, Slavery, Freedom, Confiscation, Slave, Property, Anti-Slavery, African American

Disciplines

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Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era

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Like the business cycle, the reputations of great actors in history seem to go through alternating periods of boom and bust. Harry Truman was scorned in his day as an incompetent bumbler. A half-century later, he is regarded as a gutsy and principled president. Andrew Jackson was hailed as the champion of the common man and the enemy of power-mad bankers. Since the 1970s, he has become the champion only of the White man, a rancid hater of Indians, and a leering political monstrosity. John Quincy Adams was, for more than a century after his death, dismissed as a dyspeptic holier-than-thou; however, a single book, William Lee Miller's *Arguing About Slavery*, and a single movie, Steven Spielberg's *Amistad*, re-made him into an apostle of the American anti-slavery conscience. Perhaps this shows only that historical reputations may be made of the same stuff as markets, and that over-investment and over-extension always leads to collapse and recession. Or perhaps it shows that the only way the attention of a generation can be grabbed by historians is to contradict, as loudly as possible, the historical certainties of the preceding one.

Either way, no historical figure carries an exemption to this, and that includes Abraham Lincoln. From being the Great Emancipator, Lincoln has fallen to being a half-hearted emancipator whose decision to free the slaves was dictated by political expediency, his passion to save the Union, or the opportunity to recruit Black bodies to fill Union ranks and save White ones. It is difficult to pick up any survey textbook of the Civil War era today and not find one or more of these motives attached to Lincoln as the "real" reason why he issued the Emancipation Proclamation or to hear, repeated over and over again,

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Richard Hofstadter's cynical dismissal of the Proclamation as having "all the moral grandeur of a bill of lading."¹ At best, Lincoln gets one-handed applause for being an astute reader of the political tea-leaves; at worst, he is an opportunistic racist whose Proclamation was extorted from him by circumstances or by multitudes of self-emancipating runaways.

Professor Fabrikant's lengthy and careful legal analysis of Congressional emancipation places him securely within this new consensus.² Although Professor Fabrikant is anxious to avoid identification with the most extreme statements of the Lincoln-haters, at the end of the day he nevertheless comes to almost the same conclusion as Lerone Bennett (of *Ebony* magazine fame): Lincoln's contribution to emancipation has been vastly over-rated, and the contributions of Congress (principally through the Confiscation Acts) and the "contrabands" (through self-emancipation) correspondingly under-rated.³ Fabrikant argues that:

- a) Lincoln's Emancipation Proclamation was "redundant with legislation already enacted by Congress"⁴ so that the Proclamation was merely ratifying what Congress, with far better motives, had achieved through legislation. According to Professor Fabrikant, Congress had recognized that the Civil War created a new constitutional and statutory environment which permitted seizures and confiscation of private property that otherwise would have remained inviolate, and thus marched past Lincoln, who only seemed worried about constitutional niceties which the war had rendered irrelevant; and
- b) that the Proclamation was redundant because it amounted in practical terms to no more than Lincoln's recognition of a *fait accompli* by the slaves, who freed themselves by deserting the Confederacy to claim freedom behind Union lines or in the Union army. This "self-emancipation by fugitive slaves" was "widespread and irreversible well before the Proclamation was issued."⁵

1. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 130 (6th prtg. 1985).

2. See Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 49 *How. L.J.* 313 (2006).

3. See LERONE BENNETT JR., *FORCED INTO GLORY: ABRAHAM LINCOLN'S WHITE DREAM* 624 (2000).

4. Fabrikant, *supra* note 2, at 314.

5. *Id.*

As one final note, Fabrikant adds that the reputation of the Proclamation cannot even be salvaged as a humanitarian gesture because of Lincoln's "racialism" and "many other reasons."⁶ Fabrikant is aware that Lincoln himself put a very different construction on all of these matters, but Fabrikant insists that Lincoln's own protestations are not to be admitted as qualifying evidence because he was "correspondingly short on candor."⁷

Let me say at the outset that Professor Fabrikant is certainly correct in understanding that the war posed two significant questions on the path to emancipating slaves and abolishing the institution:⁸

- 1) Did the Constitution bar the federal government from interfering with slavery in states where it was legalized, and did this change with the war situation?
- 2) Was "the Union . . . obligated to comply with the constitutional and statutory provisions" which mandated the capture and rendition of fugitive slaves, and did this situation also change with the war?⁹

Professor Fabrikant says that in both cases the Civil War *did* change the nature of these obligations. He offers as his principal legal proof the U.S. Supreme Court decision in the *Prize Cases*, a combined suit by the owners of ships and cargoes seized as prizes by the federal naval blockade of the Confederacy in 1861.¹⁰ Under the conventions of war, a blockade was an interdiction imposed by one sovereign nation on the commerce of another sovereign nation on the high seas.¹¹ But Lincoln insisted, from his inaugural address in March 1861 onwards, that the secession of the Southern states (to form the Confederate States of America) was unconstitutional, and therefore legally null and void; hence, the Confederate States of America could not be a sovereign nation, but was only a domestic insurrection.

Unhappily, the proper response under international law to a domestic insurrection was a "closure of ports" by the sovereign nation,

6. Fabrikant *supra* note 2, at 316.

7. *Id.*

8. Which, incidentally, is a distinction Professor Fabrikant does not make, but which will offer serious complications in situations where slaves are freed at a given moment, but slavery itself is allowed to remain legal for the future. That problem, however, lies separate from Professor Fabrikant's focus on the Proclamation, and so will not be further explored in this short space.

9. Fabrikant, *supra* note 2, at 317.

10. *Id.* at 319.

11. HENRY SUMNER MAINE, INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE, 1887, at 68 (1887); *see* STEPHEN R. WISE, LIFELINE OF THE CONFEDERACY: BLOCKADE RUNNING DURING THE CIVIL WAR 24-25 (1988).

which is a much weaker measure. Lincoln might have called for a “closure of parts,” but that would have negligibly affected the Confederate war effort, compared to the tight seal formed by a full-scale blockade.¹² Lincoln decided to straddle the fence, insisting that the Confederacy was only an insurrection, and imposed a blockade anyway.¹³ Almost immediately, this brought a concession of belligerent rights to the Confederacy from Great Britain, and the spate of federal lawsuits which became the *Prize Cases*. It also allowed the federal Navy to strangle the Confederacy’s commerce, and in 1863, the Supreme Court ruled against the plaintiffs in the *Prize Cases*,¹⁴ which signaled to the Lincoln administration that it could have its cake and eat it too.¹⁵ This, for Fabrikant, suggests that if prizes on the high seas could thus be confiscated then: (a) the “war situation” would also permit wide-spread confiscation of slave “property”; (b) Lincoln’s hesitations about moving to emancipation through confiscation were groundless; and (c) that Congress, by moving first to confiscate slave “property,” was far ahead of Lincoln’s curve toward emancipation.¹⁶

However, there are two major problems, one short and one long, with this reasoning and with Professor Fabrikant’s argument as a whole. First, the short one: the *Prize Cases* was not decided by the Supreme Court until March, 1863, long after Lincoln moved to issue his Proclamation. In other words, the *Prize Cases* was unavailable in 1862, when Lincoln wrote the Proclamation, to show him how presumably groundless his fears were about outright confiscation. In fact, the *Prize Cases* was a 5-4 decision which squeaked past only because Lincoln had appointed two justices to the court; the rest of the court was made up of Chief Justice Roger B. Taney and three of the justices who had delivered the *Dred Scott* decision in 1857.¹⁷ If the *Prize Cases* was to do the work Fabrikant believes it did, then Lincoln

12. LANCE DAVIS & STANLEY ENGERMAN, NAVAL BLOCKADES IN PEACE AND WAR: AN ECONOMIC HISTORY SINCE 1750, at 6-8, 116-18 (2006); Edwin D. Dickinson, *The Closure of Ports in Control of Insurgents*, 24 AM. J. INT’L L. 70 (1930).

13. Abraham Lincoln, By the President of the United States of America – A Proclamation, April 19, 1961, in 4 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION 156-57 (Richard Rush et al. eds., 1896).

14. 67 U.S. 635 (1862).

15. J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 61-62 (rev. ed. 1964); Ludwell H. Johnson, *The Confederacy: What Was It? A View from the Federal Courts*, 32 CIV. WAR HIST. 1, 5-7 (1986).

16. Fabrikant, *supra* note 2, at 317.

17. CARL BRENT SWISHER, HISTORY OF THE SUPREME COURT: THE TANEY PERIOD, 1836-64, at 880 (1974); Ludwell H. Johnson, *Abraham Lincoln and the Development of Presidential War-Making Powers: Prize Cases (1863) Revisited*, 35 CIV. WAR HIST. 220 (1989).

would have been well-justified in waiting until mid-1863 to learn which way the decision would fall and perhaps until later to be sure that subsequent cases developed larger and more secure majorities in the Supreme Court.

The longer problem, however, is whether the Congressional legislation which Fabrikant believes accomplished emancipation on its own long before Lincoln issued his Proclamation really achieved the triumphs of emancipation which he imputes to them. For the sake of clarity, I would like to consider each piece of this Congressional legislation on its own terms.

THE FIRST CONFISCATION ACT

Professor Fabrikant singles out the First Confiscation Act (FCA) of August 1861 as the first legislation that “had the purpose and effect of emancipating slaves.”¹⁸ I am sure that in the minds of some of the bill’s authors, this is exactly what they hoped it would do. But as Professor Fabrikant admits, the FCA was a confiscation statute, not an emancipation statute.¹⁹ It declared “confiscated” by the federal government any slaves who fell into federal hands and who were found to have been employed by Confederate forces in any military fashion (the construction of fortification, teamster and camp duties, and so forth).²⁰ The FCA, however, did not declare anyone actually emancipated. Any slave thus “confiscated” may have felt that confiscation’s “practical effect”²¹ was to emancipate him, but the *de facto* result of the FCA did not have the statutory force of the legislation’s *de jure* language.²² Even Fabrikant admits that the FCA “did not expressly grant that right”²³ because such confiscations were expressly banned by the Constitution’s exclusion of bills of attainder.²⁴ The control over those slaves “confiscated” by federal authorities through the

18. Fabrikant, *supra* note 2, at 322.

19. *Id.*

20. HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861 TO 1866*, at 7-9 (2000).

21. Fabrikant, *supra* note 2, at 324.

22. A municipal ordinance which *de jure* bans prostitution within municipal limits does not thereby give prostitution legal sanction if a “house of ill-fame” moves over the municipal boundary and continues *de facto* operation there.

23. Fabrikant, *supra* note 2, at 324.

24. John Syrett, *The Confiscation Acts: Efforts at Reconstruction during the Civil War 6-7* (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author).

FCA could only be a life estate; otherwise, the “property” passed to the owner’s heirs with the title intact.²⁵

Professor Fabrikant would, I suspect, object at this point that the War had introduced the new age of interpretation, confirmed in 1863 by the *Prize Cases*. Even if the *Prize Cases* had been available as precedent in 1861, the capture of prizes on the high seas was clearly understood to be a different matter entirely from the confiscation of property on land. This was demonstrated in *Alexander v. United States*, when the Supreme Court held that cotton confiscated from Mrs. Elizabeth Alexander’s Louisiana plantation could not be considered prize of war and that the proceeds from the sale of her cotton should have been held in trust for her.²⁶ Fabrikant goes far enough to admit that “there is much reason to doubt the constitutionality of the FCA’s forfeiture provisions insofar as it applied to Union citizens,” because that would have amounted to an attainder.²⁷ But here is where we are confronted with the really critical question—what was the legal status of the Confederacy? Strictly speaking, there was no such thing as a “Union citizen”—*all* citizens, including those in rebellion, were still considered U.S. citizens because the Confederacy was only an insurrection and not a sovereign entity. Consequently, legislative confiscation of the property of rebels—not “citizens of the Confederacy,” because legally there was no such nation-state as the Confederacy and therefore no *Confederate* citizens—amounted to an attainder. Hence, Fabrikant could not be more right when he concedes that the FCA “appears to constitute a Bill of Attainder.”²⁸ It does not merely appear; it is.²⁹

25. HENRY WAGER HALLECK, *INTERNATIONAL LAW; OR, RULES REGULATING THE INTER-COURSE OF STATES IN PEACE AND WAR* 447 (1861).

26. *See* 69 U.S. 663 (1865).

27. Fabrikant, *supra* note 2, at 325; *see* *Daniels v. Tearney*, 102 U.S. 415, 418 (1880), and *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869); *see also* John Maxcey Zane, *Lincoln the Constitutional Lawyer*, in *ABRAHAM LINCOLN ASS’N PAPERS* 92 (1933) (stating categorically, “the allegiance of all the revolted citizens to the United States remained. It was never changed.”).

28. Fabrikant, *supra* note 2, at 325.

29. Fabrikant cites *Miller v. United States*, 78 U.S. 268 (1871), to show that the confiscation statutes were eventually decided not to be an attainder. *Id.* at 326. But the decision in *Miller* was rendered in 1871 and was no help to Lincoln in 1863. *Id.* Chief Justice William Strong in fact specified that under the confiscation acts, “rebels” were held to be members of a class apart from “citizens,” but this was a determination made under the “warpowers” of Congress—whatever they were. *Id.* at 313-14. Even then, the Court was by no means unanimous: Justice Stephen Field wrote a dissent which denied that private property was ever subject to confiscation under the laws of nations. *Id.* at 314.

THE ADDITIONAL ARTICLE OF WAR

I am sympathetic to Professor Fabrikant's observation that the Additional Article of War³⁰ (AAW) has received "scant attention from Civil War scholars" for its emancipatory implications;³¹ I am among those who have not given the AAW its full rights in the emancipation story. Professor Fabrikant is also right to observe that it "sent a message" to slaves behind Confederate lines that the Union military now "constituted a safe haven."³² The pro-slavery Maryland Senator (and Washington College law professor), James A. Pearce, complained that the AAW was "an invitation to all the slaves of the State of Maryland, who can do so, to resort to the camp, sure of protection there . . . because no officer of the army can order their delivery up to their master, however loyal or however indisputable his title may be to that slave."³³ But granting a slave "safe haven" was not the same as emancipating him; runaway slaves had been finding "safe havens" all along the Underground Railroad for decades before the Civil War, but every one of them was liable to capture and rendition the moment a slave owner or his agents tracked him down.³⁴ Sending "a message" about Congress' preferences is not the same thing as statutory emancipation; even the benighted Senator Pearce understood: "It is not an act of emancipation in its terms."³⁵

DISTRICT OF COLUMBIA EMANCIPATION

Professor Fabrikant believes that Lincoln "opposed all measures calling for the abolition [of slavery] in the District," and thus left it to Congress to take the initiative in drafting and passing the first outright emancipation statute, ending slavery in the District of Columbia in

30. Act of Dec. 2, 1861, ch. 40, 12 Stat. 354 (1862).

31. Fabrikant, *supra* note 2, at 331.

32. *Id.*

33. HENRY WILSON, HISTORY OF THE ANTISLAVERY MEASURES OF THE THIRTY-SEVENTH AND THIRTY-EIGHTH UNITED STATES CONGRESSES, 1861-1864, at 25 (1864).

34. Act of Dec. 3, 1849, ch. 60, 9 Stat. 462 (1850).

35. WILSON, *supra* note 33, at 25 (1864). I think I should say, also, that it is not clear what crime Lincoln committed against the AAW by what Fabrikant calls his "acquiescence" to it. Fabrikant, *supra* note 2, at 334. Far from acquiescence, Lincoln promised he would never return to slavery any slave who has obtained *de facto* freedom. "The Negro who has once touched the hem of the government's Garment," Lincoln told Wendell Phillips in March, 1862, "shall never again be a slave," in RECOLLECTED WORDS OF ABRAHAM LINCOLN 356 (Don E. & Virginia Fehrenbacher eds., 1996). This is not enough for Professor Fabrikant: "He failed to instruct his generals not to play 'negro catcher.'" Fabrikant, *supra* note 2, at 355. This would come as a surprise to the principal offender, George McClellan, whom Lincoln fired in November 1862.

April 1862.³⁶ That Lincoln opposed immediate abolition (in the District and elsewhere) is true—Lincoln had always been a gradualist, and he commented to Horace Greeley that although “[he] would be glad to see it abolished,” he preferred that any emancipation of the District’s slaves “have three main features – gradual – compensation – and [the] vote of the people.”³⁷ But Lincoln never doubted “the authority of Congress to abolish slavery in this District” and during his solitary term in the House of Representatives in 1847-49, “he drew up, and sought to get before the House of Representatives, at that session, a bill for the abolition of slavery in the District of Columbia, upon the conditions that the abolition should be gradual, and only upon a vote of the majority of the people of the District, and with compensation to unwilling owners.”³⁸ Far from opposing District emancipation in 1862, he was “gratified” that the act largely conformed to his notion. This, again, is not enough for Professor Fabrikant, who laments that Lincoln did not accompany his signing of the bill with a statement of “moral concerns.”³⁹ To which I can only ask in mystification: *Why did he need to?* This was a statute, not a sermon. And later on in his article, Fabrikant admits that Lincoln’s emancipatory powers were “based upon the exercise of executive war powers . . . not humanitarian reasons. Such a legal assessment is undoubtedly correct and it appears that Lincoln accepted this legal constraint.”⁴⁰ If this is “correct,” why then does Professor Fabrikant fault Lincoln for failing to pen a moral or “humanitarian” statement to his signing of the bill?

THE SECOND CONFISCATION ACT

The Second Confiscation Act of July 1862 (SCA)⁴¹ was, at last, a genuinely emancipatory piece of legislation, since it identified six categories of treason and declared that the slaves of the guilty “be deemed captives of war, and shall be forever free of their servitude and not again held as slaves.”⁴² It is worth noting, however, that the slaves thus emancipated had to belong to slaveowners who fell into the six

36. Fabrikant, *supra* note 2, at 335.

37. Letter from Abraham Lincoln to Horace Greeley (Mar. 24, 1861), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy P. Basler ed., Rutgers University Press 1953).

38. Abraham Lincoln, Fragments of an Answer to John Hill (Sept. 1860), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 37, at 108.

39. Fabrikant, *supra* note 2, at 337.

40. *Id.* at 401 n.350.

41. Act of July 17, ch. 195, 12 Stat. 589 (1862).

42. *Id.* at 591.

categories and had either escaped into Union lines or been captured “from such persons or deserted by them and coming under the control of the Government of the United States.”⁴³ This was a noble aspiration, but the aspiration concealed a clumsy enforcement apparatus and limited application. To genuinely emancipate anyone, the slave-owner would have to be identified legally as a traitor; how this was to be accomplished in the middle of the war in which the traitors were unavailable to answer a summons was not explained, which is why the SCA had to provide for *in rem* proceedings.⁴⁴ An *in rem* proceeding stretched the credibility of the action; what stretched it still more was the continuing problem posed by the resemblance of this bill, like the FCA, to attainder. Lincoln did not believe the SCA to be a “formal attainder,” but it had the shape of one all the same, and so he added, “I feel constrained to say I think this feature of the act is unconstitutional,” and he signed the SCA only with the understanding that no such “forfeiture extending beyond the life of the guilty parties” was intended.⁴⁵ Otherwise, both bills would only feed an industry of post-war federal law suits over slaves as well as “real or landed estate,” and, in fact, this is exactly what happened.⁴⁶

Although the number of forfeiture cases under the SCA was not large, their litigation history was long and contentious.⁴⁷ In the case of Benjamin Dykes, a Georgian whose land was seized by the Confederate government to create the infamous Andersonville prison camp, and was seized again by the federal government to create a national cemetery, Dykes eventually won a judgment against the War Department in 1875, and failed only to win a subsequent suit to recover the rental value of the land during the years it was possessed by the federal government. Litigation concerning a New Orleans city lot owned by Confederate diplomat John Slidell, and confiscated by the federal government, lasted until 1906, some thirty-five years after Slidell’s

43. THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION 196 (Edward McPherson ed., 1864); 18 STAT. 589 (1861). The original form of the SCA actually had more broad-based emancipation language, but this was deleted, after vigorous debate, in the final form of the SCA. See DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR 71 (2006).

44. See PHILIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 146 (1994).

45. Abraham Lincoln, To the Senate and House of Representatives (July 17, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 37, at 327.

46. See PHILIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 39 (1975).

47. Frank J. Williams, “*Doing Less*” and “*Doing More*,” in HAROLD HOLZER ET AL., THE EMANCIPATION PROCLAMATION: THREE VIEWS 57-60 (2006).

death.⁴⁸ Anyone who imagines that Southerners would have been less persistent in trying to recover *slave* “property” seized under the SCA has a more magnanimous and benign view of White Southern slaveholders than I do, or than Lincoln did.

Why, then, did Congress bother to pass the confiscation acts at all, if their constitutional premise was so plainly defective? For the same reason that Congress and other legislatures routinely pass legislation (like bills against flag-burning) which have no chance of surviving a legal challenge in the federal courts, but which make for good political theater, or which keep the temperature on a particular issue high. “The confiscation act was more useful as a declaration of policy than as an act to be enforced,” acknowledged Ohio Senator John Sherman.⁴⁹ Even the confiscation bills’ architect in the Senate, Lyman Trumbull of Illinois, admitted that “far from striking at all the property of each and every citizen in the seceded States, [the SCA] would not probably reach the property of one in ten of the rebels, and in no case would touch the property of a loyal citizen.”⁵⁰ This does not give us much confidence that the confiscation legislation would have accomplished anything permanent, or that it was expected to. No wonder, then, that Congress, despite the passage of the confiscation bills, lined up to pass a resolution endorsing the Emancipation Proclamation on December 15, 1862—which looks surprisingly strange if they believed that their own bills had already accomplished its goal.⁵¹

Professor Fabrikant believes (and this is the common thread that runs through his treatment of all four statutes) that Lincoln’s reluctance to emancipate was controlled by a false theory of sovereignty—that Lincoln was wrong to believe that the Confederacy was a legal fiction and that property held in the Confederate states was still covered by the guarantees of the U.S. Constitution. This appears absurd to Professor Fabrikant because “the international law of war permitted the Union to treat innocent, loyal citizens of the Confederacy in precisely the same manner as their rebel neighbors,”⁵² and thus sanctioned broad-based emancipation by means of Congressional confisca-

48. For an extensive discussion of post-war litigation arising out of confiscation proceedings, see GREG H. WILLIAMS, *CIVIL WAR SUITS IN THE U.S. COURT OF CLAIMS: CASES INVOLVING COMPENSATION TO NORTHERNERS AND SOUTHERNERS FOR WARTIME LOSSES* (2006).

49. JOHN SHERMAN, *JOHN SHERMAN’S RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET: AN AUTOBIOGRAPHY* 316 (1895).

50. CONG. GLOBE, 37th Cong., 2d Sess. 1557 (1862).

51. *Id.* 3d Sess. 92.

52. Fabrikant, *supra* note 2, at 345.

tion statutes. Lincoln's opposition to these statutes was, consequently, an act either of willful ignorance or else covert opposition to the entire emancipation project. There is, however, no citation in Fabrikant's argument to any such "international law of war" that sanctioned the kind of confiscations embodied in the four statutes.⁵³ The major American treatises on international law—Henry Wheaton's *Elements of International Law*⁵⁴ and Henry Wager Halleck's *International Law; or, Rules Regulating the Intercourse of States in Peace and War*⁵⁵—indicated precisely the opposite. Wheaton, for instance, exempted "private property on land . . . from confiscation" in time of war and categorically forbade applying the rules of prize in "maritime warfare" to "the operations of war by land."⁵⁶ So did the Captured and Abandoned Properties Act of 1863, which defined the federal government's relationship to the Southern people as "a trustee of funds generated from the sale of their property."⁵⁷

Rather than the niceties of "international law," Fabrikant instead believes that "Lincoln was influenced by politics, not principle, with respect to this important issue."⁵⁸ Lincoln had, in other words, no real interest in emancipation, and issued the Emancipation Proclamation only because playing catch-up to Congress seemed to be the politically expedient thing to do. Actually, Lincoln was influenced by both politics *and* principle, and, perhaps, it is precisely the possibility that these two should mutually act on each other that is Fabrikant's basic difficulty in understanding Lincoln. After all, if Lincoln had really harbored the unmixed degree of unprincipled "callousness to slaves-in-distress" of which Fabrikant accuses him, then he would have had no reason, and no need, to issue an emancipation proclamation at all.⁵⁹ What is more, despite his legal doubts about the standing of the con-

53. Fabrikant, *supra* note 2, at 345. The only "international law of war," which existed before the Declaration of Paris in 1856, was found in (a) the various exchanges of stated policies issued by belligerents, such as the British 'Orders in Council' during the Napoleonic Wars, and the corresponding French responses, and (b) the body of commentary from the pens of theoretical jurists, principally Pufendorf and Grotius. It is worth noting in this regard that Grotius recognized no legitimacy to confiscation in war, but only the immunity of belligerents from punishment in the event of property destruction or the theft of property. See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 147-51 (2005).

54. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW WITH A SKETCH OF THE HISTORY OF THE SUBJECT* (Richard Henry Dana ed., 1836).

55. HALLECK, *supra* note 25.

56. Wheaton, *supra* note 54, at 436.

57. ROBERT BRUCE MURRAY, *LEGAL CASES OF THE CIVIL WAR* (2003); WHEATON, *supra* note 54, at 362, 379.

58. Fabrikant, *supra* note 2, at 356.

59. *Id.* at 357.

fiscation legislation, Lincoln acknowledged that “by virtue of the act of Congress entitled ‘An act to confiscate property used for insurrectionary purposes,’ approved August, 6, 1861, the legal claims of certain persons to the labor and service of certain other persons have become forfeited.”⁶⁰ *Forfeited*—not emancipated. But at the same moment, Lincoln opposed the rendition of fugitives, whether they were forfeit or not. “Numbers of the latter, thus liberated, are already dependent on the United States, and must be provided for in some way.”⁶¹ With that phrase—*thus liberated*—Lincoln turned a blind eye, in the name of freedom, to his own legal scruples.⁶²

What the multitude of impatient critics of Lincoln on emancipation seem to miss is that, if he was as uninterested, as racist, as cynical, or as political as they claim, his best option would have been to not write the Emancipation Proclamation. There were no mass meetings of Northern Whites demanding freedom for Black slaves. There were, however, riots in Northern cities over fear of competition from free Black labor.⁶³ Democratic Congressman William Allen complained on the floor of the House of Representatives that “[t]housands of negroes have been taken, decoyed or stolen” and transported North to take the jobs of White workingmen.⁶⁴ The North “must either be the home of [W]hite men or [B]lack men—they cannot dwell together!”⁶⁵ There were no soldiers’ parades with banners urging Lincoln to end slavery. There were, however, mutinies in regiments and mutterings about a *coup d’etat* by George McClellan and the Army of the Potomac.⁶⁶ There were no resolutions from state legislatures, calling on Lincoln to emancipate. There were, however, resolutions in the legislature of his home state, denouncing emancipation and calling for a peace conference to end the war. “All the democratic members of the legislature are open secessionists,” wrote one anxious Illinoisan.⁶⁷

60. Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 37, at 48.

61. *Id.*

62. *Id.*

63. V. JACQUE VOGELI, FREE BUT NOT EQUAL: THE MIDWEST AND THE NEGRO DURING THE CIVIL WAR 34-35 (1967).

64. CONG. GLOBE, 37th Cong., 3d Sess. 182 (1862).

65. *Id.*

66. *General M.C. Meigs on the Conduct of the Civil War*, 26 AM. HIST. REV. 294 (1920-21).

67. Letter from Mercy Levering Conkling to Clinton Conkling (Jan. 11, 1863), in JAMES C. & CLINTON L. CONKLING PAPERS, available at Abraham Lincoln Presidential Library & Museum, <http://hip.rpls.ws/ipac20/ipac.jsp?profile=spisalp#focus> (search “Conkling Papers” follow hyperlink “Papers, 1838-1920”).

“They talked about going to Washington, hurling Mr. Lincoln from the presidential chair, and inaugurating civil war north.”⁶⁸

On those terms, Lincoln could, conceivably, have let the Congressional statutes move forward and allowed Congressional Republicans to take the subsequent heat—and heat there was, as Congressional Republicans learned in the off-year elections in November 1862, when emancipation cost them thirty-one seats in the House of Representatives. Or he could have moved into outright opposition to emancipation, and thus won accolades from Northern Democrats and avoided intervention from the British, who feared that emancipation would trigger a race war.⁶⁹ That Lincoln did *neither* argues a much more forward position on emancipation than Fabrikant imagines. It may be true, as Professor Fabrikant says, that “[h]e had an antipathy for emancipation on any other terms than his own”⁷⁰—as if he should have enjoyed being contradicted on matters of public policy. And it may be true that “Lincoln thought he knew better than Congress what the pace and manner of emancipation should be”⁷¹—but so has every other President on every other major issue. This is why the federal system is composed of checks and balances.

Professor Fabrikant has displayed a remarkable command of, and patience with, the technicalities of the Congressional statutes. He does not, however, display a corresponding grasp of the historical pressures which acted on the people who had to deal with those statutes. Too many accounts of Lincoln’s half-heartedness over emancipation occur in a historical vacuum, as though Lincoln was perfectly free to make whatever decision he liked, free of restraint, and free of any reckoning of the consequences.⁷² If that were the case, then Lincoln’s march to emancipation really does look halting, but this is similar to criticizing Lance Armstrong for pedaling too slowly while pretending that one does not see that he is climbing Mont Blanc. Certainly one constraint to which Lincoln had to be attentive was the Supreme Court. Far from the *Prize Cases* demonstrating how much latitude he had in confiscating rebel property, the 5-4 vote in the *Prize Cases* actually underscores what very thin judicial ice confiscation was

68. Letter from Mercy Levering Conkling to Clinton Conkling, *supra* note 69.

69. See HOWARD JONES, ABRAHAM LINCOLN AND A NEW BIRTH OF FREEDOM: THE UNION AND SLAVERY IN THE DIPLOMACY OF THE CIVIL WAR 61, 84 (1999).

70. Fabrikant, *supra* note 2, at 362.

71. *Id.*

72. Allen C. Guelzo, *How Abe Lincoln Lost the Black Vote: Lincoln and Emancipation in the African American Mind*, 25 J. ABRAHAM LINCOLN ASS’N 1, 15-19 (2004).

skating on. For the fact was that, in the first two years of the war, the Supreme Court was very much Roger B. Taney's Court and the Court of *Dred Scott*, and it would have been folly to have expected Taney, an old Jacksonian Democrat, to lay aside his pro-slavery and anti-Republican prejudices.⁷³ Had a poorly-crafted emancipation decree or a confiscation statute that veered toward an attainder come before Taney on appeal, there would have been no telling what kind of an opening this would have afforded Taney to seal off slavery judicially for the next political generation (just as he had tried to do so expansively in *Dred Scott*). Lincoln had already defied one attempt at Supreme Court meddling in 1861 in *Ex parte Merryman*,⁷⁴ but at least he had some constitutional grounds for ignoring Taney's writ of *habeas corpus* for John Merryman, the Confederate recruiter.⁷⁵ Lincoln could not forever ignore the Supreme Court; not only did ignoring the Supreme Court grate against his own legal sensibilities, but it handed to the Democratic opposition stick after stick with which to beat Republicans at the polls. Against this background, Lincoln begins to look less like the unwilling emancipator and more like the careful strategist he really was, circling the bleeding bull of slavery and avoiding impalement by its horns.

Oddly enough, Professor Fabrikant believes that "there is no reason to think that Lincoln was looking over his shoulder at the Supreme Court when he issued the Emancipation Proclamation and/or when he declined to modify it."⁷⁶ And he accuses me of showing no evidence, in *Lincoln's Emancipation Proclamation: The End of Slavery in America*,⁷⁷ "that Lincoln's decisions were influenced by a concern that federal courts were looking over his shoulder."⁷⁸ However, there is ample evidence that this was very much at the front of his mind. "I think it [the Proclamation] is valid in law," Lincoln told General Stephen Hurlbut, after issuing the Emancipation Proclamation,

73. See JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE WAR POWERS 222 (2006).

74. 17 F. Cas. 144, 151-52 (C.D. Md. 1861) (No. 9487).

75. MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 10-11 (1991).

76. Fabrikant, *supra* note 2, at 382.

77. ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 171-72 (2004) (dealing with opinions and cases which did threaten court interference in emancipation).

78. Fabrikant, *supra* note 2, at 394.

but he was worried about whether it “will be so held by the courts.”⁷⁹ Two years later, he was still uncertain about the possibility of litigation over emancipation. Once the shooting stopped, emancipation became “a judicial question. How the courts would decide it, he did not know and could give no answer.”⁸⁰

[Lincoln’s] opinion was that as the proclamation was a war measure and would have effect only from its being an exercise of the war power, as soon as the war ceased, it would be inoperative for the future. It would be held to apply only to such slaves as had come under its operation while it was in active exercise. This was his individual opinion, but the courts might decide the other way and hold that it effectually emancipated all the slaves in the states to which it applied at the time. So far as he was concerned, he should leave it to the courts to decide. He never would change or modify the terms of the proclamation in the slightest particular.⁸¹

Professor Fabrikant seems to believe that these apprehensions were merely smoke-screens and that Lincoln had no reason to believe that “a post-war repeal or withdrawal of . . . the Proclamation” could have led to the re-enslavement of those “who had already attained freedom.”⁸² If so, Fabrikant grossly underestimates the depth of White racism; he also has not paid very much attention to Reconstruction and Jim Crow, since Jim Crow imposed on Southern Blacks a brutal and oppressive peonage which fell little short of slavery itself—and it did so largely through the actions of the courts.⁸³ How wise is it to assume that this same perverted energy which went into the making of Southern segregation and *Plessy v. Ferguson*⁸⁴ might not have been applied to re-enslaving runaway slaves or appealing for federal compensation for unrecoverable runaways?

That same sense of operating in a historical vacuum also undercuts Fabrikant’s assertion that “Lincoln’s only unwavering goal was preservation of the Union,” and that “[e]mancipation was adopted belatedly as a means to achieve that goal”⁸⁵—as if the preservation of the Union was not itself a means to emancipation after 1860. The

79. Letter from Abraham Lincoln to Stephen A. Hurlburt (July 31, 1863), in 6 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 37, at 358.

80. Alexander H. Stephens, in RECOLLECTED WORDS OF ABRAHAM LINCOLN *supra* note 35, at 421.

81. *Id.*

82. Fabrikant, *supra* note 2, at 390.

83. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 70-71 (1955).

84. 163 U.S. 537 (1896).

85. Fabrikant, *supra* note 2, at 392.

election that brought Lincoln into the White House was the first election since 1800 in which Southern voting power, buttressed by the added representation that the “Three-fifths Clause” awarded the South in the Electoral College, finally failed to elect a pro-slavery President.⁸⁶ From that point onwards, it was apparent that the growing population of the Northern Free States would inexorably put the power to elect presidents into Northern hands. If those presidents were, like Lincoln, anti-slavery by conviction, then the South had nothing to look forward to but a steady loss of control over federal patronage, seats in Congress, and ultimately its ability to keep the free states from enacting legislation that would eventually eliminate slavery. Just how much Southerners had to fear from Lincoln on this score became apparent within eight months of his inauguration, when he devised a plan which offered Delaware, a slave state which had opted to remain within the Union, a federally-funded buy-out for the state’s slaves, if the state legislature would enact the appropriate legislation.⁸⁷ This was the handwriting on the wall for slavery—the temptation of federal money would start a collapse of slavery among the weak sisters of the border-states, and that, in turn, would set up a domino effect which would soon see Deep South states stampeding to the federal till for buy-out money before their slaves lost all value. “Southerners were convinced that to restrict slavery was to constrict [their] life blood,” wrote the Confederate partisan-turned-Republican, John Singleton Mosby: “The South went to war on account of slavery. . . . South Carolina went to war—as she said in her secession proclamation—because slavery w[oul]d not be secure under Lincoln.”⁸⁸ Why, after all, did the Southern states secede from the Union in 1860, unless they saw that remaining in the Union would be the downfall of the slave system? Every time Lincoln pledged to restore the Union, Southerners only heard a promise to exterminate slavery—and they were right. Far from Union and emancipation being parallel or divergent strategies, they were really converging ones. “The proclamation became the heart and soul of a revolutionary action,” writes Howard Jones, “that soon established emancipation as an integral part

86. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 125-26 (1982).

87. Lincoln, “Drafts of a Bill for Compensated Emancipation in Delaware,” Nov. 26, 1861, 5 *COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 37, at 29.

88. James O. Horton, *Confronting Slavery and Revealing the ‘Lost Cause,’* 4 *CRM: THE JOURNAL OF HERITAGE STEWARDSHIP* 18, 19 (1998).

of the administration's steady movement toward an even better Union."⁸⁹

The rabbit Professor Fabrikant must finally pull out of the hat in order to prove Lincoln's bad faith on emancipation finally comes down to "the fact that Lincoln's dislike of Blacks was a prominent part of his approach to emancipation."⁹⁰ This is said without the slightest sense of the contradiction that statement embodies. I cannot repeat this often enough: if Lincoln had so great a racist "antipathy" toward Blacks, he simply did not have to emancipate anyone. As Fabrikant obligingly admits later on, the Emancipation Proclamation actually had three constitutionally-risky aspects, and, therefore, Lincoln was resorting to some substantial, but unknown, constitutional risks in issuing it.⁹¹ Why, then, did he do it? Certainly it was not because of pressure from the slaves themselves. Professor Fabrikant intimates that he will refer to the "self-emancipation thesis," which argues that so many hundreds of thousands of slaves ran away to Union lines that Lincoln had no practical choice but to issue a Proclamation.⁹² But Fabrikant never actually developed this argument, and there is good reason. First, if the slaves were indeed busy emancipating themselves by running away from their Southern masters, then this gave Lincoln even less reason to issue an emancipation proclamation, since the work of emancipation was being done quite well by the slaves themselves. Second, there is, unhappily, no "revealing the number of slaves who fled North, or who fled North in response to either the FCA or the SCA."⁹³ If there were "hundred of thousands," then the supposition seems to be that they exerted some form of preponderating influence on Lincoln to throw away his hesitations, but given the fact that none of these fugitives could vote, or that only the tiniest fraction of free Northern Blacks could vote, it is hard to see what pressure they were exerting on Lincoln. There is also no hard evidence that fugitive slaves in the Civil War numbered in the "hundreds of thousands" or any other thousands. Professor Fabrikant assumes that "it is a commonly-accepted fact that hundreds of

89. JONES, *supra* note 69, at 146.

90. Fabrikant, *supra* note 2, at 362.

91. *Id.* at 370-71.

92. Mark E. Neely, *Lincoln and the Theory of Self-Emancipation*, in *THE CONTINUING CIVIL WAR: ESSAYS IN HONOR OF THE CIVIL WAR ROUND TABLE OF CHICAGO 46-58* (John Y. Simon & Barbara Hughett eds., 1992); See James M. McPherson, *Who Freed the Slaves?*, 139 *PROCEEDINGS AM. PHIL. SOC'Y* 1-10 (Mar. 1995).

93. Fabrikant, *supra* note 2, at 378 n.251.

thousands of Blacks fled North before the end of the War, and that the number of Blacks who fled steadily increased as the War persisted.”⁹⁴ But “commonly accepted” by whom? And if there is no study of the numbers of fugitives, on what grounds is “hundreds of thousands” so “commonly accepted?” Professor Fabrikant himself later offers 700,000 as the number of fugitive slaves during the course of the Civil War.⁹⁵ In fact, this is guess-work, and fully as much guess-work as Secretary of State William Seward’s off-hand estimate in 1865 that the number was closer to 200,000.⁹⁶ And even if Fabrikant is right, these runaways acquired no political leverage over Lincoln by running away. Certainly they were not being given the vote, nor did they have representatives in Congress or the newspapers to give them a voice. Nor in fact did they gain any legal title to freedom under the confiscation statutes.⁹⁷ How, then, did they “self-emancipate”—apart, of course, from Lincoln’s Emancipation Proclamation?

At the end, Professor Fabrikant has to resort to the oldest of old canards about the Proclamation: “the Proclamation was geographically configured to keep slavery in place where Lincoln has the power to abolish it, and to abolish it [only] in those places where he had no such power.”⁹⁸ What Fabrikant means by this is that Lincoln excluded from the operation of the Proclamation the slaves of Border States and the slaves of those districts of the Confederacy which had been conquered and occupied by federal forces. As a result, Lincoln inconsistently left the slaves under his control in slavery and freed those over whom he had no control. I confess surprise that a member of a law faculty could repeat this without any qualification. What “control,” exactly, did Lincoln have over slavery in the Border States? Slavery, remember, was a matter of state law, not federal law, and before the 14th Amendment and the incorporation doctrine, state law existed beyond the reach of federal action—which is another reason Lincoln was so eager to have the state legislatures take the emancipation step, because this would insulate emancipation from appeals to the federal courts. Similarly, what “control” did Lincoln have over slavery in the occupied districts? If he was to hew logically to the line of argument, which denied the legality of secession, then every occu-

94. Fabrikant, *supra* note 2, at 398 n.251.

95. *Id.* at 396.

96. William C. Harris, *The Hampton Roads Peace Conference: A Final Test of Lincoln’s Presidential Leadership*, 21 J. ABRAHAM LINCOLN ASS’N 31, 50 (2000).

97. BELZ, *supra* note 20, at 17.

98. Fabrikant, *supra* note 2, at 369.

piated district returned to civil order as soon as federal troops cleared it of rebels and re-opened the civil courts. The Emancipation Proclamation, however, was issued on the strength of Lincoln's "war powers," powers which ceased to operate the moment the civil courts reopened. But the rebellious Confederacy was another matter—there, all civil order had disappeared (or at least all order that the federal government would recognize and assume responsibility for), and the insurrectionary states would come directly under the authority of his "war powers" as Commander-in-Chief.⁹⁹ If the Proclamation, as a "war powers" order, did not literally and immediately strike the shackles off slaves in Confederate territory, that did not mean that they had ceased *de jure* to be slaves any more than property stolen by burglars ceases to be the property *de jure* of the burglary victim. Fabrikant denies that this "frees where he can not and does not where he can" nonsense is a canard,¹⁰⁰ it is a foolish one, too, that no one would resort to except as the last refuge of a bad argument.

The Emancipation Proclamation was no "weak after-thought" to "Congress' barrage of emancipatory legislation"¹⁰¹ since that legislation consisted of political gestures which the federal courts would eventually take into their own hands. "Notwithstanding the Proclamation's exceptions and exemptions," writes the renowned Lincoln scholar and political scientist, Harry V. Jaffa, "it destroyed the viability of the institution of chattel slavery in the whole Union," while at the same time it avoided the usurpation of powers which would "have defeated the very ends of human freedom."¹⁰² Nor was Lincoln a closet racist who manipulated Black people merely to get the political results he wanted, although I suppose it suits the temperament of some people to believe that Black Americans must owe nothing to White Americans, and vice versa. The deciding moment in the freeing of the slaves was, despite the confiscation legislation, the Emancipation Proclamation. We may quibble as we like about whether Lincoln's intentions were pure, or his methods impeccable. What mattered was the sheer enormous reality of the Emancipation Proclamation and at the bottom of that document appears this indispensable name: *Abraham Lincoln*.

99. See generally WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 245 (1864).

100. Fabrikant, *supra* note 2, at 368.

101. *Id.* at 367.

102. HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 79 (2000).