

DRED SCOTT REVISITED

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I.

It has been many years since I first wrote that the American Revolution was, at once, an event in time and an idea out of time.¹ Lincoln meant no less when he wrote that Jefferson enshrined in the Declaration of Independence “an abstract truth, applicable to all men and all times.”² It was a commonplace among the Founders (and Lincoln) that the American experiment in self-government was not for Americans alone, but for all mankind.³ This was not merely an expression of national pride. It was a sober judgment. It was almost as impossible then, as it is now, to imagine circumstances more favorable to the success of this experiment than those that existed at the Founding. It was, and is, hard to imagine this experiment succeeding elsewhere if it failed here. The Civil War clearly was a test, as Lincoln said at Gettysburg, of whether any nation “conceived in Liberty, and dedicated to the proposition that all men are created equal” could long endure.⁴ The test came when

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1. See HARRY V. JAFFA, *EQUALITY AND LIBERTY* 120 (1965).

2. Letter from Abraham Lincoln to Henry L. Pierce and Others (Apr. 6, 1859), in *3 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 374, 376 (Roy P. Basler ed., 1953).

3. See, e.g., *THE FEDERALIST* NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”).

4. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN* 183, 184 (William E. Gienapp ed., 2002).

eleven states “seceded” following the election of Abraham Lincoln in 1860. The Republican platform in that year contained a pledge to end any further extension of slavery into the new territories from which new states might be formed.⁵ The seceding states found it intolerable that all new states would be free states, so that eventually three-fourths of the states might be able to abolish slavery by constitutional amendment, without the consent of the slave states. As Lincoln put it in his first inaugural, “One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong*, and ought not to be extended. This is the only substantial dispute.”⁶

Lincoln believed that the Constitution established a regime within which such disputes might be resolved peacefully. The states, in ratifying the Constitution, bound themselves to accept the results of elections held according to the rules of the Constitution. To set aside the results of an election because of dissatisfaction with those results, as the secessionists proposed, would make a mockery of the very idea of government by elections. It would leave tyranny or anarchy as the only alternatives. Lincoln set out this argument—ballots or bullets—with mathematical simplicity and clarity. He conceded, however, that if any constitutional rights or privileges had been denied to the discontented states in the elections, or if there was any future threat by the Republicans to such rights or privileges, the states’ withdrawal from the Union might be justified.⁷ Lincoln took the greatest pains to deny that any such rights or privileges had been denied or threatened. He could not, however, deny their differences concerning slavery. Nor did he deny that a difference on this subject could turn friends into enemies and make a common citizenship impossible.⁸

In all his speeches, from Peoria in 1854,⁹ to Cooper Union in 1860,¹⁰ and finally to Gettysburg in 1863,¹¹ Lincoln insisted that

5. Republican Convention 1860: Platform of 1860, in *A POLITICAL TEXT-BOOK FOR 1860*, at 26, 26–27 (Horace Greeley & John F. Cleveland eds., 1860).

6. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 4, at 88, 94.

7. *Id.* at 93.

8. *Id.* at 93–97.

9. Abraham Lincoln, The Legitimate Object of Government (July 1, 1854?), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 4, at 27–28.

the central idea of the Founding, from which all its minor thoughts radiated, was the proposition that all men are created equal. The slavery that existed in the Founding generation was an inherited evil that could not be eradicated instantly, but it was, in accordance with the principles of the Declaration, to be “put in course of ultimate extinction.”¹² All the legal rights of white men depended finally upon the recognition of a common human nature. The Declaration itself was addressed to a “candid world,”¹³ which included all races and nations. There could be no such thing as equal rights of slavery and freedom. Property in human beings could not be compared indifferently to property in non-human chattels. To make chattels of other human beings was a violation of the laws of nature, and this nation was founded upon “the Laws of Nature and of Nature’s God.”¹⁴

To justify their claim to the same rights in the territories as in the free states, leading Southerners transformed the assertion of equality of the rights of individual human beings into a claim of equality of rights of the states. They contended that the federal government could not discriminate between the property of settlers from free states and settlers from slave states, since the territories were the joint property of all the states. This argument was elaborated by John C. Calhoun.¹⁵ To make it, he had to deny any authority to the Declaration’s proposition of equality. This “hypothetical truism,” he said, was “the most false and dangerous of all political errors.”¹⁶ For the Slave South, Calhoun became a prophet of unrivalled authority. His argument suffered, however, because it was based upon a can-

10. Abraham Lincoln, Speech at the Cooper Union (Feb. 27, 1860), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 4, at 71, 78–80.

11. Abraham Lincoln, *supra* note 4, at 183.

12. Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858*, at 445, 446 (Don E. Fehrenbacher ed., 1989).

13. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

14. *Id.* at para. 1.

15. See, e.g., John C. Calhoun, Senate Speech on the Oregon Bill (June 27, 1848), in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 563, 565–70 (Ross M. Lence ed., 1992).

16. *Id.* at 565.

did rejection of the Founders, who were still revered in the antebellum South. Jefferson he regarded as a fanatic.¹⁷

To turn the Founders against the Founding, to expunge the authority of the idea of the equality of the rights of individual human persons, was the task to which Chief Justice Roger Taney set himself in *Dred Scott* 150 years ago. To accomplish this task, Taney did not merely have to ignore the generally accepted historical view of the Founding, accepted even by Calhoun; he actually had to reverse the facts in the case. Here is how he did it:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . This opinion was at that time fixed and universal in the civilized portion of the white race.¹⁸

Taney was a firm advocate of what is known now as a jurisprudence of original intent. According to this view, the words of the Constitution are always to be interpreted as they were understood by those who framed and ratified them. No change in how those words might come to be understood at any later period authorizes a departure from that original meaning. Only an amendment to the Constitution by the authority that made the Constitution can authorize an emendation in that original understanding.¹⁹ Taney's approach in *Dred Scott*, however, was counterfeit originalism. He placed this perfectly sound juris-

17. See *id.* at 569–70 (“[The belief in equality] had strong hold on the mind of Mr. Jefferson, the author of [the Declaration of Independence], which caused him to take an utterly false view of the subordinate relation of the black to the white race in the South; and to hold, in consequence, that the former, though utterly unqualified to possess liberty, were as fully entitled to both liberty and equality as the latter; and that to deprive them of it was unjust and immoral.”).

18. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

19. See *id.* at 409–11. Taney might also be said to be a disciple of Aristotle's maxim that the intention of the legislator is the law.

prudential doctrine in the service of an incredible misrepresentation of the Founding ideals shared by those who framed and adopted the Declaration of Independence and the Constitution.

It is true that blacks at the time of the Founding were regarded in some generalized sense as inferior. This remained true throughout the nineteenth century and beyond. But such alleged inequality of blacks and whites was not necessarily regarded as greater than that ordinarily seen among whites. Jefferson, for example, once observed that although Sir Isaac Newton may have been the most intelligent man in the world, this gave him no dominion over Jefferson's person or his property.²⁰ The inequality *within* species must be distinguished from the inequality *of* species. There is no inequality within the human species such as that between man and beast, or between man and God. Unequal abilities among human persons, regardless of color, nationality, or gender, do not determine what the rights or privileges of said persons ought to be.²¹

When Taney says that blacks during the Founding era were regarded as inferior, he is not exaggerating. But when he says that they were regarded as having "no rights which the white man was bound to respect"—as if they were animals of a different species—he is simply wrong. Historian Don Fehrenbacher has pointed out that a free black man in late eighteenth century America had, in some respects, more legal rights than a

20. Letter from Thomas Jefferson to Henri Gregoire (Feb. 25, 1809), in 11 THE WORKS OF THOMAS JEFFERSON 99, 100 (Paul Leicester Ford ed., 1905).

21. Lincoln expressed this Aristotelian idea, which makes a lie of natural slavery, with exquisite logic:

If A can prove, however conclusively, that he may, of right, enslave B, why may not B snatch the same argument and prove equally, that he may enslave A?

You say A is white and B is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule you are to be slave to the first man you meet, with a fairer skin than your own.

You do not mean *color* exactly? You mean the whites are *intellectually* the superiors of the blacks, and therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.

But, say you, it is a question of *interest*; and, if you make it your *interest*, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.

Abraham Lincoln, Fragment on Slavery (1854), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832–1858, *supra* note 12, at 303.

married white woman.²² Free blacks could marry, inherit and bequeath property, buy and sell, sue and be sued.²³ Nor is it true that they could “justly and lawfully be reduced to slavery.”²⁴ In fact, there was never a time or place at which a free black in America could be lawfully reduced to slavery. A free black man, like a free white man, could be deprived of his liberty only when he had been duly convicted of a crime.²⁵

Taney invented a proslavery Founding and a proslavery jurisprudence of original intent. After quoting in full the passage in the Declaration beginning, “We hold these truths to be self-evident,” he comments:

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.²⁶

Taney’s assertion that the words of the Declaration “seem to embrace the whole human family” is remarkable, and it becomes even more remarkable when joined with the further assertion that these same words would be so understood “to-day,” that is, in 1857. Taney assumes without question that he knows that the so-called African race belongs to the “human family.” But he implies that those who wrote the Declaration in 1776, and those who subsequently framed and adopted the Constitution, did not know this. We know the meaning of their words, but they did not! Taney does not explain, or apparently think there is any need to explain, why we should be governed

22. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 349 (1978).

23. *Id.*

24. *Dred Scott*, 60 U.S. at 407.

25. FEHRENBACHER, *supra* note 22, at 348–49.

26. *Dred Scott*, 60 U.S. at 410.

by the Founders' allegedly defective understanding, rather than by our own superior understanding. Yet, the doctrine of original understanding presupposes a Constitution based upon the laws of nature and of nature's God—human nature as it really is. Without this legitimacy, the Constitution would have no intrinsic moral authority or claim on our fidelity to original meaning.²⁷

Taney implies that if the Framers had understood the meaning of their own words, they would have abolished slavery. But he does not explain why, if we today (in 1857) know that the words of the Declaration "embrace the whole human family," do we not act to end slavery? Why should we who know better not make that better understanding the basis for interpreting the Constitution? Why does Taney pile Pelion on Ossa to prove that because the Founders did not abolish slavery (something they had no power to do!), they did not think blacks belonged to the human family? Taney's contention was that public opinion in 1857 was more favorable to the recognition of a black man's humanity than it was at the Founding. But this is clearly the reverse of the truth. It is the reverse, not only of what dissenting Justice Curtis and Abraham Lincoln thought, but also of what virtually everyone—including the most vocal partisans of the Slave South—thought.

27. Some qualifications concerning the jurisprudence of original intent are here in order. As a general doctrine governing the relationship of judges to law, originalism must meet the objection that it applies only to a morally defensible legal system. Could a judge in Nazi Germany conscientiously apply Nazi law—for example, the Nuremberg laws—governing Jews? He could if he were a Nazi with a Nazi conscience (if that is not an oxymoron). If he were instead a decent human being, he would do his best to frustrate the law, and to make it as unburdensome to the Jews as possible. He might go along with it to some extent, on the assumption that his replacement would be a true Nazi. But, as a non-Nazi he could not commit himself to a jurisprudence of Nazi intent. To paraphrase Aristotle, a good man is a good citizen (or a good judge) only in a good regime. He is a bad citizen in a bad regime. Only a bad man can be a good citizen in a bad regime. Justice Thurgood Marshall believed the regime of the Founding was bad because he believed it was based upon slavery and racism, not unlike the regime of Adolf Hitler. Clearly, the Founders thought the regime they were founding—based upon the principles of the Declaration of Independence—was a good one. They regarded slavery as an exception to the principles of the Declaration, not as consistent with those principles. A Nazi judge would have regarded the Nuremberg laws as perfectly consistent with the Nazi principles of Adolf Hitler. A Jefferson (or a Lincoln) could not regard the presence of slavery in the Constitution of 1787 as consistent with the principles of the Declaration or the Constitution.

Taney wrote that the opinion that blacks did not belong to the human family was “fixed and universal” in the civilized world in 1776 and 1787.²⁸ In fact, the “fixed and universal” opinion was almost the exact opposite. Consider, for example, the following passage from Alexander Stephens’s “Cornerstone” Speech of March 22, 1861. Stephens was Vice President of the Confederate States of America, which had become a completely organized and functioning government at least two weeks before Abraham Lincoln was sworn in as President of the United States. Stephens explained:

The prevailing ideas entertained by [Jefferson] and most of the leading statesmen at the time of the formation of the old Constitution were, that the enslavement of the African was in violation of the laws of nature; that it was wrong in *principle*, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other, in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the Constitution, was the prevailing idea at the time.²⁹

Stephens recognized in the Founding principles the exact opposite of the assertion Taney called “fixed and universal.” He recognized, too, that the principles of the Declaration of Independence, although not explicitly incorporated in the Constitution, are the necessary ground for distinguishing the Constitution’s principles from its compromises, something hotly denied and disputed today no less than before the Civil War. While acknowledging the racial egalitarianism of the Founding, Stephens goes on to say that it has now been superseded:

Our new government is founded upon exactly the opposite idea [to that of the equality of the races]; its foundations are laid, its corner-stone rests upon the great truth that the negro is not equal to the white man. That slavery—subordination to the superior race—is his natural and moral condition.

28. *Dred Scott*, 60 U.S. at 407.

29. Alexander H. Stephens, African Slavery: The Corner-stone of the Southern Confederacy (Mar. 22, 1861), in 27 PULPIT AND ROSTRUM 65, 69 (1862). The date of this speech was at almost an exact midpoint between Lincoln’s inauguration on March 4 and the firing on Fort Sumter on April 13, at a time before there was any certainty of a coming civil war. Hence there was no clear reason for Stephens at that time to have doubted the permanence of the Confederate government.

This, our new government, is the first in the history of the world based upon this great physical, philosophical, and moral truth.³⁰

Stephens goes on to compare the reluctance to accept this “truth” to the tardy acceptance of all new scientific discoveries, such as those of Galileo and Harvey.³¹ He is confident that this scientific discovery, like others that have preceded it, will eventually triumph, and with it will come the vindication of “our new government.” It is sufficient for present purposes to repeat once again that Stephens’s account of the opinion of the civilized world on the subject of race in the latter part of the eighteenth century is the exact opposite of Taney’s. Yet, Taney does not subscribe to the “scientific” racism of Stephens. The afore-said “science,” along with a host of other variants on the theory of evolution, was sweeping over the western world in the later nineteenth century, virtually obliterating consciousness of the natural rights doctrine of the Declaration of Independence. Darwin’s *Origin of Species* was published in 1859, but the seminal ideas therein had been germinating since Rousseau’s 1754 *Discourse on the Origin of Inequality*.

There is yet another witness against Taney, one more unlikely and potent than even Alexander Stephens. The following is a speech to a jury in 1819 by a young lawyer in Frederick, Maryland. His client was Jacob Gruber, a Methodist minister who had delivered an abolitionist sermon to an audience of some 2,600, including some 400 blacks, many of whom were slaves. Gruber was indicted for inciting the slaves to rebellion. The young lawyer delivered this remarkable (and successful) speech to the jury:

Any man has a right to publish his opinions on that subject [slavery] whenever he pleases It is a subject of national concern, and may at all times be freely discussed. Mr. Gruber did quote the language of our great act of national independence, and insisted on the principles contained in that venerated instrument. He did rebuke those masters, who, in the exercise of power, are deaf to the calls of humanity; and he warned them of the evils they might bring upon themselves. He did speak with abhorrence of those reptiles, who live by trading in human flesh, and enrich themselves

30. *Id.* at 70.

31. *Id.* at 71.

by tearing the husband from the wife—the infant from the bosom of the mother: and this I am instructed was the head and front of his offending. Shall I content myself with saying he had a right to say this? That there is no law to punish him? So far is he from being the object of punishment in any form of proceeding, that we are prepared to maintain the same principles, and to use, if necessary, the same language here in the temple of justice, and in the presence of those who are the ministers of the law. A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily, or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means, by which this necessary object may be best attained. And until it shall be accomplished: until the time shall come when we can point without a blush, to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.³²

A modern scholar, nay, Lincoln himself, could not have composed a better epitome of Lincoln's speeches and writings on slavery. It is all there: the recognition of the slaves' humanity, the recognition of "colonial vassalage" as the cause of the presence of slavery at the Founding, the reliance on the authentic antislavery meaning of the Declaration of Independence, and the avowal that the honor and future of the United States depended upon the "ultimate extinction" of slavery.³³ The young lawyer who in 1819 authored this speech was, of course, Roger B. Taney. He was, therefore, the greatest among all witnesses against the Chief Justice who espoused the opposite point of view in 1857. There is no question that the public opinion from which the Declaration was fashioned was favorable to the rights of black human beings, and that in 1857, the Constitution ought to have been interpreted in that light. Yet, against this condemnation of the Taney of 1857, we must nonetheless

32. CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* 132 (Harper & Row 1964) (1940).

33. Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858), in *ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858*, *supra* note 12, at 426, 428.

recognize the faint echo of 1819, which reveals that Taney's mind (unlike Alexander Stephens's) had not been completely submerged in the rising tide of a false "scientific" racism.

II.

There is no more erroneous opinion about *Dred Scott* today than that it represented an attempt by the Supreme Court to usurp power belonging to the elected branches of government. A prominent critic of the Taney Court has written:

The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing. It was, in the words of Macbeth, "A tale told by an idiot, full of sound and fury, signifying nothing." According to the Court, the decision had never been one that Congress was entitled to make; it was one that the Court alone, in construing the Constitution, was empowered to make.³⁴

This analysis skips from the Wilmot Proviso of 1846–47 to the Kansas-Nebraska Act of 1854, omitting any mention of the territorial laws passed as part of the great Compromise of 1850. The laws adopted in 1850 for the Territories of Utah and New Mexico, from which five states were eventually formed, provided that the people of those territories could apply for admission to the Union with constitutions that permitted or prohibited slavery, as the people might at that time decide.³⁵ This was, as far as it went, "popular sovereignty" for the territories. Senator Stephen A. Douglas adopted these laws as the authority for his version of popular sovereignty that he incorporated into the Kansas-Nebraska Act of 1854.³⁶ But there was a difference, which Douglas (but not Lincoln) conveniently overlooked: according to the territorial laws of 1850, the deci-

34. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 701–702 (1976), reprinted in 29 HARV. J.L. & PUB. POL'Y 401, 410 (2006) (footnote omitted).

35. Act of Sept. 9, 1850, ch. 51, § 1, 9 Stat. 453, 453 (establishing a territorial government for Utah); Act of Sept. 9, 1850, ch. 49, § 2, 9 Stat. 446, 446–47 (establishing a territorial government for New Mexico).

36. See Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1838, *supra* note 12, at 307, 344.

sion for or against slavery was to be made by the people of the territories at the time they framed their state constitutions.³⁷ Nothing, however, was said in 1850 of the legal status of slavery *during* the territorial period, before the people of the territories framed their state constitutions.³⁸ The facts on the ground during this interim period would determine what the people of the territories would decide when they framed their constitutions, but on the all-important question of the status of slavery during the territorial period, Congress could not and did not make up its mind. Congress was divided into so many different factions that none commanded a majority. Its solution was to provide in the territorial laws that any dispute over slavery arising during the territorial period could be appealed directly from the supreme court of the territory to the Supreme Court of the United States.³⁹ Hence, jurisdiction on the question of the status of slavery in a territory during the territorial period was given to the Court by Congress. It was not seized by the Court from Congress.

Dred Scott was not a judicial power grab but rather part of a Slave Power conspiracy involving two Presidents, a Chief Justice, and a United States Senator (with many unnamed co-conspirators). An indispensable guide to understanding the politics surrounding *Dred Scott* is Lincoln's "House Divided" speech, which set in motion his 1858 campaign for the Senate seat held by Stephen A. Douglas. The speech places *Dred Scott* in the context of a national conspiracy. But the speech must also be seen from the perspective of the struggle within the Republican Party between Illinois Republicans and the East Coast Republicans who wanted Illinois Republicans to support Douglas for reelection. The House Divided speech was delivered to a state convention that had assembled for the express purpose of declaring that Abraham Lincoln was the first, last, and only candidate of the Republican Party of Illinois.⁴⁰ Until the firing on Fort Sumter, Lincoln regarded Douglas (rather than the fol-

37. § 1, 9 Stat. at 453; § 2, 9 Stat. at 447. In his Peoria Speech, Lincoln definitively refutes the idea that the territorial laws of 1850 supplied a precedent for the concept of popular sovereignty embodied in the Kansas-Nebraska Act. Lincoln, *supra* note 36, at 344–46.

38. See generally § 1, 9 Stat. 453; § 2, 9 Stat. 446.

39. See § 1, 9 Stat. at 455–56; § 2, 9 Stat. at 450.

40. See Lincoln, *supra* note 33, at 426.

lowers of John C. Calhoun) as the greatest threat to the nation. This was because Douglas offered, in popular sovereignty, a temptingly easy way out of the sectional crisis. Douglas's claim was that if the people of each territory were allowed to determine the status of slavery in that territory, then the slavery question could be confined within territorial boundaries and need not roil Congress or the nation. What made Douglas all the more attractive was his leadership of the Congressional Republicans in the recent struggle over the Lecompton Constitution—the draft state constitution proposed by proslavery forces in Kansas. According to Lincoln, however, Douglas's easy way out would delay but not end the crisis over slavery. Furthermore, such appeasement of slavery would only make the crisis, when it came, more difficult. For Lincoln, only a principled rejection of slavery could end the crisis.

In the House Divided speech, Lincoln accused Douglas, along with Taney and two Presidents of the United States, of participating in a conspiracy to spread slavery, not only to all the new territories, but to the free states as well:

“A house divided against itself cannot stand.”

I believe this government cannot endure, permanently half *slave* and half *free*.

I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.

Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its *advocates* will push it forward, till it shall become lawful in *all* the States, *old* as well as *new*—*North* as well as *South*.⁴¹

No more fateful words have ever been spoken here, or perhaps anywhere, or at any time in human history. Lincoln's account of events, from the Kansas-Nebraska Act of 1854 to *Dred Scott* in 1857 and beyond, cannot be stated more concisely, more profoundly, or more brilliantly than Lincoln himself did in the House Divided speech. It cannot be doubted that there existed a common understanding and common goal among the four

41. *Id.*

“workmen—Stephen, Franklin, Roger, and James,” as Lincoln described them.⁴² “Roger” was certainly not acting alone. *Dred Scott* was not primarily in the interest of judicial power. It was in the interest of the Slave Power.

The results of the Presidential Election of 1856 signaled the looming threat to the Slave Power and were surely on Taney’s mind when he began writing the opinion in *Dred Scott*. Democrat James Buchanan had been elected with 174 electoral votes to Republican John C. Fremont’s 114; Millard Fillmore received only 8 electoral votes but garnered 873,053 popular votes to Buchanan’s 1,836,072 and Fremont’s 1,342,345.⁴³ Fillmore’s American Party was largely the residue of the old Whig party. Thus, the further alienation of old Whigs (like Lincoln), together with Know Nothings and Free Soil Democrats, would soon engulf the presidential electoral process. That would mean the end of slavery’s expansion and, eventually, of slavery itself.

How to preserve slavery within the Union and prevent the impending Republican victory were the problems facing Taney when he sat down to write the opinion of the Court in *Dred Scott*. To this end he devoted all his energy and considerable talent.

This was not a task in which he was acting alone. Pierce and Buchanan were the preeminent “Doughface” Presidents (Northern men with Southern principles).⁴⁴ Pierce in his final State of the Union Address⁴⁵ and Buchanan in his Inaugural Address,⁴⁶ endorsed, in advance, the forthcoming *Dred Scott* decision. The two Presidents joined in calling on all good Americans to accept *Dred Scott* as a final settlement of all outstanding constitutional questions in regard to slavery. Both of these Presidents knew that *Dred Scott* would “settle” these questions in a way most satisfactory to the Slave Power. Stephen A. Douglas also

42. *Id.* at 431. Lincoln was referring of course to Stephen A. Douglas, Franklin Pierce, Roger Taney, and James Buchanan.

43. CONGRESSIONAL QUARTERLY, 1 GUIDE TO U.S. ELECTIONS 682, 767 (5th ed. 2005).

44. Northern Democrats were said to have faces of dough that Southerners could shape as they wanted.

45. Franklin Pierce, Fourth Annual Address (Dec. 2, 1856), in 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790–1966, at 918, 922 (Fred L. Israel, ed., 1966).

46. James Buchanan, Inaugural Address (Mar. 4, 1857), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO HARRY S. TRUMAN 1949, at 103, 104 (1952).

endorsed *Dred Scott* in advance,⁴⁷ although it is doubtful that he knew how the decision would undercut “popular sovereignty.”

At the time of Buchanan’s inauguration on March 4, 1857, the forces of slavery had tenuous control of the presidency, the Senate, and the Supreme Court. This gave slavery a moment of political power not likely to occur again in the foreseeable future. The election of a Republican President would mean no more proslavery appointments to the Court. It would mean a veto of any legislation likely to add a slave territory or a slave state to the Union. The Court in *Dred Scott* attempted to provide a permanent constitutional status for slavery within the Union. But should that status be denied to it by the forthcoming elections, *Dred Scott* also would provide a constitutional justification for secession. Secession could be made to appear not as an attack on the Union, but as a defense of the Constitution as interpreted by the Supreme Court.

Exactly how, then, did Taney in *Dred Scott* propose to resolve the existing constitutional impasse? First, he declared that the right to property in slaves was “expressly affirmed” in the Constitution.⁴⁸ This was another example of a straightforward lie—like the one about the subhuman status of the Negro at the time of the Founding—which he knew to be false, but which he also knew would be believed by those who had an interest in believing it. Taney then observed that if the right of property in slaves was an expressly affirmed constitutional right, any law or state constitution that denies it is itself unconstitutional.⁴⁹ Hence, the Missouri Compromise’s exclusion of slavery from the Louisiana Territory, or any law limiting a slaveowner’s access to any United States territory, was unconstitutional.⁵⁰ Although Taney’s opinion directly addresses only slavery in the territories, its logic applied to the states as well, by virtue of the Supremacy Clause.⁵¹ The “tenons and mortises” of the four workmen, when fitted together, made a struc-

47. See ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS 546 (1973).

48. *Dred Scott*, 60 U.S. at 451.

49. *Id.* at 451–52.

50. *Id.* at 452.

51. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

ture of legal reasoning in which slavery would be lawful not only in every territory, but in every state, old as well as new, North as well as South.⁵²

Lincoln foresaw this threat. When I was writing *Crisis of the House Divided*, some fifty years ago, the most influential historians refused to take seriously Lincoln's assertion of an imminent threat of slavery becoming lawful in the free states.⁵³ They saw Lincoln's argument as a scare tactic in the service of his personal ambitions.⁵⁴ They believed that the great historical trends were against slavery.⁵⁵ They supposed that with or without Lincoln, and without a civil war, slavery was destined for the dust bin of history.⁵⁶ But in the second of their seven joint debates, at Freeport, Lincoln read at length from a speech in which Douglas denounced the Washington *Union*—the mouthpiece of the Buchanan administration. Here are Douglas's words, as quoted by Lincoln:

When I saw that article in the *Union* of the 17th of November, followed by the glorification of the Lecompton Constitution on the 18th of November, and this clause in the [Lecompton] Constitution asserting the doctrine that a State has no right to prohibit slavery within its limits, I saw that there was a *fatal blow* being struck at the sovereignty of the States of this Union.⁵⁷

Here is direct confirmation, from Douglas himself, of Lincoln's charge in the House Divided Speech that slavery could become lawful in all the states, as well as in all the territories. Lincoln's quoting of Douglas on the threat of slavery becoming lawful in the states, no less than in the territories, was a lightning bolt, an illumination of the entire political landscape.

The third of the questions (or "interrogatories") put by Lincoln to Douglas at Freeport was as follows:

52. Lincoln, *supra* note 33, at 431–32.

53. See HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED 19–27* (1959) (identifying historians making these arguments).

54. *Id.* at 23, 27.

55. See *id.* at 22.

56. See *id.*

57. Abraham Lincoln, Second Debate, Freeport, Illinois: Lincoln's Rejoinder (Aug. 27, 1858), in ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1832–1858*, *supra* note 12, at 573, 579.

If the Supreme Court of the United States shall decide that States can not exclude slavery from their limits, are you in favor of acquiescing in, adopting and following such decision as a rule of political action?⁵⁸

Here is Douglas's reply:

I am amazed that Lincoln should ask such a question. ("A school boy knows better.") Yes, a school boy does know better. Mr. Lincoln's object is to cast an imputation upon the Supreme Court. He knows that there never was but one man in America, claiming any degree of intelligence or decency, who ever for a moment pretended such a thing. It is true that the *Washington Union*, in an article published on the 17th of last December, did put forth that doctrine, and I denounced the article on the floor of the Senate, in a speech which Mr. Lincoln now pretends was against the President. . . . He casts an imputation upon the Supreme Court of the United States by supposing that they would violate the Constitution of the United States. I tell him that such a thing is not possible. (Cheers). It would be an act of moral treason⁵⁹

Douglas is simply blustering; he never answers the question. The *Washington Union* was Buchanan's mouthpiece, and the article in question was a sighting shot in the war that was beginning between Douglas and the Buchanan Administration on the proslavery Lecompton Constitution. In that war, Douglas led the Republicans to victory over the leadership of his own party. This gave Douglas at least a temporary standing in the Free Soil movement. Lincoln, however, would destroy that standing by pointing to the inconsistency between Douglas's support of *Dred Scott* and his attempt to annul the consequences of *Dred Scott* by popular sovereignty. The imputation of moral treason that Douglas says Lincoln cast upon the Supreme Court was not speculative. The moral treason had already been committed. To call property in slaves an *expressly affirmed* constitutional right would make it the supreme law of the land, overriding any state constitution or law to the contrary.

58. Abraham Lincoln, Second Debate, Freeport, Illinois: Lincoln's Speech (Aug. 27, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 537, 542.

59. Stephen A. Douglas, Second Debate, Freeport, Illinois: Douglas' Reply (Aug. 27, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 549, 553-54.

The second question put to Douglas by Lincoln at Freeport has been wrongly celebrated in the popular lore about the debates, for its significance is not equal to that of the third question. The “Freeport question” and the reply to it are nonetheless worth examining in their original forms:

Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State Constitution?⁶⁰

Douglas replied:

I answer emphatically, as Mr. Lincoln has heard me answer a hundred times from every stump in Illinois, that in my opinion the people of a Territory can, by lawful means, exclude slavery from their limits prior to the formation of a State Constitution. . . . It matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a territory under the constitution, the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations. . . . Those police regulations can only be established by the local legislature, and if the people are opposed to slavery they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst. If, on the contrary, they are for it, their legislation will favor its extension. Hence, no matter what the decision of the Supreme Court may be on that abstract question, still the right of the people to make a slave territory or a free territory is perfect and complete under the Nebraska bill.⁶¹

Douglas, as one of the four “workmen,” had committed himself in advance to accepting the decision of the Supreme Court in *Dred Scott* as the solution to all outstanding questions on slavery. Yet he now tries to escape the Court’s conclusion that there is no power under the Constitution to prevent a slaveowner from lawfully carrying his slave property into a territory. Douglas was quite wrong in asserting that slavery cannot exist without local police regulations. As Lincoln explained, slavery had often been protected by the informal collaboration

60. Lincoln, *supra* note 58, at 541–42.

61. Douglas, *supra* note 59, at 551–52.

of slave owners.⁶² Readers of *Huckleberry Finn* will recall the slave patrol on the Mississippi that forced Jim to hide under the raft.⁶³ Such patrols were commonplace in the antebellum South, as was the *posse comitatus*, a system of police enforcement that did not require legislation.⁶⁴

Douglas's distinction between an "abstract" constitutional right and an effectual one was utterly fallacious, and Lincoln took pains to see that it did not gain acceptance. He did so by comparing the right to hold slave property in a territory, as set forth in *Dred Scott*, to the constitutional right to reclaim runaway slaves. The Fugitive Slave Clause provides that,

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁶⁵

The Constitution does not say how or by whom a runaway slave is to be pursued, captured, or incarcerated, or how the owner's claim is to be adjudicated. The words "shall be delivered up," however, leave no room for doubt that appropriate legislation, whether by the states or by Congress, must be forthcoming to implement this constitutional right. Lincoln supported the Fugitive Slave Act of 1850, much as he hated to see runaway slaves hunted down and forcibly returned to their unrequited labor. He did so because the commanding word "shall" in the Constitution bound whoever took an oath to support the Constitution to support such legislation as well.⁶⁶ The obligation to do so could not be evaded by calling the right in question "abstract."

62. Abraham Lincoln, Third Debate, Jonesboro, Illinois: Lincoln's Reply (Sept. 15, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 602, 618.

63. MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN 155-57 (Susan K. Harris ed., Houghton Mifflin Co. 2000) (1884).

64. See Lincoln, *supra* note 62, at 618; see also Fugitive Slave Act of 1850, ch. 60, § 5, 9 Stat. 462, 462-63 (authorizing enlistment of *posse comitatus* and commanding "all good citizens" to aid enforcement of fugitive slave law).

65. U.S. CONST. art. IV, § 2, cl. 3.

66. Abraham Lincoln, Seventh Debate, Alton, Illinois: Lincoln's Reply (Oct. 15, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 790, 813 ("Why then do I yield support to a fugitive slave law? Because I do not understand that the Constitution, which guarantees that right, can be supported without it.").

In the course of the debates, Lincoln pointed out the abolitionists' claim of a right to deny enforcement of the Fugitive Slave Law of 1850. He then pointed to Douglas's analogous claim of a right to deny enforcement of a slaveholder's right to be secure in his slave property when emigrating to a territory. Lincoln would show that, just as the Fugitive Slave Clause could not be evaded, neither could Douglas use his doctrine of popular sovereignty to evade the "abstract" constitutional right of slave ownership, if *Dred Scott* were correct.⁶⁷ Lincoln concluded the last of the joint debates, at Alton, as follows:

I defy any man to make an argument that will justify unfriendly legislation to deprive a slaveholder of his right to hold his slave in a Territory, that will not equally, in all its length, breadth and thickness furnish an argument for nullifying the fugitive slave law. Why there is not such an Abolitionist in the nation as Douglas, after all.⁶⁸

This ironic comparison of Douglas's Freeport Doctrine to abolitionism, pursued relentlessly by Lincoln, effectively destroyed Douglas as a national leader. Its culminating effect came at the Democratic Convention in Charleston in April of 1860. A majority of the delegates wanted Douglas as the Democratic candidate for President, but they could not attain the two-thirds majority that the party's rules required. The seven states of the Deep South would not support Douglas unless he supported federal enforcement of slaveholders' rights in any United States territory. They took their stand upon these concluding words in Taney's opinion in *Dred Scott*:

Now, as we have already said . . . the right of property in a slave is distinctly and expressly affirmed in the Constitution. . . . And no word can be found in the Constitution which gives Congress a greater power over slave property . . . than property of any other description. The only power conferred is the power *coupled with the duty* of guarding and protecting the owner in his rights.⁶⁹

The italicized words may be the most portentous in American history. No one who accepted them could have been elected dog catcher in any free state. Yet they convinced the Deep

67. *Id.* at 813–14.

68. *Id.* at 814.

69. *Dred Scott*, 60 U.S. at 451–52 (emphasis added).

South that it was an absolute constitutional necessity that Congress provide federal police protection for slave property in any territory that did not itself provide that protection. The South believed that a denial of this alleged constitutional right was a breach of the compact from which the Union under the Constitution derived its being. It became the foundation of their soon to be claimed right of secession.

These words—the words of Roger Taney—denied the nomination of a united Democratic party to Douglas and, in effect, assured the Election of 1860 to Lincoln and the Republicans.