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Understanding Emancipation: Lincoln's Proclamation and the Overthrow of Slavery

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Abstract
The most common trope that governs understanding of Abraham Lincoln and emancipation is that of progress. The variations on that trope are legion, and they include notions of Lincoln's journey toward emancipation, his growth in understanding the justice of emancipation, and his path to the Emancipation Proclamation. "Lincoln was," as Horace Greeley put it, "a growing man"; growing from a stance of moral indifference and ignorance at the time of his election in 1860 toward deep conviction about African American freedom by the time of the Emancipation Proclamation less than two years later. That was a generous sentiment, since it credited Lincoln with being "breathtaking in his advance from prewar advocacy of restricting slavery's spread to foremost responsibility for slavery's total, immediate, uncompensated destruction by constitutional amendment." But it was also an unconvincing one, since a journey may not be about growth at all if it is an unwilling one, or one guided purely by opportunism. Neo-Beardian historians like Richard Hofstadter read Lincoln as a political poseur for whom growth was synonymous with a keep eye for the main chance. In the afterwash of the Civil Rights movement, embittered dissenters within the African American world brooded over the casual racism that accompanied Lincoln's prewar utterances on slavery and wondered why they should offer homage to a white man whose principal act of emancipation was limited to slaves he could not free, while ignoring the plight of the slaves he could. "Lincoln grew during the war," conceded Ebony editor Lerone Bennett Jr. in a sensational 1968 article on Lincoln, "but he didn't grow much. On every issue relating to the black man... he was the very essence of the white supremacist with good intentions." [excerpt]

Keywords
Abraham Lincoln, slavery, emancipation, abolition of slavery, Emancipation Proclamation, freedom, Civil War, abolitionist, colonization, thirteenth amendment

Disciplines
African American Studies | Cultural History | History | Legal | Political History | Politics and Social Change | Race and Ethnicity | Race, Ethnicity and Post-Colonial Studies | Social History | United States History
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Lincoln's Proclamation and the End of Slavery

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In the aftermath of the Civil Rights movement, embittered dissidents within the African American world brooded over the casual racism that accompanied Lincoln's prewar utterances on slavery and wondered why they should offer homage to a white man whose principal act of emancipation was limited to slaves he could not free, while ignoring the plight of the slaves he could. "Lincoln grew during the war," conceded Ebony editor Lerone Bennett Jr. in a sensational 1968 article on Lincoln, "but he didn't grow much. On every issue relating to the black man . . . he was the very essence of the white supremacists with good intentions." In the face of such skepticism, a second and even more generous trope has been applied to Lincoln that finds Lincoln not growing, but maturing. In that scenario, Lincoln already possessed in 1861 all the racial goodwill necessary for emancipation, but waited until the right moment in the war, or the right moment in the growth of Northern acceptance of the idea of emancipation. Lincoln "saw the time of emancipation coming" and was "quick to see the tendency of the public mind," said Lincoln's earliest serious biographer, Josiah G. Holland, in 1866. "He was clearing away obstacles, and preparing his ground" for emancipation. He was, in a more recent version by LaWanda Cook, "cautious, advancing one step at a time, and indirect, exerting influence behind the scenes." That has had the advantage of casting Lincoln as a sort of political seer, biding his time until the nation could see the future as clearly as he did, and it turned his year-and-a-half delay in issuing the Proclamation into a compliment to his political wisdom. But it also has generated its share of disappointment, since unaunted critics wanted to know how long one should wait to do right. "After all, he came into office in 1861. How come it took him two whole years to free the slaves?" asked


Hofstadter coined the most enduring commonplace over rules on the Proclamation when he complained that it had "all the moral grandeur of a bill of landing." Hofstadter meant to imply triviality, but a "bill of landing" was actually a significant commercial document in the antebellum economy. There is no one instrument or contract used in commercial transactions made to achieve so many various, useful and important purposes, as the Bill of Landing," wrote P. C. Wright in Dalby's Review in July 1846, "yet it appears . . . that there is no one so little understood, as to its legal effect, when applied to some of the purposes to which it is peculiarly adapted. . . . A Bill of Landing is defined to be an instrument signed by the master of a ship, or by some one authorized to act in his behalf, whereby he acknowledges the receipt of merchandise on board his vessel, and engages . . . to deliver the same at the port of destination in salinity." If that was what the Emancipation Proclamation was supposed to do, then Hofstadter was offering Lincoln more of a compliment than he intended.

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In the face of such skepticism, a second and even more generous trope has been applied to Lincoln that finds Lincoln not growing, but maturing. In that scenario, Lincoln already possesses in 1861 all the racial goodwill necessary for emancipation, but waits until the right moment in the war, or the right moment in the growth of Northern acceptance of the idea of emancipation. Lincoln “saw the time of emancipation coming” and was “quick to see the tendency of the public mind,” said Lincoln’s earliest serious biographer, Josiah G. Holland, in 1866. “He was clearing away obstacles, and preparing his ground” for emancipation. He was, in a more recent version by LaWanda Cox, “cautious, advancing one step at a time, and, indirectly, exerting influence behind the scenes.” That has had the advantage of casting Lincoln as a sort of political savior, bridging his time until the nation could see the future as clearly as he did, and it turned his year-long delay in issuing the Proclamation into a compliment to his political wisdom. But it also has generated its share of disappointment, since unappeased critics wanted to know how long one should wait to do right. “After all, he came into office in 1861. How come it took him two whole years to free the slaves?” asked


2Hofstadter, The American Political Tradition and the Men Who Made It (1948; rpt. New York: Knopf, 1976), 117, 120, 131. Hofstadter coined the most enduring memorable comment ever made on the Proclamation when he complained that it had “all the moral grandeur of a bill of lading.” Hofstadter meant to imply triviality, but a “bill of lading” was actually a significant commercial document in the antebellum economy. There are no one instrument or contract used in commercial transactions made to achieve so many vital, useful and important purposes, as the bill of lading,” wrote F. C. Wright in Dalhousie Review in July 1846. “It appears . . . that there is no one so little understood, as to its legal effect, when applied to some of the purposes to which it is peculiarly adapted . . . A Bill of Lading is defined to be an instrument signed by the master of a ship, or by some one authorized to sit in his behalf, whereby he acknowledges the receipt of merchandise on board his vessel, and engages . . . to deliver the same at the port of destination in salvo.” If that was what the Emancipation Proclamation was supposed to do, then Hofstadter was offering Lincoln more of a compliment than he intended.

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But a better reason for skepticism about those tropes is that there is so little evidence behind them. The Radicals of Lincoln's own party found his refusal to embrace immediate abolition infuriating, yet they never spoke of Lincoln in terms of progress or saving, but instead in terms of "imbecility," "perverseness," or "vacillation." Those who had been closest to Lincoln both before and during the war believed that far from needing growth, Lincoln came to the presidency fully committed to implementing an emancipation program—without waiting. Emancipation, wrote Isaac N. Arnold in 1866, was Lincoln's "deepest, strongest desire of the soul," and from the time of his election he "hoped and expected to be the Liberator of the slaves." Joshua Speed, Lincoln's oldest and closest friend, told William Herndon: "My own opinion of the history of the emancipation proclamation is, that Mr. Lincoln foresaw the necessity for it—long before he issued it." Joseph Gilleonie was convinced that Lincoln "had it in his mind for a long time to war upon slavery until its destruction was effected."

But the most important testimony comes from Lincoln himself. "I have always thought that all men should be free," he insisted in 1865. "I am naturally anti-slavery," he told Albert G. Hodges and Thomas Bramlette in 1864. "If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel." Far from having waited for the right moment to issue the Proclamation, Lincoln was sure that the moment could not have been more politically inapt. "When I issued that proclamation," Lincoln frankly told Methodist educator John McClintock, "I was in great doubt about it myself. I did not think that the people had been quite educated up to it, and I feared its effects upon the border states."


Abraham Lincoln

Nevertheless, the prevailing view of Lincoln and emancipation has been almost entirely governed by those tropes, as almost any biography of Lincoln written in the last hundred years will attest. They are intended as a shield to Lincoln's iconic place in American historical consciousness. But they also serve to diminish that place by substituting a shorthand character analysis for political perception. Understanding the Emancipation Proclamation rests not with Lincoln's "vacillation" or his "patience" or even with Lincoln himself, but with the varieties of emancipation on offer at the onset of the Civil War, the legal mechanisms necessary to give emancipation permanence, the necessity of keeping the question out of the hands of the federal court system once the war was over, and the vastly underestimated political instability threatened by General George B. McClellan and the Army of the Potomac from July to November 1862. From those complexities, however, two things become apparent: Lincoln had determined to emancipate from the beginning of his presidency, and for understanding that both the trope of progress and that of patience are useless; and the Emancipation Proclamation that he eventually issued was intended to produce far more radical and immediate results than even the most forward abolitionists could have imagined.

Although the Emancipation Proclamation is routinely spoken of as though it were a single document, there are in fact four emancipation proclamations: the
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“Young Henry to Jesse Weik, Feb. 23, 1867, Herndon-Weik Papers, microfilm Group
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so-called "First Draft" of July 22, 1862; the "Preliminary" Emancipation Proclamation of September 22, 1862, the final draft, submitted and discussed at the cabinet meetings of December 29 and 31, 1862; and the formal Proclamation of January 1, 1863, all of which differ markedly from each other, and some parts of which were not even of Lincoln's composing. But there are also three other Lincoln documents that qualify as emancipation proclamations that are far less well-known: the November 1861 plan for compensated emancipation that Lincoln drew up for George F. Fisher to introduce into the Delaware legislature; the March 6, 1862, joint resolution Lincoln drafted to endorse national compensated emancipation that he presented to Congress; and the July 14, 1862, bill he drafted for Congress to implement the national compensated emancipation plan. And then there are five other emancipation proclamations not of Lincoln's authorship that, in some cases, rival Lincoln's own plans. These are the local emancipations announced by Major Generals John Charles Frémont in Missouri and David Hunter in the occupied Carolina coastal districts (and subsequently cancelled by Lincoln), and Congress's own emancipation decrees: the First Confiscation Act of August 1861; the emancipation bill for the District of Columbia in April 1862; and the Second Confiscation Act of July 17, 1862, all of which were described as emancipation proclamations in the national press.

Surveying them together, the broad picture that emerges from those documents over the course of thirteen months in 1861 and 1862 is the clarity with which Lincoln's face was set toward emancipation from the first. The time that elapsed between Lincoln's inauguration and the issue of the Proclamation was not a question of emancipation itself, nor was it a question of whether emancipation was secondary to the preservation of the Union, nor even the supposed practicability of emancipating slaves lest it jeopardize the Union, but about the issues of emancipation, and that was complicated in Lincoln's understanding, first by the political and legal entanglements of slavery and then by the war. No single factor was more important in Lincoln's mind than the limited reach of the federal government; slavery was a matter of individual state enactments, and even the slave code that governed the District of Columbia was only an enforcement of the existing Maryland and Virginia codes, not a product of federal statute. "As an anti-slavery man I have a motive to desire emancipation, which pro-slavery men do not have," Lincoln wrote, but "the general government, sets up no claim of a right, by federal authority, to interfere with slavery within state limits, referring, as it does, the absolute control of the subject, in each case, to the state and it's people, immediately interested."


But that did not mean the federal government could not put motives to emancipation in their minds that would hasten the decision, something that both Lincoln and the Southern secessionists keenly appreciated. Principally, the federal government could offer financial incentives by providing emancipation subsidies to the slave states, and social incentives by allowing the state legislatures to set their own emancipation timetables, "making the emancipation gradual and compensating the unwilling owners." Compensation would be costly, but it would not be nearly so costly as civil war: "Mr. Lincoln always contended that the cheapest way of getting rid of slavery," recalled Joseph Gillespie, "was for the nation to buy the slaves & set them free." Similarly, gradualism delayed the promise of full freedom for at least a generation. But in Lincoln's mind, it had the virtue of allowing former slaveholders to keep their slaves to find "some practical system by which the two races could gradually live themselves out of their old relation to each other, and both come out better prepared for the new." It also avoided the virtually automatic associations that immediate emancipation with slave insurrection, a racial fantasy that had enormous currency based on the San Domingo slave revolt, Nat Turner's insurrection in 1831, and, ultimately, John Brown's raid on Harper's Ferry. Above all, using compensation and gradualism to solicit the cooperation of the state legislatures would keep emancipation out of the federal courts. In a federal judicial system headed by a chief justice, Roger B. Taney, who only four years before had written the majority opinion in Dred Scott and further tried to cripple the Union war effort in ex parte Merryman and Price Cases, any unilateral move by Lincoln on the federal level would inevitably generate constitutional challenges that gave presidential emancipation little likelihood of survival. Emancipation must, as Lincoln wrote to Horace Greeley in 1862, have "three main features—gradual—compensation—and [the] vote of the people." With that, Lincoln told Gilbert Greene that "He was quite sure it [slavery] would not outlive the century. It seemed to him that gradual emancipation and governmental compensation, would bring it to an end."[

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EMANCIPATION PROCLAMATION

But that did not mean the federal government could not put motives to emancipate in their minds that would hasten the decision, something that both Lincoln and the Southern secessionists keenly appreciated. Principally, the federal government could offer financial incentives by providing emancipation subsidies to the slave states, and social incentives by allowing the state legislatures to set their own emancipation timetables, "making the emancipation gradual and compensating the unwilling owners." Compensation would be costly, but it would not be nearly so costly as civil war. "Mr. Lincoln always contended that the cheapest way of getting rid of slavery," recalled Joseph Gillespie, "was for the nation to buy the slaves & set them free." Similarly, gradualism delayed the promise of full freedom for at least a generation. But in Lincoln's mind, it had the virtue of allowing former slave and slaveowners to find "some practical system by which the two races could gradually live themselves out of their old relation to each other, and both come out better prepared for the new." It also avoided the virtual automatic associations that immediate emancipation had with slave insurrection, a racial fancy that had enormous currency based on the San Domingo slave revolt, Nat Turner's insurrection in 1831, and, ultimately, John Brown's raid on Harper's Ferry. Above all, using compensation and gradualism to solicit the cooperation of the state legislatures would keep emancipation out of the federal courts. In a federal judicial system headed by a chief justice, Roger B. Taney, who only four years before had written the majority opinion in Dred Scott and further tried to cripple the Union war effort in ex parte Merryman and Prize Cases, any unilateral move by Lincoln on the federal level would inevitably generate constitutional challenges that gave presidential emancipation little likelihood of survival. Emancipation must, as Lincoln wrote to Horace Greeley in 1862, have "three main features—gradual—compensation—and [the] vote of the people." With that, Lincoln told Gilbert Greene that "He was quite sure it [slavery] would not outlive the century. It seemed to him that gradual emancipation and governmental compensation, would bring it to an end."
Although in his First Inaugural Lincoln promised to abide by the Fugitive Slave Law of 1850, refrain from threatening obnoxious appointees into federal positions in the South, and even posed "no objection" to a constitutional amendment "to the effect that the federal government, shall never interfere with the domestic institutions of the States, including that of persons held to service," the fact was that everything he had said about gradual emancipation was perfectly consistent with those apparently constitutionally offers. It was what he did not promise—to permit the extension of slavery into the territories, to broaden the fugitive slave statutes, or (in short) to back the Crittenden Compromise—that was held decisive by the people for whom it mattered the most, the Southern slaveholders, since they understood that without such promises Lincoln was leaving himself all the opportunity he needed to set the national political clock ticking toward emancipation. This was a tactic Lincoln had often practiced in the Illinois course, Leonard Swett once remarked that Lincoln was notorious for graciously giving away point after point to opposing counsel until, "[w]hen the whole thing is unarranged, the adversary begins to see that he was so blandly giving away was simply what he couldn't 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 every thing which would give him the least and in carrying that". 8

The most likely place to begin a campaign for gradual, compensated emancipation would be the border states—the slave states of Missouri, Kentucky, Maryland, and Delaware—where slavery was at its weakest; and among the border states, none was weaker in its hold on slavery than Delaware. Persuades a state like Delaware to adopt emancipation with the carrot of compensation, and the other border states would follow; let slavery disappear from the border states and slaveowners either have to agree to accept compensation and emancipate their slaves or move further south. The more the territory open to slavery shrank, the more the number of slaves crowded into those states grew, the more their price would decline until they either became worthless or the next round of slave states decided to cut their losses and embrace emancipation and accept federal compensation. Now was that scenario merely speculation. Each of Lincoln's "three main features" were patterned after the gradual emancipation plans adopted by the Northern states between 1780 and 1827, and upon the most successful large-scale emancipation scheme of the day, Britain's 1833 emancipation of the slaves that it held in the West Indies. The West Indian emancipation was both gradual and compensated and enjoyed the support, even if reluctant, of the West Indian assemblies. Its gradualism was embodied in limitations that provided for long-term apprenticeships and a compensation fund for the West Indian planters cushioned the economic blow of lost capital investment. Compensation was not, as it might seem, a pay-off to the planters so much as it was a cash-flow subsidy that would allow the planters immediately to begin paying wages to black apprentices. Even more significant, the resettlement of the ex-slaves under apprenticeship forced the telescoping of the terms of apprenticeship from twenty years to four. Emancipation, in every instance in the western hemisphere, was a process that inevitably acquired its own speed, and every observer of the West Indian scene could understand that even the most halting first step away from slavery always accelerated beyond the timetables and scope of its author. 9

The problem posed by Southern secession from the Union was, on those terms, quite simple: reunite the nation first, either by the North's numerical and military superiority or by politically undermining the Confederate elite. That meant saving the Union was actually the indispensable means to emancipation (rather than the other way round), since only within the constraints imposed by being part of the Union did Lincoln have any leverage over the slave states. It also meant that he could not tolerate any effort to push him toward more immediate federal solutions, and that included especially the voices that demanded that he use the war as a platform from which to declare military emancipation. That might stymie the loyal border slave states into joining the Confederacy and putting both military victory and the South's slaves permanently beyond his reach. "I think to lose Kentucky is nearly the same as to lose the whole game. Kentucky gone, we can not hold Missouri, not, as I think, Maryland." Lincoln wrote. "These all against us, and the job on our hands is too large for us. We would as well consent to separation at once, including the surrender of this capital." So, when Lincoln's headstrong commander in Missouri, John Charles Fremont, issued a martial-law emancipation edict on April 1, 1861—The Results of Emancipation, trans. Mary L. Booth (Boston: Walker; New York, 1885), 324–25; William A. Green, British Slave Emancipation, The Slavery Complex and the Great Experiment, 1831–
Although in his First Inaugural Lincoln promised to abide by the Fugitive Slave Law of 1850, refrain from thrusting obstreperous appointees into federal positions in the South, and even posed "no objection" to a constitutional amendment "to the effect that the federal government, shall never interfere with the domestic institutions of the States, including that of persons held to service," the fact was that everything he had said about gradual emancipation was perfectly consistent with those apparently contradictory offers. It was what he did not promise—to permit the extension of slavery into the territories, to broaden the fugitive slave statutes, or (in short) to back the Compromise that was held decisive by the people for whom it mattered the most, the Southern slaveholders, since they understood that without such promises Lincoln was leaving himself all the opportunity he needed to set the national political clock ticking toward emancipation. (This was a tactic Lincoln had often practiced in the Illinois courts.) Leonard Swett once remarked that Lincoln was notorious for graciously giving away point after point to opposing counsel until, "[when the whole thing is unravelled, the adversary begins to see that what he was so blandly giving away was simply what he could not 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 every thing which would give him the least and in carrying that]."

The most likely place to begin a campaign for gradual, compensated emancipation would be the border states—the slave states of Missouri, Kentucky, Maryland, and Delaware—where slavery was at its weakest; and among the border states, none was weaker in its hold on slavery than Delaware. Persuade a state like Delaware to adopt emancipation with the carrot of compensation, and the other border states would follow; let slavery disappear from the border states and slaveowners either have to agree to accept compensation and emancipate their slaves or move further south. The more the territory open to slavery shrank, the more the number of slaves crowded into those states grew, the more their price would decline until they either became worthless or the next round of slave states decided to cut their losses and embrace emancipation and accept federal compensation. Nor was that scenario merely speculation. Each of Lincoln's "three main features" were patented after the gradual emancipation plans adopted by the Northern states between 1870 and 1872, and upon the most successful large-scale emancipation scheme of the day, Britain's 1833 emancipation of the slaves that it held in the West Indies. The West Indian emancipation was both gradual and compensated and enjoyed the support, even if reluctant, of the West Indian assemblies. Its gradualism was embodied in limitations that provided for long-term apprenticeships and a compensation fund for the West Indian planters cushioned the economic blow of lost capital investment. Compensation was not, as it might seem, a pay-off to the planters so much as it was a cash-flow subsidy that would allow the planters immediately to begin paying wages to black apprentices. Even more significant, the restraint of the ex-slaves under apprenticeship forced the telescoping of the terms of apprenticeship from twenty years to four. Emancipation, in every instance in the western hemisphere, was a process that inevitably acquired its own speed, and every observer of the West Indian scene could understand that even the most halting first step away from slavery always accelerated beyond the timetables and scope of its authors. The problem posed by Southern secession from the Union was, on those terms, quite simple: reunite the nation first, either by the North's numerical and military superiority or by politically undermining the Confederate elite. That meant saving the Union was actually the indispensable means to emancipation (rather than the other way round), since only within the constraints imposed by being part of the Union did Lincoln have any leverage over the slave states. It also meant that he could not tolerate any effort to push him toward more immediate federal solutions, and that included especially the voices that demanded that he use the war as a platform from which to declare military emancipation. That might stampede the loyal border slave states into joining the Confederacy and putting both military victory and the South's slaves permanently beyond his reach. "I think to lose Kentucky is nearly the same as to lose the whole game. Kentucky gone, we can not hold Missouri, not, as I think, Maryland," Lincoln wrote. "These all against us, and the job on our hands is too large for us. We would as well consent to separation at once, including the surrender of this capitol." So, when Lincoln's headstrong commander in Missouri, John Charles Fremont, issued a martial-law emancipation edict on

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command two months later. When David Hunter did the same in the occupied
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proclamation "altogether void," and Hunter was soon recalled as well.10

Those revocations, as much as any battle, saved the border for the Union and
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justify further confiscation legislation that would seize any slave remaining in
bondage.11

1Horace White, The Life of Lyman Trumbull (Boston: Houghton, Mifflin, 1915), 172-73; Senator
(Boston: Northeastern University Press, 1990), 2:14; Congressional Globe, 37th Cong., 1st sess., 1861,
appendix 3; "An Act to Confiscate Property used for Insurrectionary Purposes," Aug. 3, 1861, and
"An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property
of rebels, and for other Purposes," July 17, 1862, both in The Statutes at Large, Treaties, and
Proclamations of the United States of America, from December 8, 1823, to March 3, 1883, ed. George P.
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But confiscation, while it satisfied the political urge to strike at slavery directly, also held serious legal perils. Property confiscation in time of war is as old as war itself, but from the time of Hugo Grotius, the seventeenth-century Dutch "father" of the "law of nations," lawyers and judges had struggled to construct a code of rules and laws that would restrict the most vicious examples of it.11 In the United States, the authors of the Constitution, remembering that they had once themselves come close to having everything they had confiscate as rebels against the king, authorized Congress "to define and punish" breaches of "the law of nations" (Article I, section eight) and put explicit limits on property seizures and the use of martial law on their fellow citizens. Article I, section nine, of the Constitution outlawed bills of attainder, which allowed legislators to inflict the death penalty for treason without jury trials, while the punishment of treason itself was hedged in by Article 3, section three, which forbade Congress to "work Corruption of Blood"—in other words, to pass bills of "pains and penalties" that went beyond punishing traitors themselves and reached down to impoverish their families by permanently confiscating a convicted traitor's property.12

For those reasons, trying to achieve emancipation through confiscation was less easy than it looked. During the War of 1812, the United States Supreme Court had held that the property of British subjects in the United States could not be taken without "some legislative act expressly authorizing its confiscation," and so when the First Confiscation Act was proposed during the special summer session of 1861, the matter was referred to the Senate Judiciary Committee, where, as it turned out, Illinois Senator Lyman Trumbull was one of the rare Radical Republicans sitting as chair of a congressional committee. What Trumbull's committee came back with on July 15, 1861, was a confiscation bill that tried to evade the constitutional restriction on "pains and penalties" by declaring the property of anyone "aiding, abetting or promoting insurrection" open to seizure as "prize and capture," as though all such property resembled


the capture of "prizes" at sea. That would, in particular, render slaves used by the Confederate military liable to federal confiscation, since by invoking the law of prize, the constitutional ban on attainted would have no application.13 But confiscating slaves, and doing so during a civil war, meant stretching the law of nations, prize law, and admiralty law to cover categories they had never included before. Moreover, any confiscations of property were regarded by the textbook authors as justified actions in time of war only between belligerent nations. The law of prize might work very well when the captured cargoes of ships belonged to the citizens of enemy nations, but Lincoln’s commission from the start of the war was that the Confederacy was not a nation. It was merely an insurrection because secession from the Union was a constitutional impossibility. That made the Confiscation Act, even as prize law, an action directed against the property of one’s own citizens, and even in cases of treason, that ran afoul of the Constitution’s ban on bills of attainder.14

Nevertheless, in the turbulent atmosphere following the humiliating defeat at First Bull Run, Congress passed Trumbull’s Confiscation Act, and Lincoln signed it, albeit grudgingly. "[T]he President had some difficulty in consenting to approve the act of Congress," wrote Treasury Secretary Salmon P. Chase, and according to the New York Times, Lincoln “finally consented only upon the most urgent entreaties of prominent members of the Senate.” When the Second Confiscation Act was placed before him by Congress in July 1863, Lincoln threatened to balk again, and on the same grounds. Much as he saw “no formal attainder” in the Second Confiscation Act, “I am constrained to say I think” confiscation “is unconstitutional,” and he was ready to veto it until Congress hurriedly passed a joint resolution that denied that “proceedings under said act” should “be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.” But even then Lincoln showed little energy in enforcing the bill. He gave no directions on enforcement to Attorney General Edward Bates, and Bates, a geriatric Missouri Whig who had no use for any emancipation that did not immediately deport the blacks it emancipated, declined to issue a circular of directions to federal attorneys unless they asked for it point-blank. “It cannot be said,” recalled James G. Blaine, “that the results flowing from this measure, either in restraining the action of Southern men or in securing to the National
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Treasury money derived from confiscated property were at all in proportion to the importance ascribed to it in the discussions of both branches of Congress.™

The Fremont and Hunter proclamations suffered from the opposite problem. As commander-in-chief of the Department of Missouri in the summer of 1861, Fremont tried to deal with the annoyance of guerrilla warfare by proclaiming martial law on August 30, and in the spirit of the First Confiscation Act of two weeks before, he proposed punishing rebel sympathizers who sponsored the guerrillas by seizing "[t]he property, real and personal, of all persons... who shall take up arms... or who shall be directly proven to have taken an active part with their enemies in the field, is declared to be confiscated to the public use, and..."—here was the red flag—"their slaves, if any they have, are hereby declared free men."™ The political consequences of Fremont's decree in the border states were, just by themselves, enough to move Lincoln to "modify" it. "No doubt the thing was popular in some quarters, and would have been more so if it had been a general declaration of emancipation," Lincoln explained to Ovville Hickman Browning. But in Kentucky, "the very arms we had furnished... would be turned against us."

Still, the principal reason why Lincoln believed that Fremont had "no authority" to issue martial-law decrees about emancipation was because none in American law really knew what standing martial-law emancipations might have if, after the period of martial law expired, they were appealed to the civil courts. In Planing v. Page, Chief Justice Taney had so circumcised the effect of martial law by the United States forces that he denied the appeal of several Philadelphian merchants against the levy of customs on goods shipped from the American-occupied Mexican port of Tampico during the Mexican War on the grounds that American military occupation of Tampico had done nothing to change its civil status as a foreign port. "Martial law is a thing not mentioned by name, and scarcely as much as hinted at, in the Constitution and statutes of the United States," admitted one-time Attorney General Caleb Cushing in 1856. "I say, we are without law on the subject."™ At best, Lincoln explained, a commander might be able to seize property, but only "as long as the necessity lasts." He could not emancipate it from its owner. "That must be settled according to laws made by law-makers and not by military proclamations. Anything other than that was simply "dictatorship," and even the best-intentioned dictatorship would mean the death of "any government of Constitution and laws."™

The common defect in both of those devices for emancipating slaves—confiscation and martial law—was their lack of legal permanence once the war emergency was over. Moreover, neither did anything to the institution of slavery itself, which would remain perfectly legal in both scenarios no matter how many individual slaves were emancipated.™ Worst of all, if either failed to survive a court challenge and a federal decision mired the federal judiciary the guarantor of slavery, the prospect for all future emancipation would be set back in just the same way as Dred Scott had set back the struggle to keep slavery out of the territories. And that was before any consideration of the possible political demise of those schemes would shake out in the border states or in Congress. In the wake of Bull Run, recalled Blair, "[t]he military situation was so discouraging that in the President's view it would have been wiser for Congress to refrain from enacting laws which, without success in the field, would be rendered unnecessary."™

Yet, in the end, it was not Lincoln's favored path of gradual, legislated emancipation that Lincoln finally adopted as his weapon to end slavery. As much as compensated emancipation avoided all the legal and political pitfalls by getting states to begin emancipating slaves by means of their own statutes, the project failed disastrously, and largely because Lincoln had woefully underestimated both the strength of Southern Unionism and the willingness of the border states to take the bait of compensation.

What happened in Delaware became a case in point. As early as November 1861, Lincoln began preparatory work for compensated emancipation by drawing up a plan for emancipation in Delaware, and met with antislavery Delawareans with a view toward getting the assent of the minuscule Delaware legislature to compensation. That would then allow Lincoln to approach Congress with a request for funding, and by the time the Delaware legislature met in the spring of 1862, both federal funding and the good will of the legislature would allow the first compensated emancipation to be put in motion. The plan, presented by Lincoln to Delaware's lone member of the House of Representatives, George

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™McPherson, 245-46, 250.


™Lincoln to Browning, Sept. 22, 1861, 4:531-32.


™Blair, 1:377.
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20Blaine, 1:577.
P. Fisher, would free all children born to Delaware slaves after the adoption of the bill and all Delaware slaves over the age of thirty-five; all others would become free at age thirty-five, although free children with slave mothers might still be subject to compulsory apprenticeship until age twenty-one for males and age eighteen for females. For that, Congress would pay the state of Delaware $719,200 in 6 percent United States bonds, doled out in thirty-one annual installments. Given the likelihood that the emancipation timetable would accelerate, Lincoln additionally offered to compress the compensation into ten payments of $71,920, which would completely eliminate slavery in Delaware by 1872. 86

By the time Congress was ready to convene for its new session in December, Lincoln was confident that Delaware would accede. Browning, who arrived in Washington the day before the session opened, stopped by the White House and found Lincoln "very hopeful of ultimate success." The Delaware "proposition" could then "be made use of as the initiative to hitch the whole thing to." Slavery would be on the short road to extinction, and as an added benefit, the Confederates would be disheartened and use for peace. 87 ["[I]f Congress will pass a law authorizing the issuance of bonds for the payment of the emancipated Negroes in the border states," Lincoln cheerfully assured his old judicial friend, David Davis, then "Delaware, Maryland, Kentucky, and Missouri will accept the terms." Almost on cue, Massachusetts Radical Republican Henry Wilson introduced a compensated emancipation bill for the District of Columbia, the one place apart from the territories where Congress could directly legislate slavery out of existence, and after a tortuous passage through committee and both houses of Congress, Lincoln signed it on April 16, 1862. Once the impetus of legislative emancipation began, the Confederates, staking their hopes for success on wooing the border states into rebellion, would collapse in dismay. By those means, "[I]t seemed to him that gradual emancipation and governmental compensation would bring slavery to an end."

But Lincoln was surprised to find that even Delawareans who "look upon slavery as a curse" were so deeply dyed by racial hatred that they "also look upon freedom possessed by a negro, except in a very few cases, as a greater curse." Fisher published the text of Lincoln's "act for the gradual emancipation of slaves in the State of Delaware" in the newspapers at the beginning of February 1862, and squawked it through the Delaware Senate by a five-to-four vote despite its Democratic majority. But in the Delaware House, a straw poll showed Fisher that the bill would fail by a single vote. Hoping to fight another day, Fisher had the bill withdrawn. "No man in his senses," the Democratic newspapers in Delaware crowed, "supposes that the Government intends to give Delaware $900,000 to buy out slavery. "If it ever buys the slaves Delawareans will be saddled with the cost."

The vigor with which Delaware threw compensated emancipation back in Fisher's (and Lincoln's) face should have said something to Lincoln about misjudging how fanatically resistant the border states might be to transforming Unionism into emancipation. Instead, Lincoln preferred to treat the Delaware refusal as a temporary setback that could be remedied by the next session of the legislature. Three weeks after Fisher's bill died for want of support in the Delaware House, Lincoln sent to Congress a proposed joint resolution that not only restored most of the terms of the Delaware plan, but extended its offer of compensated emancipation to all of the border states. "I recommend," Lincoln wrote to Congress on March 6, 1862, "Resolved that the United States ought to co-operate with any state which may adopt gradual abolition of slavery giving to such state pecuniary aid, to be used by such state in its discretion, to compensate for the inconveniences public and private, produced by such change of system."

He believed, even after the failure of the Delaware proposal, "that it would soon lead to important practical results." 88 The resolution passed the House on March 11 by a vote of eighty-nine to thirty-one; after little more than a week of debate, the Senate approved it on April 2 by a vote of thirty-two to ten. A week later Lincoln signed the joint resolution and sent it out to the border states for their action. "The Preposition of the Presidt. is an epoch," exulted Charles Sumner, "& I hope it will commence the end."

Lincoln told Horace Greeley at the end of March that "[i]f some one or more of the border-states would move fast, I should greatly prefer it," but his main concern was that emancipation be presented with as little apparent arm twisting as possible. "[W]e should urge it peaceably, and not menacingly, upon the South." It was less important to him to get emancipation put on a timetable than to frame it in a way that would avoid a challenge in the federal courts, and he assured Carl Schurz that "He was not altogether without hope that the proposition be had presented to the Southern States in his message of March 6th would find favorable consideration."

86 "A Cordial Emancipation Plan and Its Relation to Delaware," in Delaware Natl (Norwich: University of Delaware, 1931), 35-39; "Draft of a Bill for Compensated Emancipation in Delaware," in Butler, 5:29-30; Fisher later adjusted the total federal offer upwards to $900,000, since federal bonds were trading well below par that winter.


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The vigor with which Delaware threw compensated emancipation back in Fisher's (and Lincoln's) face should have said something to Lincoln about misjudging how fanatically resistant the border states might be to transforming Unionism into emancipation. Instead, Lincoln preferred to treat the Delaware refusal as a temporary setback that could be remedied by the next session of the legislature. Three weeks after Fisher's bill died for want of "support in the Delaware House, Lincoln sent to Congress a proposed joint resolution that not only restated most of the terms of the Delaware plan, but extended its offer of compensated emancipation to all of the border states. "I recommend," Lincoln wrote to Congress on March 6, 1862, "Resolved that the United States ought to cooperate with any state which may adopt gradual abolition of slavery, giving to such state pecuniary aid, to be used by such state in its discretion, to compensate for the inconveniences public and private, produced by such change of system." He believed, even after the failure of the Delaware proposal, "that it would soon lead to important practical results." The resolution passed the House on March 11 by a vote of eighty-nine-to-thirty-one; after little more than a week of debate, the Senate approved it on April 2 by a vote of thirty-two to ten. A week later Lincoln signed the joint resolution and sent it out to the border states for their action. "The Preposition of the President is an epoch," exulted Charles Sumner, "& I hope it will commence the end." Lincoln told Horace Greeley at the end of March that "[i]f some one or more of the border-states would move fast, I should greatly prefer it, but his main concern was that emancipation be presented with as slight apparent arm twisting as possible. "[W]e should urge it persuasively, and not menacingly, upon the South." It was less important to him to get emancipation put on a timetable than it be framed in a way that would avoid a challenge in the federal courts, and he assured Carl Schurz that "He was not altogether without hope that the proposition he had presented to the Southern States in his message of March 6th would find favorable consideration."
And perhaps it might have, had Lincoln been given time. But time was what he had less of than he thought, and that reality was brought home to him by the general-in-chief of the Union armies, George Brinton McClellan. When McClellan failed to capture Richmond and suddenly pulled his numerically superior Army of the Potomac back to its base around Harrison's Landing in June 1862, Lincoln decided to go to the peninsula to gain his own perspective on McClellan's predicament.87 "The object of the Presidential visit was to see the condition of the army, and learn what change of plans, if any, were deemed necessary by Gen. McClellan," reported Washington's Sunday Morning Chronicle. But the changes of plans McClellan had in mind were political rather than military in nature, all of which were included in a letter McClellan had prepared for Lincoln upon his arrival. The Harrison's Landing Letter may have been the most insubordinate communication ever made by an American officer to his civilian commander-in-chief. It declared that "Military power should not be allowed to interfere with the relations of servitude, either by supporting or impairing the authority of the master"; otherwise, "A declaration of radical views, especially upon slavery, will rapidly disintegrate our present armies.

Given McClellan's temperamential reluctance to act, few of McClellan's biographers have been sure whether McClellan was simply clumsy or whether he was actually flirting with the idea of a coup d'etat. Nevertheless, for months there had been whispers about McClellan's "putting his sword across the government's policy," about "his sympathies with the South," and his "incapacity and want of loyalty." Quartermaster General Montgomery Meigs was appalled to hear "officers of rank" in the camp at Harrison's Landing speak easily about "a march on Washington to 'clean out those fellows.'" One of McClellan's generals, William F. "Baldy" Smith, protested that tolerating even the cheapest
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Lincoln returned to Washington on July 10, “grieved with what he had witnessed.” McClellan’s ultimatum destroyed the illusion that time was on Lincoln’s side and that gradual emancipation could be tended slowly and calmly while the war went doggedly on to its conclusion. He now feared that if he acted at once to cashier McClellan, “his dismissal would provoke popular indignation”—not to mention the indignation of the Army of the Potomac—“and shake the faith of the people in the final success of the war.” If he had to begin the emancipation of slaves, it would have to be premeditated, no matter what McClellan’s ultimate plans were, and that meant that it would need to happen at once. “Oh,” Lincoln groaned to Isaac Arnold and Owen Lovejoy, “if the border States would accept my proposition! Then... you Lovejoy and Arnold, and all of us, would not have lived in vain! The labor of your life, Lovejoy, would be crowned with success—you would live to see the end of slavery” But the border states would not do anything to help him put compensated emancipation into action now. It was time, Lincoln concluded, after returning from Harrison’s Landing, to stop waiting war “with elbow-stalk squats, charged with rose water.” From that point, he would not leave “any available means untried.”


EMANCIPATION PROCLAMATION

The “means” Lincoln had in view was anything but humdrum, for he was now determined to resort to the kind of military emancipation he had foreseen Frémont from decreeing a year before. On July 22, 1862, Lincoln laid before his cabinet what has been designated as the “First Draft” of an emancipation proclamation, and it was clearly a military proclamation. How long Lincoln had been composing the document is unclear: Vice President Hannibal Hamlin insisted on at least three occasions in later years that Lincoln had read a version to him in mid-June; Lovejoy also claims to have heard Lincoln read to him an early draft in June; Francis Carpenter and Joseph Barrett thought it was “undoubtedly true” that Lincoln had begun composing the “First Draft” on July 9, while still en route back to Washington from Harrison’s Landing; Welles was convinced that Lincoln had not begun work on the proclamation until July 14, after a final meeting with the border state congressional delegations that met with a blank refusal of cooperation. What is certainly true is that as soon as it finally became clear that the border states would not accept even the most generous compensation plan, Lincoln began dropping portentous hints that he had given emancipation “much thought and had arrived to the conclusion that it was a military necessity absolutely essential for the salvation of the Union, that we must free the slaves or be ourselves subdu’d.”

The legal device for military emancipation would be a particular form of martial law known as the “war powers.” The Constitution designates the president as the commander-in-chief of the armed services in time of war, and in war, the president was presumed to possess a set of “war powers” that occupied a vague and undefined middle ground between martial law and civil law. That presumption had a shaky history: the only body of opinion that described the “war powers”
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was a series of comments made by John Quincy Adams on the floor of the House of Representatives in 1836, and again in 1841 and 1842, in which he stated that Congress had the "authority to interfere with the institution of slavery" in time of national emergency, including the power "to abolish it by treaties of peace.

Under those "war powers," the president might exercise certain martial-law prerogatives, but without invoking widespread military policing or the closure of the civil courts. Legal commentators hotly debated that any such "war powers" existed in the Constitution, but the notion refused to die, and at the beginning of the Civil War, Charles Sumner was quick to urge Lincoln "that under the war power the right had come to him to emancipate the slaves."  

It was with those "war powers" in mind that Lincoln composed the "First Draft" of the Emancipation Proclamation. The "First Draft" does not, at first glance, appear to be a proclamation at all, since it seems to begin as the enabling announcement required by the Second Confiscation Act, which he had just signed the week before.

In pursuance of the sixth section of the act of congress entitled "the act to suppress insurrection and to punish treason and rebellion, to seize and confiscate property of rebels, and for other purposes," Approved July 17, 1862, and

which act, and the joint Resolution explanatory thereof, were hereon published, I, Abraham Lincoln, President of the United States, do hereby proclaim to, and warn all persons within the contemplation of said sixth section to cease participating in, aiding, countenancing, or sheltering the existing rebellion, or any rebellion against the government of the United States, and to return to their proper allegiance to the United States, on pain of the forfeitures and sufferances, as well within and by said sixth section provided.

But that much said, Lincoln proceeded to transform confiscation from Lyman Trumbull's bizarre application of the law of prize to an executive decree based on the "war powers." And, as a fit and necessary military measure for effecting this object, I, as Commander-in-Chief of the Army and Navy of the United States, do order and declare that on the first day of January in the year of Our Lord one thousand, eight hundred and sixty-three, all persons held as slaves within any state or states, wherein the constitutional authority of the United States shall not then be practically recognized, submitted to, and maintained, shall then, thenceforward, and forever, be free."  

By confining confiscation to the "states, wherein the constitutional authority of the United States shall not then be practically recognized"—in other words, the Confederacy—the border states, with their civil courts open and laws (including laws on slavery) untainted by rebellion, were now exempt. But not being in rebellion, Lincoln had no grounds for extending his "war powers" to them. The states of the Confederacy were another matter, and here Lincoln opened the original scope of the Second Confiscation Act dramatically. Under the rubric of the "war powers," Lincoln was prepared to do what no president under any other rubric could have done, and that was declare general emancipation, not just of slaves used in Confederate war service or the slaves of loyal masters, but of all the slaves, without exception, in all rebellious areas. And not merely seized as "contraband" or vaguely "free," but permanently free, "thenceforward, and forever."

That was taking a long chance, especially with the federal armies stumbling from one defeat to another. Secretary of State William H. Seward "thought it would be well to postpone the whole subject to a more auspicious period." Lincoln eventually agreed and "put the draft of the proclamation aside" in order to wait for a Union victory, so that it would appear "supported by military success." But in that instance, assisting was the strategy of Seward, not Lincoln.  

If Lincoln had regarded the Proclamation as a grudging necessity, he showed no sign of it by the way he leaned rumors of it. New York politico James A. Hamilton gave New York Governor Edward D. Morgan a garbled version of the Proclamation that described an emancipation proclamation presented to Lincoln "by several members of Congress and other gentlemen." Lincoln, as Hamilton heard, "approved of the policy thereby indicated, and declared that, with slight modifications, he would issue it," but "this purpose was frustrated by two members of his cabinet." Lincoln certainly read it to James Speed, brother of Joshua Speed, only to have Speed conclude that "it will do no good; probably much harm." Southern Unionist Robert J. Walker brought novelin

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and journalist James R. Gilmore to meet Lincoln on August 18, whispering to Gilmore that “I have good news for you, but it must be strictly confidential,—the Emancipation Proclamation is decided upon,” news that Lincoln then authorized Gilmore to leak privately to Gilmore’s boss at the New York Tribune, Horace Greeley. Leonard Swett related to John Nicolay that Lincoln had read the proclamation to him at the White House on the evening of August 20. Horace Greeley, Collector of the Port of New York and a key figure in New York Republican politics, also claimed fifteen years later that Lincoln had read him a draft of the Proclamation “in his own hand writing and in his pocket where we were together” in Washington on September 5.20

The rumors, in turn, gave way to demands. Lydia Maria Child and Greeley both published calls to Lincoln as editors, Greeley’s “The Prayer of Twenty Millions,” in the New York Tribune on August 19, and Child’s “To the President of the United States,” in the Washington National Republican on August 22. In September, the New York City Central Republican Committee adopted resolutions calling on Lincoln “to issue a proclamation of emancipation, and declare that all slaves of rebels in this Union are forever free”—language that approximated the “First Draft” a little too closely to have been an accident. On September 17, veteran abolitionist Robert Park Owen wrote Lincoln a lengthy letter, enclosing an emancipation proclamation he had drafted himself for Lincoln’s use. But Lincoln shook grizzly to Seward’s advice, letting public demand and the military situation seem to draw the Proclamation out of him. On August 30, the rebel Army of Northern Virginia soundly defeated a federal army at Manassas, Virginia, and the following week, Robert E. Lee’s army crossed the Potomac River into Maryland, invading Northern territory for the first time in the war. On September 17, Lee was attacked by the Army of the Potomac under McClellan along Antietam Creek at Sharpsburg, Maryland. In an all-day battle of unprecedented ferocity, Lee was hammered almost to destruction, and withdrew across the Potomac the following evening. Lincoln would have preferred that Lee had been cornered and crushed, but he was willing to accept the results of the Antietam battle as a victory. And a victory was what he needed to undergird the Proclamation. “When Lee came over the river,” Lincoln told

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22Donald, Inside Lincoln’s Cabinet, 149; Diary of Gideon Welles, 1:142-43.
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The “Preliminary” Proclamation was countersigned by Secretary of State Seward and issued the next day, with every major Northern newspaper printing and commenting on it. “How utterly insignificant seemed my personal fortunes, disappearing from my own mind in the radiance and glow of this, to me, the greatest human utterance,” wrote Ohio Congressman Albert Gallatin Riddle.

[It] was like speaking a new world into being by Omnipotence.”

The Confederates were given one hundred days, until January 1, 1863, to submit or face the legal reality of emancipation. However, if the goal of the “Preliminary” Proclamation was to turn the hearts of the rebels, very little such repentence occurred. For the third and last time, on December 29, Lincoln “read the draft of his Emancipation Proclamation, invited criticism, and finally directed that copies should be furnished to each” cabinet member. No manuscript of that “Final Draft” survives in Lincoln’s hand, but four of the printed copies belonging to Attorney General Edward Bates, Postmaster General Montgomery Blair, Chase, and Seward, together with their comments, do. They do not make particularly instructive reading, since the bulk of the comments touched on only two issues—the precise identification of which states and parts of states were exempt from the Proclamation since they were now under Union occupation, and the promise that the federal government “will recognize and maintain” the slaves in any set they took “for their actual freedom.” Lincoln thought he had softened objections to that threat by adding, in this “Final Draft,” an additional “appeal to the people so declared to be free, to abstain from all disorder, tumult, and violence, unless in necessary self-defense.” But the “self-defense” provision still left the door open to slave violence. Bates, Seward, Blair, and even Chase all urged him to strike it out entirely, and two days later, when the cabinet met to review the “Final Draft,” both Chase and Seward proposed a rewriting, “enjoining upon, instead of appealing to, those emancipated, to forbear from tumult.” In the end, Lincoln would concede, and “enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defense; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.”

The origins of the trope of progress lie largely in the Radical Republicans’ perceptions that Lincoln did not appreciate the urgency of the opportunity that the elections of 1860 had put into antislavery hands, just as the trope of wasting was cultivated as a rejoinder (and a rebuke) to the notorious “impatience” of the Radicals. They had, on the whole, little reason to be patient. The Republican held political power in Congress for the first time in 1861, and, as the numerous veterans of the Whig party in their ranks could attest, there was no surety that they would ever have that power again. It was in their interest, as a minority party, to strike for emancipation as quickly as possible while that power was still in their hands, and the swiftest way to exercise that power was by a martial-law decree, such as the one issued by Fremont and Hunter. Lincoln did not actually disagree, at least in principle. As much as the Radicals irritated Lincoln “with their everlasting emancipation talk,” he also acknowledged that “Sumner and Wade and Chandler are right about it. . . . We can’t get through this terrible war with slavery existing.” The Radicals were “utterly lawless” and “the unhandiest devils in the world to deal with,” but they were “nearer to me than the other side” and “after all their faces are set

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The “Preliminary” Proclamation was countersigned by Secretary of State Seward and issued the next day, with every major Northern newspaper printing and commenting on it. “How utterly insignificant seemed my personal fortunes, disappearing from my own mind in the radiance and glow of this, to me, the greatest human utterance,” wrote Ohio Congressman Albert Gallatin Riddle.

“[I]t was like speaking a new world into being by Omnipotence.”

The Confederates were given one hundred days, until January 1, 1863, to submit or face the legal reality of emancipation. However, if the goal of the “Preliminary” Proclamation was to turn the hearts of the rebels, very little such repeating occurred. For the third and last time, on December 29, Lincoln “read the draft of his Emancipation Proclamation, invited criticism, and finally directed

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“Schreiber and Ehrenberg, 25: Dana to Seward, Sept. 23, 1862, Abraham Lincoln Papers: Barbour to Samuel Bates, Dec. 30, 1862, Samuel Bates Papers, The Huntington Library, San Marino, Calif. J. Boles, Bertram, whom Lincoln utilized as a back door to Horace Greeley and the editorial page of the New York Tribune, forwarded to Lincoln in May 1863 the proposal of a New Orleans Union, Augustus Montgomery, to “ induce the blacks to make a concerted and simultaneous rising . . . to arm themselves with any and every kind of weapon that may come to hand.” Lincoln was initially’inclined to regard the plan as “a base,” but he also signaled to Gilmer that he had “no objection whatever to your publishing what you propose concerning negro insurrection,” as long as Gilmer did not cite Lincoln as personally authorizing the insurrection. In the end, nothing came of it but some sporadic outbursts “among the blacks in Georgia and Alabama” in September 1863. The plan for the spring was drafted by Montgomery on May 17, 1863, and forwarded to Major General William S. Rosecrans, then in command of the federal Army of the Cumberland. Gilmer then sent the letter to Lincoln. See Montgomery to Rosecrans, May 17, 1863, Abraham Lincoln Papers: Gilmer, 150-53, Nicolay to Gilmer, June 14, 1863, in Foote, Wild Geese in the White House, 115. In the summer of 1864, with George McClellan the Democratic candidate for the presidency, Lincoln read a similar proposition to Frederick Douglass, not as much in the form of an insurrection, as in a movement “outside the army to induce the slaves in the rebel states to come within the federal lines.” “As it had been here after the Harrison’s Landing Letter, Lincoln’s motto was energy over McClellan. ‘He thought now was the time,’ because if McClellan was the elector, only few of them as insurmountable that would be, if for the war was over’ Douglass agreed in “understand the organization of a band of slaves, composed of colored men, whose linemen should be somewhat antioxidant of the original plans of John Brown.” But the sudden opening in Lincoln’s military and political fortunes, and his reluctance that autumn, eroded the plan most. For the 1864 “John Brown plan,” see Douglass, Life and Times of Frederick Douglass, William H. Brownell (1881); pp. New York: Collier Books, (1969), 355-59; Douglass to Theodore Tilton, Oct. 15, 1863, in Frederick Douglass: Selected Speeches and Writings, ed. Philip S. Foner (Chicago: Lawrence Hill Books, 1991), 372.


that copies should be furnished to each” cabinet member. No manuscript of that “Final Draft” survives in Lincoln’s hand, but four of the printed copies belonging to Attorney General Edward Bates, Postmaster General Montgomery Blair, Chase, and Seward, together with their corrections, do. They do not make particularly instructive reading, since the bulk of the comments touched on only two issues—the precise identification of which states and parts of states were exempt from the Proclamation since they were now under Union occupation, and the promise that the federal government “will recognize and maintain” the slaves in any set they took “for their actual freedom.” Lincoln thought he had softened objections to that threat by adding, in this “Final Draft,” an additional “appeal to the people so declared to be free, to abstain from all disorder, tumult, and violence, unless in necessary self-defense.” But the “self-defense” provision still left the door open to slave violence. Bates, Seward, Blair, and even Chase all urged him to strike it out entirely, and two days later, when the cabinet met to review the “Final Draft,” both Chase and Seward proposed a rewriting, “enjoining upon, instead of appealing to, those emancipated, to forbear from tumult.” In the end, Lincoln would concede, and “enjoin upon the people so declared to be free, to abstain from all violence, unless in necessary self-defense; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.”

The origins of the trope of progress lie largely in the Radical Republicans’ perceptions that Lincoln did not appreciate the urgency of the opportunity that the elections of 1860 had put into antislavery hands, just as the trope of selling was cultivated as a rejoinder (and a rebuke) to the notorious “impatience” of the Radicals. They had, on the whole, little reason to be patient. The Republican held political power in Congress for the first time in 1861, and, as the numerous veterans of the Whig party in their ranks could attest, there was no surety that they would ever have that power again. It was in their interest, as a minority party, to strike for emancipation as quickly as possible while that power was still in their hands, and the swiftest way to exercise that power was by a martial-law decree, such as the one issued by Fremont and Hunter.

Lincoln did not actually disagree, at least in principle. As much as the Radicals irritated Lincoln “with their everlasting emancipation talk,” he also acknowledged that “Sumner and Wade and Chandler are right about it . . . We can’t get through this terrible war with slavery existing.” The Radicals were “utterly lawless” and “the unhappiest devils in the world to deal with,” but they “are nearer to me than the other side” and “after all their faces are set

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Lincoln liked to think of himself, on the strength of his Kentucky birth and Virginia parentage, as a Northerner who nevertheless possessed a unique empathy and understanding of the Southern mind. "If I could only get this proposition [compensated emancipation] before the southern people, I believe they would accept it," he told Pennsylvania Republican Alexander McClure, "and I have faith that the northern people, however started at first, would soon appreciate the wisdom of such a settlement of the war." In that, he could not have been more wrong, but it allowed him to believe that Kentuckians—and by extension, all Union-loving Southerners—would be willing to slug off the burdens of slavery if someone could put it in their interest to do so. Lincoln was convinced, in classic Benthamite fashion, that people were motivated by "interest" rather than altruism, and it was to that "interest" he believed a gradual, compensated emancipation scheme would appeal. It was only after the bleak failure of his appeal to the border states in July 1862, and after it became apparent that the army under McClellan was becoming increasingly unreliable, that he moved to take up the martial-law weapon, not because it was the best weapon, but because urgency had now become his agenda, too. Even then, he was not convinced that an emancipation proclamation based on the "war powers" would survive postwar court appeals. "A question might be raised whether the proclamation was legally valid," he remarked as late as February 1865. "[T]he proclamation was a war measure and would have effect only from its being an exercise of the war power." Hence, "as soon as the war ceased, it would be inoperative for the future," and perhaps even for the past. "Nobody was more quick to perceive or more frank to admit the legal weakness and insufficiency of the Emancipation Proclamation than Mr. Lincoln," recalled James Welling. "Determined though he was never to retract the paper, or by his own act to return to slavery any person who was free by its terms, he saw that, in itself considered, it was a final renunciation of title to any slave who should claim to be free by virtue of its vigor alone." So, he continued to propose compensated emancipation schemes, not only during the hundred days between the "Preliminary" and final proclamations, but for the rest of the war. In the largest sense, the Thirteenth Amendment was his ultimate resort to a legislative solution to slavery. That, as he said, would provide the "King's cure for all the evils."[6]

And yet, what is remarkable is that Lincoln was only dubious about the various legal mechanisms of emancipation, not emancipation itself. The trope required to fully understand emancipation is neither progress nor unity, but prudence. Lincoln was just as conscious as the Radicals of the window of
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And yet, what is remarkable is that Lincoln was only dubious about the various legal mechanisms of emancipation, not emancipation itself. The trope required to fully understand emancipation is neither progress nor usury, but prudence. Lincoln was just as conscious as the Radicals of the window of
opportunity his presidency provided, and even if his plan took a different path from the Radicals, it should not be missed that he was already moving on that road by November 1861. True as it is that the Proclamation is couched in a legalese strangely different from the eloquence of Lincoln's other famous papers, it cannot be said often enough that it was intended to be a legal document so that it could have real legal consequences. The Gettysburg Address might have been a tremendous exercise in elegaic rhetoric, but it also accomplished absolutely nothing—literally, it changed the status of no one—apart from dedicating a cemetery. The Emancipation Proclamation, which was fully as prosaic as the Gettysburg Address was memorable, changed the legal state of four million slaves who "are, and henceforward shall be free." It did not, of course, liberate any Southern slaves until the Union armies marched far enough across the South to make it effectual, nor did it liberate slaves in places where the federal government was sovereign, as in the border states and the occupied Confederacy. But no one believes, in the first case, that law (even martial law) lacks meaning only because enforcement has yet to catch up with it; and no one allowed at that time that federal power had the constitutional right to impose emancipation where the federal courts were open and functioning. It has to be said, also, that the proclamations of Frémont and Hunter were equally technical and prosaic, yet no one among the legions of Lincoln's critics seems inclined to fault them on that score.45

Lincoln's Proclamation has no meaning apart from his singular determination to place his nation, at once and for sure, on the best-paved road to emancipation and the death of slavery. It was a determination with the flexibility to consider more than one path, but it was also a determination that did not propose ever to negotiate the fact of emancipation. "[W]hile I remain in my present position," he told Congress eleven months later, "I shall not attempt to retract or modify the emancipation proclamation; nor shall I return to slavery any person who is free by the terms of that proclamation." He repeated that declaration a year later, adding: "If the people should, by whatever mode or means, make it an Executive duty to re-enslave such persons, another, and not I, must be their instrument to perform it." Of the three terms he laid down for negotiations with Confederate emissaries in February 1865, the second was, "No receding, by the Executive of the United States on the Slavery question."46 If that promise, as embodied in the Emancipation Proclamation, appears to later generations to have lacked style, intention, commitment, or scope, the fault may lie, not in a political failure on the part of Abraham Lincoln, but in a failure of civic understanding on our own.

45Salmon P. Chase to Lincoln, Feb.–Mar., 1862, Abraham Lincoln Papers.