

REVIEWS

Our Secret Constitution
How Lincoln Redefined American Democracy
By George P. Fletcher

(New York: Oxford University Press, 2001. Pp. xi, 292. Notes, index. Clothbound, \$30.00; paperbound, \$16.95.)

Judging Lincoln

By Frank J. Williams. Foreword by Harold Holzer and epilogue by John Y. Simon

(Carbondale: Southern Illinois University Press, 2002. Pp. xxiii, 202. Illustrations, bibliography, notes, index. \$25.00.)

Lincoln's Constitution

By Daniel A. Farber

(Chicago: University of Chicago Press, 2003. Pp. x, 240. Notes, index. \$27.50.)

Although there are more books written about Abraham Lincoln than any other American, his life continues to be a perennial source for investigation and reinterpretation. Jurists, whether they are lawyers, judges, or law professors, bring a unique perspective to the study of Lincoln's life and legacy. Because his quarter-century legal career shaped his thoughts and actions as president and because he faced some of the most challenging constitutional crises in the

nation's history, legal scholars have asked many questions about Abraham Lincoln and the law. These three volumes demonstrate that jurists can offer new insights into our understanding of Lincoln's presidency and the Civil War.

Columbia University Law Professor George P. Fletcher argues that "the Civil War called forth a new constitutional order," based on the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Con-

stitution (p. 2). These amendments established a second American constitution with principles in sharp contrast to the Constitution of 1787. While the original document was based on the principles of “peoplehood as a voluntary association, individual freedom, and republican elitism,” the principles of this second constitution were “organic nationhood, equality of all persons, and popular democracy” (p. 2). These competing visions have struggled for supremacy in American life since the Civil War era.

In Fletcher’s interpretation, Lincoln’s Gettysburg Address serves as “the preamble of the second American constitution” and “the secular prayer of the postbellum American Republic” (p. 4). Unfortunately for America, Fletcher contends, the United States Supreme Court in the late nineteenth century truncated the promise of this second constitution through its judgments in the *Slaughterhouse* (1873) and *Civil Rights* (1883) cases. These and other decisions effectively nullified the promise of the postwar amendments and drove the second constitution underground, where it became America’s “Secret Constitution” throughout the twentieth century. Although it did not predominate in the decisions of the U. S. Supreme Court, the Secret Constitution “has, in fact, a much deeper grounding in American political and legal culture, and it has come to express itself in diverse arenas” (p. 189). From this location deep in the nation’s legal culture, the com-

mitments of the Secret Constitution shaped subsequent constitutional amendments; according to Fletcher, the fourteen amendments since the Civil War “were all designed to further the causes of nationhood, equality, and popular democracy” (p. 7).

While Fletcher provides an imaginative and thought-provoking overview of American constitutional history, his analysis is based on some problematic assumptions and interpretations, both about the nature of law and about the historical record of Lincoln’s presidency and the Civil War amendments. In his discussion of the Gettysburg Address, Fletcher dismisses the ideas of those scholars and jurists who concern themselves with the “original intent” of laws and amendments as intellectually and morally “impoverished” (p. 30). What Lincoln intended does not matter; the words of his Gettysburg Address are the preamble to a new constitutional order because “we came to understand them as nearly sacred” (p. 33). Likewise, the purposes for which Congress proposed and the states ratified the postwar amendments are less important than the meaning that later generations attached to them. For Fletcher, laws, amendments, constitutions, and even speeches seem to be empty vessels into which each generation of Americans has poured its own meanings.

Fletcher’s characterization of Lincoln’s attitudes toward the Constitution and the laws is equally flawed. Citing “Lincoln’s casual attitude toward formal constitutional institu-

tions, such as the writ of habeas corpus," Fletcher insists that Lincoln was committed to higher principles of law (p. 5). To support this position, Fletcher relies on Robert Penn Warren's apology for the South (*The Legacy of the Civil War: Meditations on the Centennial*, 1961) and overlooks Mark Neely's careful studies of wartime civil liberties in both the North and the South (*The Fate of Liberty: Abraham Lincoln and Civil Liberties*, 1991; *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*, 1999). Neely found that both the Lincoln and Davis administrations sacrificed civil liberties to the larger goals of retaining territory and winning the war. Fletcher consistently underestimates Lincoln's reverence for the Constitution in limiting his actions as President, and he insists that Lincoln failed to justify his actions when he asked, in his July 4, 1861, message to Congress: "Are all the laws but one to go unexecuted, and the government itself go to pieces lest that one be violated?" Fletcher blithely declares that "there is no evidence that the country's circumstances were anywhere near this flashpoint of imminent destruction" (p. 38). However, he neglects the very real concerns in the spring of 1861 that Washington, D.C., would be cut off from the rest of the North by Confederate sympathizers in Maryland. The earliest Union regiments to reach the beleaguered capital city literally had to fight their way through angry mobs in Baltimore.

Fletcher concludes his chronicle

of the strange career of the Secret Constitution with an analysis of the Supreme Court's role in the 2000 Presidential election: "No single incident better demonstrated how torn our psyches were between the procedures laid down in 1787 and modified in 1803 and the new principles of democracy that were born in the Gettysburg Address and anchored in the Secret Constitution" (p. 234). Although the election initially appeared to vindicate the democratic commitments of the Secret Constitution, "in the end the resolution bore many resemblances to the high-handed intervention of the power-brokers in 1876" (p. 238).

While Fletcher views Lincoln's actions and the Reconstruction amendments through the lens of his Secret Constitution interpretation, legal scholar Daniel Farber pursues a more modest goal in *Lincoln's Constitution*. Farber recognizes that during the Civil War, "the Constitution was placed under pressure that it had never seen before and has not seen since" (p. 1). The Civil War raised many fundamental constitutional questions, including the nature of the Union and the scope of presidential authority. During the war, Lincoln did not become a dictator, but "he did stretch the power of the presidency to its outer reaches" (p. 20).

Farber seeks to understand Lincoln within his historical context, but he also employs the unconventional method of comparing Lincoln's actions to modern conceptions of executive authority as well. Farber

carefully examines southern constitutional arguments for secession and finds them “ultimately unpersuasive” (p. 81). He then considers whether the federal government had the constitutional power to coerce states into remaining in the Union and concludes that “secession was a lawless act, to which the government was legally and morally entitled to respond with force” (p. 112).

Farber next turns to Lincoln’s authority as President, in contrast to the power of Congress, to act in response to secession. Here, Farber suggests that Lincoln may have been wrong according to the partially formed standards of his day but that he has been vindicated by history. Although many scholars might stumble headlong into presentism by employing this approach, Farber effectively uses subsequent legal precedents to evaluate Lincoln’s actions as president. In doing so, he offers a different angle of vision from that of a legal historian but carefully provides specific insights rather than sweeping generalizations.

In his consideration of Lincoln’s initial response to secession, Farber finds that “Lincoln remained very much a democratic leader throughout the war” (p. 115). Congress in August 1861 legalized and validated most of Lincoln’s actions in the spring of 1861. With the partial exception of *Ex parte Milligan* in 1866, postwar U. S. Supreme Court decisions largely validated the degree of presidential power exercised by Lincoln. Farber does not shy away from criticism of

Lincoln, however. He finds the president’s call for volunteers and his use of federal funds in the early stage of the war hard to defend constitutionally, but he believes that “the Union marched to war in general compliance with the Constitution” (p. 143).

Although Lincoln’s suppression of civil liberties was not a sign of impending dictatorship, it was a serious constitutional issue. Lincoln’s use of military trials in contested border areas was “probably constitutional” although restrictions on freedoms of speech and the press in secure areas were not. He also failed to hold his subordinates to a strict standard for suppressing speech and went too far in defending them. Farber is more critical of Lincoln’s disobedience of a court order in *Ex parte Merryman* (1861), an action that Farber considers to have been “unlawful” (p. 192). Farber concludes that, on balance, Lincoln’s was not “a perfect record, but a creditable one, under incredibly trying circumstances” (p. 197).

Chief Justice Frank J. Williams of the Supreme Court of Rhode Island has been a lifelong student of Abraham Lincoln and currently serves on the federal Abraham Lincoln Bicentennial Commission. His collection of essays on topics as diverse as Lincoln’s record on civil liberties, the women in Lincoln’s life, and collecting Lincolniana demonstrates the breadth of Williams’s interests in Lincoln. From his perspective on the bench, Justice Williams insists that “each generation makes its own Lincoln, and he may not be the Lincoln

known before" (p. 12). At first glance, this statement sounds much like Fletcher's insistence that Lincoln's words and actions have merely the meaning subsequent generations ascribe to them, but Williams is more cautious and faithful to the historical record. For Williams, perhaps the most remarkable characteristic of Lincoln was his leadership style: he remained flexible enough to learn from others, including the women in his life and his political opponents, yet strong enough to secure the passage of the Thirteenth Amendment to end slavery.

Lincoln's law practice was "a springboard to reach his political goals, and this contributed to his later success as president and commander in chief" (pp. 34-35). He was always a politician and a lawyer simultaneously, and when he became president, "Lincoln always operated within the constraints of the law, recognizing that power in a democracy always requires checks and balances" (p. 51). Williams admires Lincoln's "constitutional flexibility." In dealing with civil liberties in the wartime North, Lincoln could "bend the Constitution within the framework of its intent without breaking it" (p. 77). He could also hold national elections during a civil war, while working assiduously to ensure that as many soldiers as possible could vote.

Williams concludes his meditations on the life, leadership, and legacy of Lincoln with an essay on "Lincoln Collecting," written with Mark Neely, Jr. After the middle of the

twentieth century, they write, collecting became more of an investment than a scholarly, literary, or cultural activity. In response to this division, Williams and Neely wisely conclude that it would have been better "if Lincoln collecting turned its back on the notion of investment in historical materials and embraced the more enduring values of scholarship and culture" (p. 177).

These three jurists examine Lincoln through the lens of their legal training and experience. While Fletcher argues that Lincoln consciously or inadvertently created a new constitutional order through his rhetoric and leadership, Farber and Williams find his performance on constitutional matters under exceptionally trying circumstances to be restrained by good judgment and the rule of law. While all three scholars draw inspiration and lessons for today from Lincoln's life, they disagree over what those lessons are. Fletcher welcomes the relentless pursuit of equality and democracy regardless of what Lincoln thought of these ideas; Farber and Williams find instructive lessons in leadership styles, presidential power, and integrity within Lincoln's efforts to preserve the Union. Each of the authors offers fresh ideas about the relevance of Lincoln's ideas, words, and actions for the world today.

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