

Lincoln's Constitution

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Recommended Citation

Berheide, Michael (2004) "Lincoln's Constitution," *Civil War Book Review*: Vol. 6 : Iss. 1 , Article 17.
Available at: <https://digitalcommons.lsu.edu/cwbr/vol6/iss1/17>

Review

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Winter 2004

Farber, Daniel *Lincoln's Constitution*. University of Chicago Press, \$27.50
ISBN 226237831

Liberty and Justice

Scholar dissects Fundamental Problem

There is a sort of Fundamental Problem of Politics which goes like this: how can a political community—which after all has as its essential function the control of individual behavior — be dedicated to liberty? Theorists and thinkers have pondered the question more or less continually since before Socrates, but occasionally one faces it in concrete practical terms as well as theoretical ones. One such time in American history was the Founding, when it was addressed first by fifty-five men in Philadelphia and subsequently by the citizenry. But a second, perhaps more significant, time was in the years surrounding the Civil War, when the ideas and actions of Abraham Lincoln produced, as the phrase has it, a second founding.

No period in American history has been studied, debated, romanticized and mythologized as much as the Civil War. Arguably, no period had greater influence on the underlying culture of American society, and unarguably, no period other than the Founding itself had greater impact upon the fundamental structure and processes of American governance.

And the central figure of this time was, of course, Lincoln, and he remains the focus of our attention. Even now, as then, no figure of the era is more lionized — or demonized. Lee may be a lion, but no demon. Sherman, perhaps, the reverse. But the figure of Lincoln dominates the landscape, paradoxically embodying all that was good and bad about the war. He was — and is — the Civil War itself.

While the South may have left the Union regardless of his election, it seems fairly unlikely that there would have been much of a war without Lincoln in the White House, perhaps none at all: Buchanan was famous in declaring that, while the South had no right to secede, no one else had any right to stop it if it did. This was not an unusual point of view.

It was Lincoln's single-minded determination that the Union must and would be preserved that presented the Fundamental Problem in its starkest form: how can people be forced to belong to a political community dedicated to maximizing their freedom to choose? Is it possible? Is it permissible?

This paradox expressed itself in the several great questions Lincoln faced. May states leave the Union of their own accord? May the President go to war without legislative action? Expand the military? Suspend the Great Writ? Ignore the Supreme Court? Shut down newspapers? When Lincoln defended his violation of Chief Justice Taney's *Merryman* order that *habeas* writs be issued over the President's suspension — the only instance in history of a President directly disobeying an order from the Court — he put the matter famously: "are all the laws *but one* to go unexecuted, and the government itself go to pieces, lest that one be violated?"

The complexity and depth of the issues, and the acknowledgement that the Fundamental Problem still has not been solved, it seems, after several millennia, leads one to approach analysis of these matters with some humility. Indeed, I first greeted Farber's work with a deal of skepticism: "the first comprehensive evaluation of Lincoln's legal legacy in over seventy-five years" the dust jacket proclaims. Comprehensive? I asked myself, In a mere two hundred pages? It did not seem possible. As it turns out, Farber demonstrates that it is not only possible to be comprehensive in a mere two hundred pages, but to be comprehensive with flair, style, wit and brio.

With each topic — secession, the nature of sovereignty, constitutional interpretation, civil liberties, presidential powers in and out of war, the "rule of law" — Farber presents all sides of the scholarly argument, lards them with a wealth of historical detail and documentation, and analyzes minutely and relentlessly. The first five chapters tracing the legal, theoretical and moral arguments over secession present the finest piece of legal analysis I have ever seen. In the remaining three chapters, Farber treats Lincoln's conduct during the war, and is absolutely masterful in seamlessly combining analysis of

jurisprudential principle, constitutional interpretation styles, and historical context.

Nor does he shy from the conclusions his arguments force. I will not spoil the story by giving his conclusions here. In fact, it might be foolish to try: the negative side to Farber's compact style is that virtually every page deserves to be quoted and every argument is expressed so economically that to review the work by developing and critiquing the arguments would produce a review as long as the book itself.

But this is not an arid exercise in logic. His attention to just-the-right historical detail and his concise yet fluid style is the best kind of teaching: the reader feels entertained while fully aware of being enlightened. The book repays both casual, brisk reading and a close scholarly attention. So there is a positive side to the book's brevity: I was able to turn immediately to the beginning and read it again — and it's even better the second time through.

I have but one quibble, and it is a small one, indeed. In my own Constitutional Law classes, I make a great effort to have students distinguish between the idea of legality and constitutionality. Because the Constitution is the "supreme law of the land," the distinction is often slurred. But it is more than a grammatical nicety, and articulating the distinction in language serves to remind students of the appropriate level of analysis. Farber, like many if not most scholars who are well-versed in legal theory, often conflates the two, writing about the "legality" of this or that action, when the issue is constitutionality. But as I say, this is a quibble, the type of thing a reviewer who feels duty-bound to find at least one thing to criticize would offer, and is really of no consequence.

It is absolutely clear that from now on, no one can be considered competent to comment on the Constitutional crisis of the Civil War years who has not read Farber's work and met his analysis — it is a book which belongs in every public and collegiate library in the nation.

Michael Berheide is Professor and Chairman of the Department of Political Science at Berea College, and he is convinced that the South has already risen again.