busing plan because of the history of de jure segregation in the school district. It was in the 1974 decision in *Milliken v. Bradley,* a case about busing in Detroit, Michigan, that the Court limited the ability of district courts to use busing as a remedy for de facto segregation. All four of Nixon's nominees were in the five-person majority.

There is little to criticize in this book. It is carefully and thoroughly researched and clearly argued, and offers new insights into an important era that continues to have an impact on our judicial and electoral politics. A reader without a good understanding of modern American history might come away from the book not realizing the importance of the Vietnam War to the politics of the period. McMahon acknowledges the war, but perhaps because his focus is on Nixon's targeted judicial strategy of focusing on busing and criminal procedure, he leaves the impression that "the Social Issue" was the central electoral force of the time. There are also some odd characterizations of a few cases that might only trouble someone who teaches these cases regularly. For example, he discusses the *Cohen v. California* (1971) case as one about profanity rather than political dissent, and the Pentagon Papers case as one about political dissent rather than free press and executive power, but these are minor points. They take nothing away from this very fine piece of scholarship.

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STATE POWER AND CIVIL WAR CONSTITUTIONALISM

Mark E. Neely Jr.: *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War.* (Chapel Hill: University of North Carolina Press, 2011. Pp. 349.)

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In *Lincoln and the Triumph of the Nation,* a Pulitzer Prize-winning historian and our foremost scholar of legal and constitutional controversy during the Civil War seeks to reopen debates that he says have languished since James G. Randall's *Constitutional Problems under Lincoln* (University of Illinois Press, 1926) and Harold M. Hyman's *A More Perfect Union* (Knopf, 1973). Certainly civil liberties in the period have been carefully scrutinized more recently, including by Neely himself in *The Fate of Liberty* (Oxford University Press, 1991), but Neely's project here is to more fully historicize constitutional argument in the period. Recent literature reflects our own constitutional preoccupations whereas Neely now turns his attention to the broader constitutional concerns of the participants themselves, concerns that he says "reached the largest questions of national existence" (17). Rather than supplying a comprehensive history, Neely wants to stimulate

interest. Thus, as he says, "Readers will find stretches of text aimed at describing the variety and types of arguments and opinions about Civil War issues that can be found in judicial opinions and pamphlet literature" (17). As such, the book is more of a prod to scholars than a finished argument. Neely gives fair warning: much of the book reads like careful research notes on important sources from a leading scholar rather than as a monograph with a clear thesis. The book does have a thesis, however. With varying degrees of success, Neely attributes most of the constitutional developments of the period not to tensions between textualism and broad construction, but to nationalism. "This book does not take the view that nationalism is necessarily dangerous to the Constitution and the liberties it protects. It does not take the view that nationalism and humanitarianism were opposites in the middle of the nineteenth century" (13). Perhaps controversially, nationalism for Neely was not a "near pathology," but a source of inspiration and even love.

In the prologue, Neely notes that Jefferson's compact theory "was only one theory of the Constitution, but it proved to be a powerfully persuasive one. Abraham Lincoln would devise an equally powerful theory in opposition to this one in his First Inaugural Address" (7). Lincoln's statesmanship took him beyond mere lawyering. Thus for Neely, constitutional interpretation is plastic, but not infinitely so; a creative act, but not an arbitrary one. Neely therefore resists the temptation to conclude that one side was simply right and the other merely wrong, even on the question of the validity of secession. This may well be too much historicism for some. On the other hand, others may find his willingness to point out weaknesses in Lincoln's constitutional justifications for resistance to secession and for emancipation refreshing and even daring.

In chapter 1, "Secession and Anarchy," Neely takes a refreshing look at the First Inaugural and finds three sources for Lincoln's view of the Constitution: Nationalism, Whig Party activist government, and importantly, the antislavery movement. Neely then breaks the First Inaugural down into four different arguments—constitutional, legal, historical, and practical—each of which he finds weak, especially Lincoln's argument that secession would lead to future secessions and therefore to anarchy. Much of this serves to humanize Lincoln: "Lincoln was still struggling to smuggle perpetuity into the text of the Constitution of 1787" (53). But Neely is no neoconfederate: "The omission of Jackson's ideas about the executive provides proof that Lincoln had no premeditated expansion of presidential power in mind when he took office before the war broke out" (44). Again demonstrating the synthetic character of constitutional thought, Neely finds essentially mythic Lincoln's historical argument that the Constitution was part of a steady progression toward a more perfect and therefore inviolable Union. Nevertheless Neely admires "Lincoln's resourcefulness in constitutional argument" (57). Unlike Allen Guelzo (*Lincoln's Emancipation Proclamation* [Simon and Schuster, 2001]), Neely does not seek to drive a wedge between supposedly absolutist and

politically incapable abolitionists and a thankfully more "prudent" Lincoln. This is a welcome correction. Moving beyond Andrew Jackson's and even Daniel Webster's version of American nationalism, Lincoln drew on the anti-slavery tradition to put the Declaration of Independence into American constitutional history, thus laying the foundation for popular constitutionalism in the myth of a common American past (45). Though this is not the only possible reading of the Constitution, Neely nevertheless finds the resultant constitutional theory wise (228). The same might be said for Neely's interpretation here.

Oddly, Neely attributes the nationalist poetry of the First Inaugural entirely to Seward, claiming "it never occurred to Lincoln to appeal to sentiment and national feeling" (50–51). This not only works against the basic contention of the book, that nationalism was then the most important force in constitutional hermeneutics, it seems almost absurd given Lincoln's consistent poetic nationalism from the Lyceum Address through Gettysburg. Lincoln made Seward's peroration more soaring, not less so. This is but one instance of several idiosyncratic asides that spice the book.

In chapter 2, Neely surveys in great detail the prominent arguments regarding suspension of habeas corpus. Here again, Neely stresses the synthetic nature of constitutional interpretation, but concludes that "in the instance of the critics of Lincoln's expanding powers in the Civil War, if anything, the literal textual ground was held by Lincoln's defenders" (95). Yet Neely sees Lincoln as having been somewhat heavy-handed against his copperhead opponents. This is in part because Neely consistently downplays fears of a slave-power conspiracy as well as of copperhead disloyalty. Students will question this interpretation. Citing Stephen A. Douglas, of all people, as an authority (117–18), Neely does not adequately refute Fehrenbacher, Foner, and others who contend that fears of a second *Dred Scott* decision making slavery national were legitimate. This is particularly odd because Neely concedes in the next chapter that "the most important constitutional development on the eve of the Civil War was the growth of constitutional racism" (113). It was precisely this constitutional racism that Republicans feared might result in the nationalization of slavery and which they consistently sought to head off. Nor does Neely cite Jennifer Weber's *Copperheads* (Oxford University Press, 2008), which demonstrated that the threat of copperhead disloyalty to the war effort was quite real. Thus in Lincoln's Corning Letter Neely finds coercive nationalism irrationally unleashed; and in invoking a slave-power conspiracy, he detects the near criminalization of libertarian dissent (87). Were one to accept Neely's view of the copperhead threat, one would be tempted to say that nationalism was not entirely benign after all. But it is not entirely clear that the copperhead threat was merely a paranoid nationalist fantasy.

In one of many important arguments, Neely shows that Lincoln changed his mind on the validity of proclaiming emancipation as commander in chief under the doctrine of military necessity. Whereas in September of

1861 he believed such a confiscation could only last as long as the military necessity lasted, a year later he no longer thought such a move would constitute extralegal "dictatorship." Here Neely takes the plastic and political nature of constitutional thought furthest when he says "Lincoln rather quickly figured out how to make it constitutionally acceptable if and when he deemed it expedient" (123). "How did Lincoln get to that new view of the Constitution?" Neely says, "We have no idea"(124).

But we do have some idea. Initially Lincoln believed proclaiming emancipation would harm the war effort by alienating, for instance, Kentucky. As it became clear that the border was safe and that Southern Unionist could not be enticed back into the Union, emancipation became a net positive to the war effort and thus a legitimate act of war. That is what changed. More importantly, Neely slights Lincoln's attention to legal craftsmanship. In the Fremont situation, Lincoln analogized confiscation of slaves to confiscation of real property which would have to be returned to the owners when the military necessity was over. A year later, he analogized slaves to mobile property which as an act of war could be seized, like a bale of cotton, and then sold … or liberated. Lincoln could now "perceive no objection to Congress deciding in advance that they shall be free." He carefully noted precedent cases in which Kentucky freed rather than sold slaves whom the state possessed by escheat, a common-law process whereby the state lays claim to intestate property in the absence of recognized heirs. Lincoln then noted that the attainder clause in this country only applied to real or landed estate. Of course such arguments served his purposes, but they were not merely expedient; Lincoln's Message of July 17, 1862, was replete with the arguments of an experienced common lawyer. Neely might also have added that Lincoln himself clearly believed the Proclamation was good constitutional law, even while he feared Taney would never see it that way and moved almost immediately to forward what eventually became the Thirteenth Amendment. Having dismissed Lincoln's legal career as a source for understanding his presidency and his constitutional thought (122, 141, 149), Neely ends up giving us an arbitrary Lincoln. In this Guelzo's account succeeds far better.

For Neely, reading Lincoln as he does almost exclusively through a political lens, Lincoln lost control of the timing of emancipation. On the one hand Neely argues Lincoln simply should have waited until after the elections of 1862. Why risk the political losses? Somewhat contradictory to this, Neely on the other hand also argues Lincoln delayed emancipation in part because he somewhat understandably overestimated the effect of Northern racism and feared the army would not sustain him in this policy shift. In one of the most important and helpful contentions of the book, Neely says that racism was the last obstacle to emancipation: "Nationalism overcame that" (156).

There is much to be said for this interpretation. Nationalism was surely one of the major forces at work in the nineteenth century, and in thinking about

how the Proclamation was received, the idea that in this instance nationalism trumped racism is well worth mulling over. The Gettysburg Address certainly attempted to tap into feelings of national destiny. Yet Neely almost certainly has not had the last word. Thinking of Lincoln only as a politician, Neely can only think Lincoln "lost control." But perhaps Lincoln sometimes thought of things other than politics. In addition to slighting the legal history, Neely fails to reference the military situation that Mark Grimsley has suggested had something to do with the timing of the Proclamation (*The Hard Hand of War* [Cambridge University Press, 1995]). Nor does he contend with Lincoln's promises to Almighty God.

Above all, it would be a shame to conclude that nationalism merely trumped constitutionalism in this period, a view that Neely does not quite endorse but that for some will lie close to hand. Neely downplays the importance of Lincoln's legal experience in his role as president, in part, one suspects, because he does not want us to lose sight of Lincoln the politician, always a valid concern. But this leads him to miss the importance of the common law, which in addition to nationalism, international law, and yes, political convenience, contributed to constitutional construction in this period.

For instance, Neely notes that virtually everyone assumed that the state had the power to compel citizens to fight. The only question was whether it was the state (in this case the Federal Government) or the states (plural) that had this power. Neely lovingly portrays a Pennsylvania case regarding the constitutionality of conscription in which Justice Ingersoll, a Democrat, objected in copperhead fashion to the Federal draft, but freely admitted that "governments have a power, beyond that of recruiting; they are *parens patriae*." Ingersoll went on to describe the sweeping power over persons and property that was everywhere assumed in America prior to the rise of legal liberalism after the war. "God forbid the day should ever come when this power is denied or questioned" (227). Neely attributes this view to the nationalism of the nineteenth century, which is odd, given that Ingersoll and the copperheads were not nationalists. When Neely finds that in this period "constitutional history was more concerned with power than with individual liberty" (199), he has in fact bumped up against a nonliberal legal order, the "well-regulated society." (See William Novak, *The People's Welfare* [University of North Carolina Press, 1996].) This is what Lincoln meant when in the First Inaugural he contrasted a "government proper" with "an association of States in the nature of a contract merely" (39). Note well: "government proper" for this generation of legal thinkers did not arise from "mere" contract. Lincoln's legal thinking consistently reflected the common law sensibility that dominated American legal thought before the rise of legal liberalism in the late nineteenth century, prior to the apostasy of the Liberal Republicans, the dissents of Stephen Johnson Field, and the substantive due process of "Lochner Court." Laboring under the mistaken assumption that American political and legal thought has always been broadly speaking "liberal" in the classical sense, scholars find themselves groping

for other principles, in this case nationalism, to explain what they find. Closer attention to recent developments in legal history might help clarify our constitutional history as well.

Given current constitutional debate, Neely buried his lead. Though elements of legal liberalism were beginning to emerge, with few exceptions Lincoln's generation did not believe in "limited government." They believed in government. They even believed in a parternalist government. They believed in the rule of law and in republican government, and this meant a very powerful government, even for Southerners and Copperheads. The Civil War was not fought between the advocates of limited government and its opponents. The chief question raised by copperheadism did not concern the power of government in general, but only whether sweeping police powers existed at the federal as well as the state level. This generation believed not in "free" markets but in a moral and legal community that included a market economy. And note well: it was always a well-regulated market economy, one in which the public welfare trumped individual rights, including individual property rights. Seeing this resolves most of the paradoxes of the legal history of the Civil War era.

Space does not permit careful treatment of the many possibilities raised in Neely's provocative set of reflections. Neely brings new perspectives and new evidence to discussions of the Prize Cases, legal tender issues, and conscription. The judicial opinions he has uncovered and parsed for us were primarily in the state courts, a source too long neglected; and he devotes about a third of the book to constitutional developments in the Confederacy. This is especially welcome because lingering neoconfederate apologies as well as one of our anti-Lincoln traditions take root in the express or implied superiority of Confederate constitutional adherence. In sum, students of constitutional history will find *Lincoln and the Triumph of the Nation* continuously provocative if not always entirely convincing. In calling attention to the pamphlet literature and state-level developments, Neely has laid bare a new foundation for all future scholarship of Civil War constitutionalism.

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MACHO MEN

Erica R. Edwards: *Charisma and the Fictions of Black Leadership*. (Minneapolis: University of Minnesota Press, 2012. Pp. xxii, 249.)

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Professor Edwards has given us an engaging book accompanied by vigorous scholarship. A too cryptic statement of her thesis is that *charisma* has