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Lincoln and the Constitutional Dilemma of Emancipation

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

—U. S. Constitution, Article II, Section 2

On the afternoon of January 1, 1863, following nearly two years of bloody civil war, Abraham Lincoln set in motion events that would reconnect the detached cord of Union and that would begin to reconcile the nation's practices to its avowed democratic principles. Interpreting Article II, Section 2 of the Constitution broadly, the president used his war powers to proclaim freedom for those enslaved laborers caught in the dehumanizing grip of one of the Confederacy's most sacrosanct institutions. His bold move challenged prevailing notions of presidential prerogative and triggered criticism from his supporters as well as his opponents. While many abolitionists bemoaned the limited scope of the president's actions, alleging that he freed those persons over whom he had no control, while exempting from his edict those under Union authority, his more conservative critics charged that he had exceeded the powers the Constitution invested in the executive.

Lincoln anticipated the criticism. He knew that most abolitionists would be satisfied with nothing less than universal emancipation and that, contrarily, pro-South forces would find in his actions reason to brand him a betrayer of American liberties. Given that slavery evoked such polarization in the North, he realized that whatever action he took on the institution posed considerable danger to the goal of the war—preservation of the Union.

Although influenced by the practical considerations of containing the rebellion—that is, not losing any more slaveholding states to the Confederacy—Lincoln's greatest challenge regarding emancipation was to achieve it without violating constitutional guarantees. He understood slavery to be the cause of the war, but he believed that the Constitution denied the president any easy solution for its eradication. Whatever his personal views on slavery (and there is incontrovertible evidence that he hated

the institution on moral grounds as well as practical reasons), law and custom had deemed enslaved people property (1). Because the Constitution protected property rights, Lincoln felt compelled to operate within those constraints. As war propelled him inexorably toward emancipation, he sought authority to do so within the framework that the Constitution provided.

The Civil War began as a struggle over national union, one half of the American people believed it indissoluble and fought to preserve it, while the other half wished to withdraw from it and secure their own identity. Northern attempts

at appeasement and diplomacy having failed, war became the only recourse for a president convinced that secession was unconstitutional. Hence, in his first official act after hostilities commenced, Lincoln called up the state militias “to maintain the honor, the integrity, and the existence” of the nation (2). The decision had not been an easy one. When he spoke before Congress in special session on July 4, 1861, he explained that,

“It was with the deepest regret that the Executive found the duty of employing the war-power, in defense of the government, forced upon him. He could but perform this duty, or surrender the existence of the government (3).”

Defense of the government ultimately led Lincoln to strike at the heart of the South's reason for challenging national union. It would prove even harder than prosecuting the war itself, because the Constitution—compromise document that it was—reflected the ambivalence of the framers over the issue of slavery. Lincoln had acknowledged “not grudgingly, but fully, and fairly,” the constitutional rights of the slaveholder, but the treatment of slavery in the Constitution suggested to him that the framers had deliberately paved the way for the institution's eventual extinction (4). The founding fathers and the earliest Congress were hostile to slavery; they tolerated it “only by necessity,” he argued. The

framers even excluded the words “slave” and “slavery” from the Constitution and chose instead to refer to those held in bondage as “persons” from whom “service or labor may be due.” This was a deliberate attempt, thought Lincoln, to keep the idea of “property in man” out of this democratic document (5). The founding fathers hid it away “just as an afflicted man hides away . . . a cancer, which he



Abraham Lincoln and the Emancipation Proclamation, 1888. (Image Courtesy of Library of Congress, Prints and Photographs, LC-USZC4-1526.)



The first reading of the Emancipation Proclamation before the cabinet in 1862. Painted by F.B. Carpenter and engraved by A.H. Ritchie in 1866. (Image Courtesy of the Library of Congress, Prints and Photographs, LC-USZ62-2070 DLC).

does not cut out at once, lest he bleed to death' (6). Hence, the Supreme Court's ruling in *Scott v. Sandford*, which declared that slaveholders could not be prohibited from taking their chattel wherever they wished, was "based upon a mistaken statement of fact . . . that the right of property in a slave is distinctly and expressly affirmed in the Constitution." That document was "literally silent" about any right of slaveholders to take their human property into the territories (7).

Lincoln had always believed that Congress could prevent slavery from spreading into the territories, over which it had jurisdiction. But the government, he believed, did not have the constitutional authority to touch the institution where it had already been established. Indeed, the 1860 Republican platform on which he was elected to the presidency declared:

That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend (8).

Lincoln did not stand down from this position when in the weeks following his election several southern states seceded and formed the Confederate States of America. Far from seizing upon this as an opportunity to move against slavery, the newly elected president attempted to reassure the secessionists and their non-seceding slaveholding brothers that he had "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." Lincoln promised that "all the protection which, consistently with the Constitution and the laws, can be given, will be cheerfully given to all the States when lawfully demanded as cheerfully to one section, as to another" (9). It was a position he held throughout the war.

In promising to uphold the laws, Lincoln was speaking primarily about enforcement of the Fugitive Slave Act, passed in 1850 as one of the compromises after the war with Mexico resulted in the ceding of millions of acres to the United States. The Missouri Compromise had maintained a balance of free and slave states since 1820, but this new acquisition threatened to give advantage to one section over the other. In an effort to stay the rising crisis, Congress had proposed a series of measures that would appease each region. The Fugitive Slave Act aimed to assure southerners that the northern people would be equally obligated to protect the rights of the slaveholder. The law imposed fines on anyone who refused to assist in the apprehending of a fugitive or who facilitated any effort to prevent recovery. This attempt by Congress to resolve the conflict may have pleased the South, but it evoked anger and frustration among northerners who had no desire to become slave catchers (10).

After the secessionist attack on Fort Sumter ignited armed conflict, Lincoln's declaration of noninterference met with increased criticism within the Union and initiated direct challenge to the administrator's position. Undeterred by the president's pledge, enslaved African Americans had themselves seized the opportunity to obtain their freedom by flight. As Union troops advanced on the Confederacy, fugitives from slavery met them and offered loyalty, labor, and information in exchange for asylum. Even in the ostensibly loyal border states, black men and women sought to secure freedom as the chaos of war blurred distinctions between rebel and Unionist slaveholders (11).

Without specific guidelines for dealing with fugitives, Union Commanders in the field implemented their own solutions. Some of them saw the advantage to sheltering runaways and chose to employ them in erecting defenses against southern forces or utilized them in a variety of noncombatant occupations. General Benjamin Butler's declaration that these fugitives were contraband of war encouraged other commanders to embrace the designation (12). But for every

General Butler there was a Henry Halleck who barred fugitive slaves from the camps under his command. In the first months of the war, the Lincoln administration chose not to make any additional public pronouncements on the issue of fugitives, but the president, eager to keep the conflict contained and of short duration, privately queried the general-in-chief, Winfield Scott, if it “would be well to allow owners to bring back [slaves] which have crossed the Potomac” with Union troops (13). As a consequence, runaways were banned from the Union camps of the Department of Washington and were prohibited from following soldiers on the move (14).

Congress’s attempt to turn the South’s “peculiar institution” to the North’s advantage and the emancipating actions of commanders in the field left Lincoln less than enthusiastic and, in some instances, downright perturbed. In August 1861, Congress had passed the First Confiscation Act, which provided for seizure of any property (including enslaved persons) that had been used to wage war against the government. The act did not address the status of the confiscated slaves once the war was over. Yet, concerned that such action would strengthen the resolve of the rebels and would likely be overturned by constitutional challenge, Lincoln reluctantly signed the measure and made little effort to enforce it (15).

General John C. Frémont’s proclamation of August 30 gave Lincoln even greater concern. As commander of the Department of the West, Frémont declared martial law in Missouri and issued a proclamation stipulating that “the property, real and personal, of all persons in the state of Missouri who shall take up arms against the United States . . . is declared to be confiscated and their slaves are hereby declared freemen” (16). Frémont’s proclamation differed from the First Confiscation Act in that property could be seized without having been employed against the Union. Moreover, the human property thus confiscated was declared free. Citing concern that the decree might “alarm our southern Union friends, and turn them against us—perhaps ruin our rather fair prospect for Kentucky,” Lincoln asked, and later commanded, the unyielding Frémont to place his proclamation in conformity with Congress’ confiscation measure (17).

In a letter written in late September to friend Orville H. Browning, fellow Republican and U.S. senator from Illinois, Lincoln reiterated these political concerns, especially the importance of securing the loyalty of Kentucky. But it was the constitutional question that was paramount. Lincoln argued that the general’s proclamation, specifically the part which stipulated the liberation of the slaves, was “purely political, and not within the range of military law, or necessity.” He challenged the notion that:

“If a commanding General finds a necessity to seize the farm of a private owner, for a pasture, an encampment, or a fortification, he has the right to do so . . . as long as the necessity lasts But to say the farm no longer belong to the owner, or his heirs forever, and this as well when the farm is not needed for

military purposes as when it is, is purely political, without the savor of military law about it” (18).

Lincoln believed that this applied to slaves as well. Human property could be confiscated, “But when the need is past, it is not for [the confiscator] to fix their permanent future condition. That must be settled according to laws made by law-makers, and not by military proclamations Can it be pretended that it is any longer the government of the U.S. . . . wherein a General, or a President, may make permanent rules of property by proclamation?” (19).

When eight months later, General David Hunter, commander of the Department of the South, declared martial law and freed the slaves within the three states under his jurisdiction, an exasperated Lincoln rescinded the order, declaring that as president he would “reserve to myself” the question of whether or not as commander in chief he had authority to emancipate the slaves (20).

Contrary to his response to the emancipating actions of commanders in the field, Lincoln did not challenge Congress’s authority to free enslaved people in the District of Columbia when, on April 11, 1862, that body approved a measure to emancipate “persons held to service or labor” in the city. As a federal enclave, Washington was under the jurisdiction of Congress, and hence, it had the constitutional authority to end slavery there. The city had been steadily moving toward eradication of the institution for some time, and so fewer than 3,200 African Americans out of a total black population of 11,000 were affected directly (21). Nevertheless, many white Washingtonians challenged Congress’s actions because they thought the maximum amount of three hundred dollars per slave was inadequate compensation and because they imagined that a free city would quickly become overrun with fugitives from slavery in Maryland and Virginia (22).

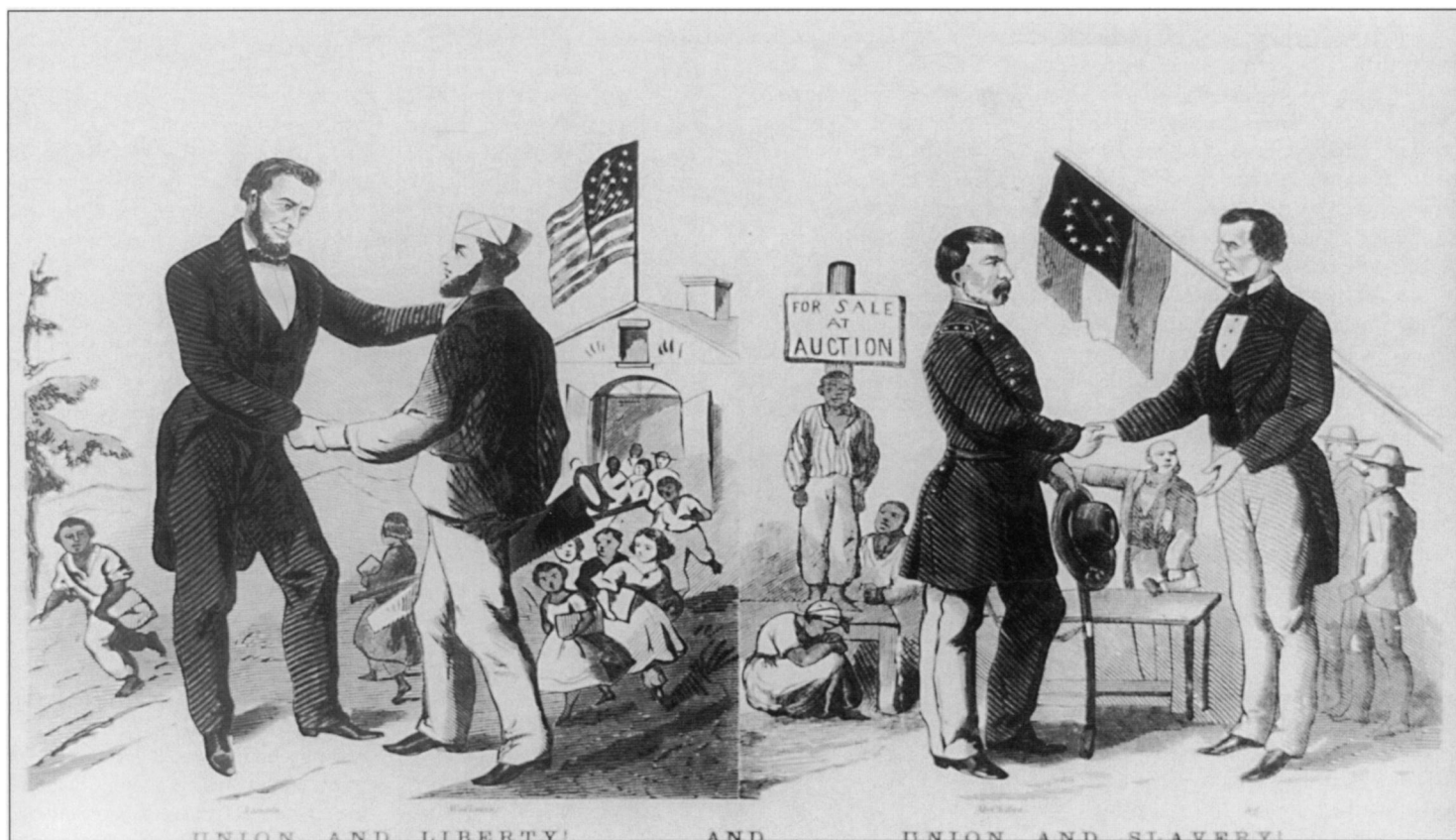
But acknowledgement of constitutional authority did not suggest that the District Emancipation Bill was to Lincoln’s liking. Weeks before, he had proposed a plan for gradual, compensated emancipation, implemented by the border states. In this way, constitutional constraints would be recognized while emancipation would sever the bond between the slaveholding Union states and their sisters in rebellion (23). But none of

those states had exhibited much interest. Hence, when Congress stepped in to implement emancipation for the District of Columbia, Lincoln was somewhat ambivalent. While the measure was making its way through Congress, he expressed his uneasiness “as to the time and manner of doing it.” He preferred the initiative to come from one of the border states, but if this could not be achieved quickly, he hoped that the bill would stipulate an emancipation that was gradual, provided compensation to the owners, and was voted on by the people of the District (24).

When Lincoln signed the District Emancipation Bill after delaying for five days, he sent a message to Congress that officially voiced his concerns. The president reminded them that he had “ever desired to see the national capital



Man reading a newspaper with headline, “Presidential Proclamation, Slavery,” which refers to the January 1863 Emancipation Proclamation. Drawing watercolor, 1863. (Image Courtesy of Library of Congress, Prints and Photographs, LC-USZC4-2442).



An anti-McClellan broadside (1864), contrasts Republican candidate Abraham Lincoln's advocacy of equality and free labor in the North with Democratic opponent McClellan's alleged support of the slave system in the South. On the left, Lincoln shakes the hand of a bearded man wearing a square paper labor cap, while black and white school children issue from a schoolhouse flying the American flag in the background. On the right, McClellan, in military uniform, shakes the hand of Confederate president Jefferson Davis, as a slave auction takes place behind them. (Image Courtesy of Library of Congress, Prints and Photographs, LC-USZ62-945.)

freed from the institution in some satisfactory way" (25). But he proposed an "amendatory or supplemental act" that would guarantee sufficient time for which to file claims for compensation. Moreover, he hinted at "matters within and about this act, which might have taken a course or shape, more satisfactory to my judgment" (26). Presumably, he was disturbed that emancipation had been carried out absent any opportunity for District residents to shape it, as they did not have a vote.

One last action on the part of Congress would address the issue of emancipation of enslaved people before Lincoln issued his preliminary proclamation in September 1862. In July, Congress had passed the Second Confiscation Act. The measure, intended "to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels," provided for the freeing of all slaves of persons who were "adjudged guilty" of committing treason against the United States (27). Again, certain features of the bill disturbed Lincoln, and again he responded by submitting written objections to Congress. While expressing his pleasure that loyal Unionist slaveholders were not touched by the measure and that persons charged with treason would enjoy "regular trials, in duly constituted courts," the president found it "startling" that Congress could free a slave who resided in a state unless "it were said the ownership of the slave had first been transferred to the nation, and that congress had then liberated him." But what troubled Lincoln most about the Second Confiscation Act was the idea that forfeiture of title to the slave extended beyond the life of the rebel owner. The act, Lincoln believed, violated Article III, Section 3 of the Constitution that stipulated: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained" (28). The enforcement of the Second Confiscation Act would do just that by denying the property rights of the heirs of the person committing treason. Lincoln's objections led Congress to pass a joint resolution that disallowed any "punishment or proceedings under the act that would lead to forfeiture beyond the offender's natural life" (29).

The president's concerns regarding the Second Confiscation Act were no trivial matter. He was only two months away from issuing his Preliminary Emancipation Proclamation, which would announce his intention to make "forever free" those slaves in states and parts thereof still in rebellion by January 1, 1863. While the Constitution did not expressly give the president the authority to free slaves, Lincoln claimed such authority through the war powers. "The Constitution invests its Commander-in-Chief with the law of war, in time of war," he declared. "By the law of war, property, both of enemies and friends, may be taken" or destroyed if doing so hurts the enemy and helps the cause (30). Hence, Lincoln claimed the right to issue the proclamation as a "fit and necessary war measure" (31) By claiming military necessity, he sidestepped the constitutional concerns that had attended Congress's effort to legislate freedom under the clause regulating punishment for treason.

Despite objections to the proclamation, Lincoln declined to rescind the decree. "The promise [of freedom] being made, must be kept," he declared (32). But his resoluteness masked the fear that his decree would face legal challenge. Moreover, he recognized that while freeing enslaved people in the Confederacy, slavery as an institution had not been abolished. Hence, during the summer of 1864, he joined Congress in pressing for the passage of a constitutional amendment banning slavery. When in February 1865, Congress passed the Thirteenth

Amendment and submitted it to the states for ratification, Lincoln declared it “a King’s cure for all the evils” (33). Interestingly, shortly thereafter, he drafted a recommendation to Congress that proposed that compensation payments be made to all the slaveholding states—including those currently in the Confederacy—provided the states were not in rebellion by April. The recommendation was never delivered to Congress because the president’s cabinet unanimously rejected it (34).

As he moved toward emancipation, Lincoln looked to the Constitution for guidance, ever careful to conform to what he believed were the guarantees of that document. Since enslaved people were deemed property, he felt it imperative to address the legality of efforts to liberate them from the perspective of the constitutional rights of the slaveholder. Although he acknowledged the humanity (albeit inferior to whites, in his estimation) of black men and women, issues of emancipation within the context of constitutional constraints precluded any humanitarian sentiment as a part of “official duty.” “What I do about slavery, and the colored race, I do because I believe it helps to save the Union,” he had declared. “[A]nd what I forbear, I forbear because I do not believe it would help to save the Union” (35). Despite the limitations it placed on presidential emancipation, the Constitution had given him the authority to save the Union and begin the destruction of slavery throughout the nation. □

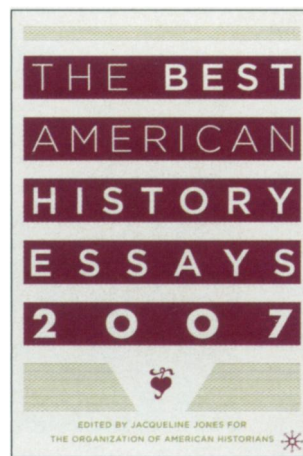
Endnotes

- In his speech on the Kansas-Nebraska Act at Peoria, Illinois, on October 16, 1854, Lincoln had declared: “I hate [slavery] because of the monstrous injustice . . . I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions . . . to taunt us as hypocrites.” See “Speech at Peoria,” in *The Collected Works of Abraham Lincoln* (hereinafter cited as *Collected Works*), 8 vols., ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 2:255.
- “By the President of the United States a Proclamation, April 15, 1861,” *Collected Works*, 4:331-32.
- “Message to Congress in Special Session, July 4, 1861,” in *Collected Works*, 4:421.
- Speech at Peoria, October 16, 1854, *Collected Works*, 2:256.
- Address at Cooper Institute, February 27, 1860, *Collected Works*, 3:545.
- Speech at Peoria, October 16, 1854, *Collected Works*, 2:274.
- Address at Cooper Institute, February 27, 1860, *Collected Works*, 3:543-44.
- Quoted in First Inaugural Address, 1861,” *Collected Works*, 4:263.
- Ibid.*
- For discussion of the Fugitive Slave Act and the Compromise of 1850, see Stanley W. Campbell, *The Slave Catchers: The Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill, NC: University of North Carolina Press, 1968).
- See Harold Holzer, Edna Greene Medford, and Frank Williams, *The Emancipation Proclamation: Three Views* (Baton Rouge: Louisiana State University Press, 2006), 6-9.
- Three fugitives from a rebel master sought asylum at Fortress Monroe (Virginia) in late May 1861, claiming that they were about to be taken out of Virginia and employed against the Union. As commander of the fort, Butler declared the men “contraband of war” and set them to labor for the Union. “Benj. F. Butler to Lieut. Gen. Winfield Scott, May 24, 1861,” *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (hereinafter *O.R.*), 128 vols. (Washington: Government Printing Office, 1880-1901), ser. 2, 1:752.
- Lieutenant Colonel Schuyler Hamilton to Brigadier General Irwin McDowell, Washington, July 16, 1861, *O.R.*, ser. 2, 1:760.
- General Orders, No. 33, July 17, 1861, Headquarters Department of Washington, in *O.R.*, ser. 2, 1:760.
- See Allen C. Guelzo, *Lincoln’s Emancipation Proclamation: The End of Slavery in America* (New York: Simon and Schuster, 2004), 45.
- Proclamation of John C. Frémont, August 30, 1861, *O.R.*, ser. 1, 3:467.
- To John C. Frémont, September 2, 1861, *Collected Works*, 4:506.
- To Orville H. Browning, September 22, 1861, *Collected Works*, 4:531.
- Ibid.*
- “Revocation of the Hunter Proclamation,” *Collected Works*, 5:222.

- Constance McLaughlin Green, *The Secret City: A History of Race Relations in the Nation’s Capital* (Princeton: Princeton University Press, 1967), 33. At 1860, the total population of the District (including Washington and Georgetown) was just over 75,000.
- Ibid.*, 59-60.
- Message to Congress, March 6, 1862, *Collected Works*, 5:145.
- Letter to Horace Greeley, March 24, 1862, *Collected Works*, 5:169.
- Message to Congress, April 16, 1862, *Collected Works*, 5:192.
- Ibid.*
- See Holzer, Medford and Williams, *The Emancipation Proclamation: Three Views*, 137-40.
- To the Senate and House of Representatives, July 17, 1862, *Collected Works*, 5:329.
- Ibid.*
- To Hon. James C. Conkling, August 26, 1863, *Collected Works*, 6:408.
- The Final Emancipation Proclamation, *Collected Works*, 6:29. See also Daniel Farber, *Lincoln’s Constitution* (Chicago: University of Chicago Press, 2003), 152-57.
- To Hon. James C. Conkling, August 26, 1863, *Collected Works*, 6:409.
- “Response to a Serenade,” February 1, 1865, *Collected Works*, 8:255.
- “Message to the Senate and House of Representatives,” February 5, 1865, *Collected Works*, 8:261.
- Letter to Horace Greeley, August 22, 1862, *Collected Works*, 5:388-89.

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