

DRED SCOTT AND THE CRISIS OF 1860*

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INTRODUCTION: A PROVOCATIVE VIEW

In recent work, Mark Graber, a participant in this Symposium, argues provocatively that *Dred Scott v. Sandford*¹ was a “centrist” decision when handed down.² In Graber’s view, most Americans were comfortable with *Dred Scott*. He points out that Congress, and indeed the whole country, had repeatedly looked to the Taney Court to settle the issue of slavery in the territories, and argues that the country was happy to abide by whatever the Court decided.

Graber’s main point is that *Dred Scott* was a needed compromise that sustained the Democratic Party’s North-South coalition, and in that way sustained the Union itself. Graber argues that the conflict between North and South became irreconcilable when it became wholly sectional, with the breakup of the Democratic Party into separate Northern and Southern factions. He then takes the not-uncommon view that what destroyed the Democratic Party was President James Buchanan’s insistence on the pro-slavery Lecompton constitution for Kansas, and his refusal to back the Party’s front-runner for the presidency, Stephen A. Douglas, who opposed the Lecompton constitution.³ Graber supports these views powerfully and

* Copyright © by Louise Weinberg, 2007. This paper grew out of a talk I gave on March 31, 2006, at the Dred Scott Conference held at the University of Texas. It draws on an earlier paper on which I based an evening lecture I gave in the 2004 Conference on “Presidential Elections and the Supreme Court,” held under the joint auspices of the University of California at Irvine and Whittier Law School. I also gave talks on this material at Georgia State University, the University of Texas, and Saint Louis University.

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1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

2. Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C. L. REV. 1229 (2005); cf. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (forthcoming).

3. Douglas had sponsored the Kansas-Nebraska Act of 1854. Based on the doctrine of “popular sovereignty” previously deployed in the arrangements for New Mexico Territory in the Compromise of 1850, the 1854 Act provided that whether Kansas and Nebraska Territories would be slave or free was

with much erudition. But in the end his assessments of *Dred Scott* and the crisis of 1860 are not convincing, in large part because his version of history does not fit the known facts.

In this brief space I will try to make the case that in the crisis of 1860 *Dred Scott* had in fact become the lynchpin of Southern policy and the focus of Northern protests. Although anything one can say about this period has been both said and contested, I will try to show that the reaction of the country to *Dred Scott* was hardly “comfort,” but rather fury. Even where *Dred Scott* was received with rejoicing, there was anguish over its alleged defects. I will try to show, within the confines of this brief space, why and how that fury and anguish intensified over time. I will try, as a generalist writing for generalists, to clarify the nature of the territorial question in the election of 1860 against the background of economic and political, as well as legal, developments. I hope I can lay to rest, or at least put seriously in question, some of the sorts of suppositions—found in Professor Graber’s work—with which I introduced this paper. Of course, reexaminations of the past must inevitably be suppositious. The deeper causes of great events in history are inevitably obscure, indifferent to the curiosity of avid explorers like Professor Graber, and, for that matter, myself.

I. THE CRITICAL ISSUE

Although it is the near-universal view that slavery was the cause of the Civil War, I think most historians would also agree that it was slavery in the *territories* rather than slavery in the *South* that was the acute issue in the 1850s. The territories problem was at the heart of the increasingly angry sectional dispute; it was the very wellspring of the coming crisis. Why this should have been so is still the subject of disagreement, but it is substantially undisputed that it was this expansion issue, rather than slavery itself, that came to a head in the election of 1860, and that drew the nation into civil war.

The territories controversy, simmering in 1850 when California was admitted to the Union as a free state, came to a boil in 1854 with the Kansas-Nebraska Act.⁴ Perhaps because this disastrous legislation makes a fit beginning for the story of the 1850s leading up to the War, some writers

to be determined by the people of the respective territories. Kansas-Nebraska Act, ch. 59, § 14, 10 Stat. 277, 283 (1854). In defiance of President James Buchanan’s attempt to force a pro-slavery constitution (the “Lecompton constitution”) on Kansas, and in furtherance of “popular sovereignty,” Douglas supported Kansans in their preference for free soil.

4. Kansas-Nebraska Act, ch. 59, 10 Stat. 277. I discuss the calamity of the Kansas-Nebraska Act *infra* Part V, notes 55–59 and accompanying text.

have tended to gloss over the fact that the territories issue was the big issue long before the 1850s.⁵

In 1844, Martin Van Buren was denied a place on the Democratic Presidential ticket because he opposed the westward expansion of slavery into the territories.⁶ The 1840s also saw the bitter controversy over the admission of Texas as a slave state.⁷ And then there was the 1846 Wilmot Proviso, which, if adopted, would have prohibited slavery in any lands acquired from Mexico.⁸ Introduced by Rep. David Wilmot of Pennsylvania during the Mexican War, the Wilmot Proviso was a proposed amendment to a bill authorizing President James C. Polk to negotiate a treaty with Mexico. It passed twice in the House in 1846 and 1847 but failed in the Senate. Nevertheless it stirred passionate controversy. The proposed amendment read:

Provided, That, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States by virtue of any treaty which may be negotiated between them, and to the use by the Executive of the money herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory except for crime, whereof the party shall first be duly convicted.⁹

In the eyes of Southerners at that particular moment in history, the Wilmot Proviso, if passed, would have been a betrayal of the solemn undertaking enshrined in the Missouri Compromise of 1820,¹⁰ a national commitment to the proposition that, save for Missouri, only in those territories above the 36°30' line of parallel would slavery be prohibited. Contemplating the Missouri Compromise, Henry Clay's handiwork, Thomas Jefferson saw a scarring line drawn across the land, and heard "a fire-bell

5. See, e.g., GEORGE FORT MILTON, *THE EVE OF CONFLICT: STEPHEN A. DOUGLAS AND THE NEEDLESS WAR* (1963) (1934) (beginning the narrative in the 1850s). *But see generally*, e.g., ROGER L. RANSOM, *CONFLICT AND COMPROMISE: THE POLITICAL ECONOMY OF SLAVERY, EMANCIPATION, AND THE AMERICAN CIVIL WAR* (1989) (tracing the earlier history of the controversy).

6. Letter from Martin Van Buren to W.H. Hammet (Apr. 20, 1844), in 1 *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789–1968* (Arthur M. Schlesinger, Jr. ed. 1971), at 822, 822.

7. Florida entered the Union on March 3, 1845, and Texas on December 29, 1845, both as slave states. This gave the South control of the Senate with four seats, until the entry into the Union of Iowa on December 28, 1846, and Wisconsin on May 29, 1848.

8. See generally CHAPLAIN W. MORRISON, *DEMOCRATIC POLITICS AND SECTIONALISM: THE WILMOT PROVISIO CONTROVERSY* (1967); Richard R. Stenberg, *The Motivation of the Wilmot Proviso*, 18 *MISS. VALLEY HIST. REV.* 535 (1932).

9. The text is taken from MORRISON, *DEMOCRATIC POLITICS*, *supra* note 8, at 18.

10. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545. South of the compromise line a new state would have the option of entering the Union as a slave state. That the Missouri Compromise contemplated that territories south of the line would yield slave states is made explicit, e.g., in its provision of voting rights for "free white male[s]" over the age of twenty-one. *Id.* § 3.

in the night.” He wrote, “I considered it at once as the knell of the union.”¹¹ Hotly disputed between pro- and anti-slavery forces at the time, the Compromise of 1820 would come to have the almost sacrosanct quality of organic law. And the expectation, until 1848, was that the Missouri Compromise line would extend to the Pacific.

I raise the Missouri Compromise of 1820 here to show that the expansion of slavery westward into the territories was roiling the country long before James Polk’s territorial acquisitions in the 1840s, long before the country had come together on a vision of its “manifest destiny.”¹² The conflict over Missouri and the rest of the Louisiana Territory suggests, in turn, that slavery in the territories must also have been an issue, if only implicitly, in 1803, when Congress authorized the Louisiana Purchase to begin with.¹³ (The Louisiana Purchase today encompasses Arkansas, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Wyoming.) It would have been an issue also in the 1790s, when Kentucky and Tennessee were admitted to the Union as slave states. It was clearly an issue in 1787. In that year, while the Framers were struggling to draft the Constitution in Philadelphia, Congress, sitting in New York, was abolishing slavery in the old Northwest Territory¹⁴ (today encompassing Ohio, Indiana, Illinois, Wisconsin, Michigan, and part of Minnesota). It seems evident, then, that the question whether the territories to the West would be slave or free was a burning issue from earliest times.

But whenever it began, why should there have been such agony over the territories at all? Why the focus on slavery in the *territories* rather than slavery in the *states*? Preliminarily, it should be said that some small part of the answer must lie in the fact that prudent anti-slavery Northerners might not feel quite free to launch legal assaults upon the domestic autonomy of the Southern states. Those who might have liked to attack the domestic arrangements of slave states might plausibly have feared attacks on the

11. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in *A JEFFERSON PROFILE AS REVEALED IN HIS LETTERS* (Saul K. Padover ed., 1956), at 312, 312. Even late in life Thomas Jefferson, the father of the Louisiana Purchase, was professing, perhaps disingenuously, a counterintuitive belief that westward expansion would lead to slavery’s gradual extinction. *See id.* at 313. For a current treatment of Jefferson’s complex views, see ROGER G. KENNEDY, *MR. JEFFERSON’S LOST CAUSE: LAND, FARMERS, SLAVERY, AND THE LOUISIANA PURCHASE* (2003).

12. *See* John L. O’Sullivan, *Annexation*, 17 U.S. MAG. & DEMOCRATIC REV. 5, 5 (1845) (coining the phrase); *see also* John L. O’Sullivan, *The Great Nation of Futurity*, 6 U.S. MAG. & DEMOCRATIC REV. 426, 427 (1839) (arguing that America “is destined to manifest to mankind the excellence of divine principles”). O’Sullivan was the editor of the journal in which these articles appeared.

13. Act of Oct. 31, 1803, ch. 1, 2 Stat. 245 (ratifying the Louisiana Purchase treaty).

14. Act of July 13, 1787 [Northwest Ordinance], ch. 8, 1 Stat. 50, 51 n.(a) (abolishing slavery in the old Northwest Territory).

domestic arrangements of *free* states—a fear that was to intensify sharply after *Dred Scott*. In part for this reason, and also because the Constitution itself acknowledges the existence of slaves (“Person[s] held to Service or Labour,” as opposed to “free Persons, including those bound to Service for a Term of Years”¹⁵), it might well have seemed desirable in any event to keep the two issues—slavery in the territories and slavery in the South—quite separate. Slavery in the South was presumed to be constitutional and even part of a sacred original bargain,¹⁶ with which it was the earnest object of good Unionists to keep faith. Slavery in the *territories*, on the other hand, could be safely resisted. Thus, right up to the War, Abraham Lincoln invariably avowed that he would not interfere with slavery in those states where it existed. While insisting that slavery was an evil, inconsistent with the ideals of the Declaration of Independence, he would not lay open to interference the domestic arrangements of any state, South or North. It was only the *extension* of slavery that Lincoln actively opposed.¹⁷

II. THE POLITICAL SALIENCE OF THE CONTROVERSY

Ironically, by 1860 the territories issue had actually lost much of the practical importance it had had in the early and middle antebellum periods, if the question had to do simply with a choice of labor systems.¹⁸ It was well understood that, beyond Texas, the mountainous or desert Western lands would not be suitable for the sort of latifundia agriculture that was flourishing in the cotton country of the Deep South,¹⁹ or declining in the depleted and decaying Tidewater plantations of the Old South.²⁰ A few

15. U.S. CONST. art. IV, § 2 [Fugitive Slave Clause]; *id.* at art. I, § 2 [Three-Fifths Clause].

16. *See* *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 224 (1836) (Shaw, C.J.) (confirming the sacred bargain as it concerned fugitive slaves, but seminally distinguishing slaves brought voluntarily onto free soil and sojourning there, and applying a rule of liberty to the latter); LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957), at 68, 71 (explaining the importance of Aves’ case in modifying the supposed sacred bargain).

17. *See, e.g.*, Abraham Lincoln, Address at Cooper Institute, New York (Feb. 27, 1860), in 1 *ABRAHAM LINCOLN: COMPLETE WORKS* (John G. Nicolay & John Hay eds., 1902) (1894), at 599, 608–09 (separating the two issues and adding that the “Federal Government . . . has the power of restraining the extension of the institution . . .”).

18. *See* *RANSOM, CONFLICT AND COMPROMISE*, *supra* note 5 (questioning the supposed need of Southerners to expand slavery into the West).

19. *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess. app. at 1404–15 (1850); *id.* at 1266–70 (Senators Henry Clay and Daniel Webster expressing the view that slavery could not thrive in the Western territories beyond Texas).

20. It is sometimes still questioned whether slavery and cotton agriculture continued to deplete the soil after the 1830s, once Southern planters came to understand modern fertilization. For the view that the exhaustion of Southern land continued, see, for example, FREDERICK LAW OLMSTED, *A JOURNEY IN THE SEABOARD SLAVE STATES, WITH REMARKS ON THEIR ECONOMY* (1861) (1856), at 338, 366, 413; JOHN E. CAIRNES, *THE SLAVE POWER: ITS CHARACTER, CAREER, AND PROBABLE DESIGNS* (2003) (1862), at 76–77. This problem of soil depletion was thought to explain, in part, the Westward migra-

dozen slaves might work a silver mine in Nevada, but there would be no call for the numbers of slaves typically working a large cotton plantation in the late antebellum period. A similar difficulty had been apparent during the Missouri Compromise crisis, when political leaders contemplated the future of the Northern lands that were part of the Louisiana Purchase. Later in the antebellum period, settlers near the border with Mexico were to find that affordable Mexican free labor was readily available, requiring no initial outlay and imposing no obligation of lifetime maintenance. Slavery in such places would come to seem pointless and diseconomic. In the Far West, as in some Northern states, slavery was actively opposed as depriving white breadwinners of work.²¹ For whatever reason, on the eve of the Civil War there were very few slaves to be found in any of the remaining territories.

So it may seem odd that in the 1850s Southern journalists and politicians were keeping up a drumbeat of demands for new slave territory. And they grounded their demands, unconvincingly, in an alleged desire of Southern planters and farmers to resettle with their slaves in Western territory unsuited to agriculture and perhaps threatened by Indians, or in optimistic projections of new markets for the products of the South's slave breeders, markets delicately referred to as "outlets" for the South's "excess slaves."

The obvious inutility of slave labor in much of the West suggested then, as now, that the Southern demand for new slave territory was not about plantations, but about political power, particularly in the United States Senate. This common opinion was shared, for example, by John Elliot Cairnes, the distinguished nineteenth century Irish political economist.²² In a polemical but well-documented study published in 1862, Cairnes argued the point, remarking, "The desire to obtain fresh territory for the creation of slave states, with a view to influence in the Senate, has carried the South in its career of aggression far beyond the range which its mere

tions from the Southeast. *But see, e.g.*, GAVIN WRIGHT, *THE POLITICAL ECONOMY OF THE COTTON SOUTH: HOUSEHOLDS, MARKETS, AND WEALTH IN THE NINETEENTH CENTURY* (1978), at 131–33 (arguing that an abundance of prime, uncultivated, undeveloped land was still available as late as the 1850s in the South's wilderness). To similar effect, see also EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY & SOCIETY OF THE SLAVE SOUTH* (2d ed. 1989) (1965), at 243.

21. For such reasons, before its admission to the Union, California enacted a constitution abolishing slavery within its borders. CAL. CONST. of 1849, art. I, § 18, *reprinted in* 1 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* (William F. Swindler ed., 1973), at 447, 448 (providing that "[n]either slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State"). California's current constitution was adopted in 1879.

22. *See generally* ADELAIDE WEINBERG, JOHN ELLIOTT CAIRNES AND THE AMERICAN CIVIL WAR: A STUDY IN ANGLO-AMERICAN RELATIONS (1970).

industrial necessities would have prescribed.”²³ As early as 1817, at Mississippi’s constitutional convention, one delegate argued that Mississippi Territory should be split, explaining, “Division . . . would give to this section of the union an additional state, and of course two additional senators, and two additional electors of President, to maintain its political influence and rights.”²⁴

Southern leaders sometimes justified the South’s unending but decreasingly successful struggle for political power as an attempt to gain needed concessions in what Abraham Lincoln called “the terms of intercourse”²⁵—domestic trade relations and national fiscal policy. To Southerners, the possibility of expanding slavery into the territories began to matter quite early, as it first became evident that the South, for all the profitability of its great plantations and, after the invention of the cotton gin, the massive success of its cotton agriculture, was not doing as well as had been anticipated—not as well as the North. Southerners boasted that “[c]otton is king,”²⁶ but they were not unaware that the South was falling behind the North. Some, in the bucolic Jeffersonian tradition, might have professed themselves content with this, disclaiming any desire for industrialization or urbanization. But most Southerners blamed the growing developmental disparity on the federal government, and ultimately on the North.²⁷ To them, national policies were simply Northern policies. National policies favored the North and were bleeding the South. Although there was some truth in this, behind the South’s fiscal complaints were other, deeper fears. Southerners would continue to complain even after significant fiscal successes.

23. CAIRNES, *THE SLAVE POWER*, *supra* note 20, at 202.

24. ADAM ROTHMAN, *SLAVE COUNTRY: AMERICAN EXPANSION AND THE ORIGINS OF THE DEEP SOUTH* (2005), at 173 (quoting delegate William Lattimore).

25. See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 2 ABRAHAM LINCOLN: COMPLETE WORKS (John G. Nicolay & John Hay eds., 1902) (1894), at 1, 6.

26. James Henry Hammond, Speech on the Admission of Kansas Before the United States Senate (Mar. 4, 1858), in SELECTIONS FROM THE LETTERS AND SPEECHES OF THE HON. JAMES H. HAMMOND, OF SOUTH CAROLINA (Clyde N. Wilson ed., 1978) (1866), at 301, 316–17.

What would happen if no cotton was furnished for three years? I will not stop to depict what every one can imagine, but this is certain: England would topple headlong and carry the whole civilized world with her, save the South. No, you dare not make war on cotton. No power on earth dares to make war upon it. Cotton is king.

Cf. David Christy, *Cotton is King: Or, Slavery in the Light of Political Economy*, in COTTON IS KING, AND PRO-SLAVERY ARGUMENTS (E.N. Elliot ed., 1860), at 19.

27. See, e.g., Robert Toombs, “Federal Economic Policy,” Speech in the Georgia Legislature (Nov. 13, 1860), in THE CAUSES OF THE CIVIL WAR (Kenneth M. Stamp ed., 3d ed. 1991) (1959), at 86.

III. THE TWO ECONOMIES

Southerners had long objected to a number of national fiscal policies, most particularly high protective tariffs. Southerners saw high tariffs as favoring Northern industry at the expense of the South. The tariff crises of 1828 and 1832, orchestrated by John C. Calhoun, attest to Southern bitterness over these tariff increases. Southerners perceived them as “Northern aggression.”

Yet a tariff on imported goods, from which the national revenue in those days was chiefly obtained, was arguably the only federal tax that could be levied without entangling Congress in arguments over apportionments allocable to slaves, whether as persons or property.²⁸ Northerners came to favor higher tariffs that would protect Northern products from foreign price competition. The relatively high tariffs that obtained until 1846 had the chief effect of making foreign manufactures substantially as dear or dearer than American. Because the South was even more agricultural than the North, and was not developing an industrial base comparable to the North’s, Southerners came to see high tariffs as raising the price of everything Southerners could not make themselves and needed to buy. And certainly, at least until 1846, tariffs were higher than required for revenue.

Northern leaders were not content with protective tariffs only; they also demanded and got laws favoring the carriage of goods in American vessels, generally owned of course by Northerners. Northerners were interested also in expensive “internal improvements.” Northern industrial interests, later with support from the Far West, held to what today we might call a “tax and spend” ideology. They demanded increased revenue to pay for infrastructure—canals, dams, bridges, and roads. Although the South would not oppose improvements directly benefiting the South, “internal improvements” seemed to Southerners all too often simply to benefit the North at the South’s expense. In Southern eyes, the old Northern Whig policies of high tariffs and internal improvements, favored by Henry Clay and Abraham Lincoln, made the South a “slave” to the North. And high tariffs, like all taxation, federal and local, were perceived by Southerners as unfriendly to the slave system, sucking the profits out of it. In their view, the federal tariff amounted to a sneaking sort of abolition.²⁹ In Southern

28. This is the interesting argument of ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006). Cf. U.S. CONST. art. I, § 2, cl. 3 (on apportionment of direct taxes).

29. See JAMES L. HUSTON, *CALCULATING THE VALUE OF THE UNION: SLAVERY, PROPERTY RIGHTS, AND THE ECONOMIC ORIGINS OF THE CIVIL WAR* (2003), at 48 (with quotations from John C. Calhoun and John Claiborne).

thinking, the power to tax, in the end, just might be the power to destroy the South's "peculiar institution."

Of course, enormous profits were to be had for those Southerners who could intensively apply slave labor to large holdings of fertile land. But because of this very profitability and the prestige that owning slaves conferred, Southerners sank their capital into land and slaves, and had little appetite for investment in industry. Meanwhile, at least until 1846 when tariffs were sharply reduced, Northern industry, with its improving infrastructure, was flourishing behind the wall of protective tariffs, and would eventually turn the United States into an industrial powerhouse.

Undoubtedly higher prices would have been felt in the (still largely agricultural) North as well as in the South.³⁰ But free-trade enthusiasts who believe that the pain of high tariffs would have been the same in both sections fail to take into account the availability of Northern capital to take advantage of the protection high tariffs afforded, and of the consequent dynamism of the Northern economy. Although Northern states like Ohio and its neighbors were perhaps not industrializing as rapidly as states in the Northeast, they were experiencing the commercial and urbanizing benefits of the completion of the Erie Canal in 1825. As the North began pulling ahead of the South, a dynamic snowballing of development was taking place. Opportunities for manufacturing employment in the North were naturally better for free labor than in the South, and would have been increasing in the North's protected industries. So immigrants flocked in increasingly greater numbers to the North (and free West) to take advantage of these employment opportunities. Northern cities and towns grew as the population swelled. Literacy grew with the need for city workers and with the greater density of settlement that made even rural schools feasible. A substantial middle class was emerging. There was a steady advance in purchasing power, in both the laboring and entrepreneurial classes, and thus there were rapidly expanding local markets for both manufactures and agricultural products, as well as professional services. To the satisfaction of consumers, an ever more abundant and varied marketplace was developing,

30. This is an argument Calvin Johnson raised at one of my talks. I respond to this argument in the text. Parenthetically, however, I observe that it is not clear how much pain—beyond the psychological effect of apparently higher prices—protective tariffs cause. Arguably, consumers in neither section experienced economic harm to the full extent of the apparent rise in prices. Protective tariffs discourage consumers from buying the affected goods but encourage them to buy American when they do buy. These effects would tend to improve the overall balance of payments. This, in turn, would tend to strengthen the dollar as against foreign currency. As long as domestic consumers and manufacturers continue to buy at least some foreign goods or components, they will do so with this stronger dollar. In other words, a dollar strengthened by protective tariffs should cancel some quantifiable part of the apparent rise in overall prices.

as more and more local manufactures became readily available to meet this growing demand. Such advantages of accelerated dynamic economic growth and opportunity would easily have compensated Northerners for apparently higher prices on manufactures, and very probably would have continued to benefit the North, once its prosperity was dynamically advancing.³¹ Dynamic development was the long-term outlook for the North, notwithstanding the cycle of booms and busts, and notwithstanding the reduction of tariffs in 1846. This outlook only brightened with the influx of Irish and German immigrants in the late 1840s.³²

That nothing like this was happening in the South, and that something in fact was going wrong in the South, should have been patent to the meanest intelligence. The disparity between the two sections was becoming obvious quite early in the antebellum period. Although Southern sentimentalists will always be found to dispute it, this is the near-universal report of travelers in the South whose letters or journals survive. These observers are in such agreement that it would be perverse to dismiss their testimony as merely anecdotal.³³ The cause of the disparity was the slave system, as Hinton Helper,³⁴ John Cairnes,³⁵ and others contemporaneously argued. But the relation between slavery and Southern poverty was complex.

Because of racial slavery, the labor of young white men was not much wanted in the South. Yeomen farmers who owned a bit of land and perhaps a slave or two could support and educate their families, and possibly formed the largest class. For the rest, tenant farming was available to some,

31. In 1846, in an attempt to address Southern complaints, Congress significantly reduced tariffs, and did so again in 1857. Interestingly, this latter reduction coincided with a severe depression, felt very heavily in the industrial North. Wages fell and men were thrown out of work. Restoration of high tariffs in 1861 arguably ended the distress, since, before the Morrill Tariff of 1861, there were only modest signs of recovery, and only in some sectors.

32. *But see, e.g.*, BRUCE LEVINE, *THE SPIRIT OF 1848: GERMAN IMMIGRANTS, LABOR CONFLICT, AND THE COMING OF THE CIVIL WAR* (1992) (arguing that massive immigration in the nineteenth century had a destabilizing effect).

33. For the view that reliance on travelers' reports is misplaced, see ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974), at 181–87. For travelers' reactions to their encounters with poor whites in the antebellum South, see, for example, FREDERICK LAW OLMSTED, *THE COTTON KINGDOM* (1953) (1861), at 64–66, 213, 290, 376, 525–27; FRANCES ANNE KEMBLE, *JOURNAL OF A RESIDENCE ON A GEORGIAN PLANTATION IN 1838–1839* (John A. Scott ed., 1961) (1863), at 182; *see also* her more famous early entry to similar effect, unavailable in the Scott edition, *infra* note 37. *See also, e.g.*, ANTHONY TROLLOPE, *NORTH AMERICA* (1951) (1862), at 347 (the English novelist, referring to the South and wondering, “[W]here are their men, where are their books, where are their learning, their art, their enterprise?”).

34. *See* HINTON ROWAN HELPER, *THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT* (1857) (arguing that slave labor was destructive to the land, to poor whites, and to overall prosperity). Helper's book was banned in some Southern states; in 1860 the Republican Party distributed some 100,000 copies. HUGH C. BAILEY, *HINTON ROWAN HELPER: ABOLITIONIST-RACIST* (1965).

35. CAIRNES, *THE SLAVE POWER*, *supra* note 20.

and a handy man might do the occasional odd job when a farmer needed a hand. But steady employment was not a feature of the lives of the poorest rural whites. In the few Southern cities where a little urban work might be had for the skilled and unskilled alike, both sorts of jobs were often taken by slaves, often hired out. Slave or free, blacks, like whites, looked down on “poor white trash.”³⁶

Because performance of any kind was not much looked for from poor whites, and because the density of settlement was remarkably low throughout the South, even in old Virginia, no general system of free public schools was or could have been provided for poor whites, though earnest efforts were sometimes made. Poor whites told themselves that it was they who spurned employment and they who spurned book learning. To work as the blacks worked would be to become slaves themselves. Steady work, and certainly stoop labor in the fields, even if available, could only enslave them, in their own view. For them to labor alongside blacks would be to strip them of their whiteness and dishonor them. In common with the South’s aristocracy of big planters, they had their whiteness—and their freedom from work.

Thus, the South’s white lower classes internalized the heady dogma of racial supremacy as they sank into idleness, illiteracy, and backwardness. These abjectly poor whites, comprising an unknown but significant percentage of the Southern white population, lived in squalor in the South’s vast undeveloped wildernesses or backwoods, or squatted on its abandoned, untended lands, subsisting on what they could get by poaching and other petty crime, fishing, and shooting small wildlife.³⁷ They were ready re-

36. See, e.g., CHARLES C. BOLTON, *POOR WHITES OF THE ANTEBELLUM SOUTH: TENANTS AND LABORERS IN CENTRAL NORTH CAROLINA AND NORTHEAST MISSISSIPPI* (1994), at 4–6 (arguing that “white trash” was simply a pejorative term, not an identifiable Southern class; describing a “continuum” of Southern poor backwoodsmen, ranging from farm families with some surplus, to tenant farmers barely able to sustain their families, to day laborers). Bolton acknowledges that a few landless whites in the South did abandon agriculture and civilization to live off the land. See *id.* at 5, 8; see also FRANK LAWRENCE OWSLEY, *THE PLAIN FOLK OF THE OLD SOUTH* (1949) (conservative Southerner minimizing the existence of “white trash”); D.R. HUNDLEY, *SOCIAL RELATIONS IN OUR SOUTHERN STATES* (1860) (same); W.J. CASH, *THE MIND OF THE SOUTH* (1941), at 21–23 (explaining how the planters’ hunger for better land drove the yeomen deeper and deeper into the backwoods, where in their isolation they could have no chance of upward mobility); *THE PROSE WORKS OF WILLIAM BYRD OF WESTOVER: NARRATIVES OF A COLONIAL VIRGINIAN* (Louis B. Wright ed., 1966), at 184 (reporting that unemployed poor white squatters might by thievery even accumulate a few head of cattle, which, however, they would rarely stoop to milk). For recent discussion, see generally JAMES C. COBB, *AWAY DOWN SOUTH: A HISTORY OF SOUTHERN IDENTITY* (2005).

37. See KEMBLE, *JOURNAL OF A RESIDENCE*, *supra* note 33. The more famous entry of December 30, 1838, is not available in the Scott edition, *id.*, but can be found in e-text in the Gutenberg Project at <http://www.gutenberg.org/files/12422/12422-8.txt>:

Labour being here the especial portion of slaves, it is thenceforth degraded, and considered unworthy of all but slaves. No white man, therefore, of any class puts hand to work of any kind soever. This is an exceedingly dignified way of proving their gentility, for the lazy plant-

cruits for filibustering expeditions into Mexico, or as “border ruffians” in the struggle for Kansas. When the War came, they would fight as fiercely as their better-off comrades for the Confederacy and for their “honor,” the honor of white supremacy.

The South could not lift itself out of this backwardness by attracting the sort of large-scale immigration that it had once confidently expected. Of course, the South had substantial numbers of immigrants, but not on the scale experienced in the North. The mass of immigrants pouring into the country preferred not to settle in the South. This preference had to do with slavery, but not necessarily with any moral revulsion. Rather, the South’s failure to attract more immigration was about economic opportunity, or rather the lack of it. Immigrants naturally tended to settle in the North and West,³⁸ *where the jobs were*. This factor of opportunity as a link in the causal chain has not been sufficiently emphasized. Over time, the flow of immigration to the North meant a resulting shift in relative populations. And a shift in relative populations, in a democracy, must entail a shift in relative political power.

IV. THE POLITICAL STRUGGLE

From the beginning, to appease Southern wrath, an effort had been made to maintain an even balance of regional political power by preserving a balance between the numbers of slave and free states, and thus a balance in the Senate. As the South increasingly seemed to be consigned to the status of a permanent minority, John C. Calhoun, the intellectual leader of

ers who prefer an idle life of semi-starvation and barbarism to the degradation of doing anything themselves; but the effect on the poorer whites of the country is terrible. I speak now of the scattered white population, who, too poor to possess land or slaves, and having no means of living in the towns, squat (most appropriately is it so termed) either on other men’s land or government districts—always here swamp or pine barren—and claim masterdom over the place they invade, till ejected by the rightful proprietors. These wretched creatures will not, for they are whites (and labour belongs to blacks and slaves alone here), labour for their own subsistence. They are hardly protected from the weather by the rude shelters they frame for themselves in the midst of these dreary woods. Their food is chiefly supplied by shooting the wild fowl and venison, and stealing from the cultivated patches of the plantations nearest at hand. Their clothes hang about them in filthy tatters, and the combined squalor and fierceness of their appearance is really frightful. . . . [S]o long as labour is considered the disgraceful portion of slaves, these free men will hold it nobler to starve or steal than till the earth . . .

Fanny Kemble was a famous English actress, at the time of this writing the wife of Charles Butler, living on his great plantation in Georgia. They would eventually divorce. For other discussions of the condition of poor whites in the antebellum South, see, for example, Eric Foner, *Northern Progress and Southern Decadence*, in *CAUSES OF THE CIVIL WAR*, *supra* note 27, at 229; BOLTON, *POOR WHITES*, *supra* note 36, at 5–6 (arguing that most poor Southern whites were employed, but acknowledging that those “who chose to go off and live by themselves” in the wildernesses could be described as shiftless and ignorant); GEORGE M. WESTON, *THE POOR WHITES OF THE SOUTH* (1856).

38. See RANSOM, *CONFLICT AND COMPROMISE*, *supra* note 5, at 139 (“[I]mmigrants did not settle in the South. Fewer than one in ten of all Americans born abroad lived in the South in 1860 . . .”).

the South in the age of Jackson, began to argue that the South was entitled to a “concurrent voice” in the government, whether or not it comprised an equal part of the nation’s population.³⁹ Even with the aid of the Three-Fifths Clause,⁴⁰ the South was continuing to lose power in the House. By 1850 the South had become too weak politically to prevent the admission of California as a free state, although it was reasonably foreseeable at the time that no slave state would ever be admitted again to redress the balance.⁴¹ The South had to be content with the doubtful *quid pro quo* of possible, but unlikely, slave status for New Mexico, Arizona, and Utah, and a harsh new Fugitive Slave Act.⁴² The South was facing the possibility of an eventual loss of the Senate. In 1858, the Democrats lost control of the House, a phenomenon not experienced since 1846. In the face of growing political weakness, how could the South effectively oppose policies it believed were bleeding and enslaving it, and would eventually destroy its way of life?

For in the mind of the South, slavery itself could not survive without territorial expansion.⁴³ The key to Southern commitment to slavery’s expansion westward was the South’s determination to secure its traditional grip on the federal government. The key to the South’s struggle for political power was, at the first level, the Southern conviction—since Southerners would not blame the slave system—that national fiscal policy was causing the South to fall behind. At the deepest level, the key to Southern concern

39. John C. Calhoun, *A Disquisition on Government*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* (Ross M. Lance ed., 1992), at 3, 21; JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861* (1930), at 177–212, 239.

40. U.S. CONST. art I, § 2:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

41. See Act of Sept. 9, 1850, ch. 49, 9 Stat. 446 (establishing a territorial government for New Mexico); Act of Sept. 9, 1850, ch. 50, 9 Stat. 452 (admitting California into the Union); Act of Sept. 9, 1850, ch. 51, 9 Stat. 453 (establishing a territorial government for Utah). The Compromise of 1850 opened to slavery that territory taken from Mexico, excepting California, which lay North *as well as South* of the Missouri Compromise line. This brought California into the Union as a free state, while opening the New Mexico and Utah territories, including Arizona, to slavery. Later, as part of this Compromise of 1850, Congress also enacted a new, more severe fugitive slave law, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (amending the Fugitive Slave Act of 1793), and also prohibited the slave trade in the District of Columbia. Act of Sept. 20, 1850, ch. 63, 9 Stat. 467. See generally MARK J. STEGMAIER, *TEXAS, NEW MEXICO, AND THE COMPROMISE OF 1850: BOUNDARY DISPUTE & SECTIONAL CRISIS* (1996).

42. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (amending the Fugitive Slave Act of 1793).

43. For interesting treatments, see, for example, MICHAEL F. HOLT, *THE FATE OF THEIR COUNTRY: POLITICS, SLAVERY EXTENSION, AND THE COMING OF THE CIVIL WAR* (2004), and KENNETH S. GREENBERG, *MASTERS AND STATESMEN: THE POLITICAL CULTURE OF AMERICAN SLAVERY* (1985).

about losing relative political power was the South's conviction that sooner or later the North would abolish slavery, destroying the South's economy and way of life. This would be accomplished through the power to tax, or head on.⁴⁴ In his Second Inaugural Address, as Abraham Lincoln looked back to the coming of the War, he remarked that everybody knew that slavery was somehow at the bottom of it:

These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it.⁴⁵

Southern leaders were determined that as many new states as possible should enter the Union as slave states. This could be assured only if the territories from which those states were to be carved permitted slaveowners to dwell there with security for their property and thus provide a constituency for slave-state status when the state would be free to determine slave status *vel non* for itself. Yet settlers in the Far West seemed to have little interest in the slave system, some even seeking to exclude slavery from their territories. California's 1849 constitution abolished slavery in perpetuity,⁴⁶ and California sought entry to the Union in 1850 as a free state.

The Southern hope, put realistically, could only have been that sufficient slaveowners might be induced to settle in the remaining territories to achieve at least nominal slave status for the states that would emerge from those territories. The hope might have been not so much a hope of adding pro-slavery forces to Congress as of adding pro-South ones. But it was a very long shot. Even if all new states were to be admitted as nominal "slave" states, Western congressmen and senators might not always share the South's viewpoints. Westerners eagerly sought federal money for "internal improvements" in the West—irrigation systems and dams—which Southern leaders would inevitably oppose as bought at the South's expense. Some Western leaders favored protective tariffs. Contrary to the Southern ideology of states' rights, Westerners tended to favor a strong national government. Just as Southerners had in earlier days, Westerners welcomed a strong Union army with which to confront the Indians, and, unlike South-

44. Southern fear of the imposition of majority will on the South can be seen early, in the Southern delegates' insistence in 1787 on unamendably equal representation in the Senate, and in the outrage that followed Chief Justice Marshall's great opinion on national power in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

45. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 2 COMPLETE WORKS, *supra* note 25, at 656, 657.

46. For background on California's 1849 constitution, see *supra* note 21.

erners, were content in the belief that they had an army at the Union's expense, not that the Union had an army at theirs.

Southern leaders did not dwell on these realities. Perhaps the slave South would never attract as many immigrants as the North, but in Southern thinking every new slave state would bring new pro-South population,⁴⁷ adding new pro-South representatives in the House. Most importantly, every new slave state would add two pro-South votes in the Senate, and new presidential electors. New slave states, Southerners told themselves, would be the South's salvation. New slave states would shore up the South's dwindling political power.

It would be hard to understand the stridency of Southern fiscal and expansionist demands without keeping in mind the steady deterioration of the South's political position and Southerners' consequent concern about the survival of slavery. The South's political struggle seemed paradoxically more desperate on the heels of each of its practical successes. Southern wrath only increased after Andrew Jackson succeeded in destroying the Bank of the United States; increased when the South won the struggle for Texas; increased after Congress gave the South the lower tariffs it wanted in 1846. Southern wrath increased even after Congress labored to meet new, changed Southern demands, accommodating the South's *volte face* on the Missouri Compromise, with the enactment in 1854 of the Kansas-Nebraska Act.⁴⁸ Nor was the South satisfied even after the Supreme Court, in *Dred Scott*, struck down the Missouri Compromise as unconstitutional in 1857. The South, apparently, could not be appeased, not even by the drastic tariff reduction of 1857—although that reduction drove the otherwise supine James Buchanan in 1858 to suggest to Congress that from his “own observations,” presumably of distress in the North, the nation required a rise in tariff rates.⁴⁹ With the Deep South out of Congress, and his administration in its closing hours, Buchanan could simply have let the steep Morrill Tariff of 1861 become law without his stir. But apparently, having

47. In the late 1850s the illegal slave trade picked up, as if the South were hoping to import a population (or three-fifths of a population) from Africa. This development won condemnation from the Republican platform in the election of 1860. Republican Platform of 1860, in NATIONAL PARTY PLATFORMS 1840–1956 (Kirk H. Porter & Donald Bruce Johnson eds., 1956), at 31, 32–33, para. 9.

48. See *infra* Part V, notes 55–59 and accompanying text.

49. I ALLAN NEVINS, THE EMERGENCE OF LINCOLN: DOUGLAS, BUCHANAN, AND PARTY CHAOS 1857–1859 (1950) [III ALLAN NEVINS, ORDEAL OF UNION], at 422 (discussing James Buchanan's Message to Congress on December 6, 1858); see also KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK (1990), at 232–33 (discussing the Northern demand for renewed tariff protection in the wake of the Panic of 1857).

requested the legislation, he felt strongly enough about continuing distress in the country to sign it.⁵⁰

Southerners' agitation kept increasing because the South kept falling behind. Even the prosperous planter class could reasonably fear that the South's string of political victories would not continue. As national power slipped from their hands, Southerners could reasonably fear national power at the command of interests inimical to them.⁵¹ The growing moral condemnation of the South by Northern writers and preachers made the South's grasp on national power ever more insistent and necessary to it.

The struggle for political dominance was also, of course, the anti-slavery *North's* struggle, eventually the struggle of the Republican Party. This was a struggle against the pro-slavery Democratic coalition, and the imagined and feared "Slave Power." As William H. Seward frankly acknowledged in the Senate, "We are fighting for a majority of free states."⁵² To Northerners, it seemed that the mysterious "Slave Power" controlled the presidency, the Supreme Court, and the Senate, and had done so, for the most part, from the beginning. The Republicans' struggle was to achieve higher tariffs, internal improvements, and well-regulated money; to preserve and expand free soil and free labor in the face of the designs of the Slave Power; and, to these ends, to wrest the reins of government from the Slave Power.⁵³ In 1860, Northerners, shakily emerging from the Panic of 1857, lobbied hard for the restoration of protective tariffs. With the South out of the Senate, the Morrill Tariff of 1861 was swiftly enacted, restoring the tariff to some of the highest levels in our history.

For its part, the new Confederate States of America went on to become a virtual model of free trade. But, as with other failed Southern strategies and ideologies traceable to racial slavery—states' rights, low taxes generally, scant public goods—free trade would turn out to be damaging to the Confederacy and its war effort.⁵⁴

50. Act of Mar. 2, 1861, ch. 68, § 5, 12 Stat. 178, 179–80. *But see* JAMES L. HUSTON, *THE PANIC OF 1857 AND THE COMING OF THE CIVIL WAR* (1987), at 210 (conceding that Westerners continued to feel distress, with low demand for grain, but arguing that the Northeast was "halting[ly]" beginning to approach pre-Panic levels of prosperity by 1859).

51. *See* Lincoln, First Inaugural Address, in 2 *COMPLETE WORKS*, *supra* note 25, at 1, 6 (taking note of Southern concern about national economic policy—the "terms of intercourse").

52. *CONG. GLOBE*, 35th Cong., 1st Sess. 521 (1858).

53. *See, e.g.*, LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860* (2000); Russel B. Nye, *The Great Slave Power Conspiracy*, in *CAUSES OF THE CIVIL WAR*, *supra* note 27, at 20. For a particularly skeptical view of conspiracy theories on both sides, see DAVID BRION DAVIS, *THE SLAVE POWER CONSPIRACY AND THE PARANOID STYLE* (1969).

54. Alternative sources of revenue were as distasteful to Southerners as the tariff. Moreover, efforts to collect revenues required organization of a centralized bureaucracy, or state cooperation. In the main, then, the Confederacy resorted to printing its money. The resulting inflation eventually ren-

V. THE LEGAL STRUGGLE

The 1850s found Southern leaders complaining that the customary line drawn at 36°30', first established in the Missouri Compromise, could no longer bring in enough new slave states to maintain a fair balance of political power. Arguing that the Missouri Compromise applied only to Louisiana Territory anyway, they clamored for its repeal, demanding a new dispensation. This was a dangerous game. Southern leaders were seeking to tear down the Missouri Compromise as though it were a superfluous ornament of the Union, when it had become a structural support.

They got their repeal with the fateful Kansas-Nebraska Act of 1854.⁵⁵ Senator Stephen A. Douglas pushed the Kansas-Nebraska Act through Congress. Douglas was interested in delivering to his home state, Illinois, a route through Chicago for the eagerly anticipated railway to the Pacific.⁵⁶ The Kansas-Nebraska Act's displacement of the Missouri Compromise was Douglas's sop to the South for this blow to its ambitions for a Southern route.

To the South's satisfaction, the Kansas-Nebraska Act was the first territorial "compromise" that did not prohibit slavery anywhere. Instead, the Act opened the United States territory within its purview to the option of slavery, overriding the proscription of slavery in the North established with the old Missouri Compromise. In other words, the Act opened Northern as well as Southern territory, for the first time in history, to the option of slavery.

In the Kansas-Nebraska Act, Congress divested itself of authority over the issue of slave status *vel non*. Congress would have no say in the matter. Instead, the Act delegated Congress's power to "the people," providing for so-called *popular sovereignty* in the territories instead. The power of determining the status of each territory, slave or free, was delegated to the settlers living there. However attractive that idea may have sounded in theory, the result, of course, was "Bleeding Kansas." But an even more fateful consequence of the Kansas-Nebraska Act than the violence in Kan-

dered Union or foreign currency more acceptable to Southerners than their own. Meanwhile, the South's free trade policy encouraged an outward flow of needed cash and a lopsided balance of payments, as ships loaded with cheap European goods, in time of war mere luxuries, broke through the Union blockade. Thus, early benefits to Southern consumers quickly evaporated as their money depreciated. The government, strapped for revenue, from the beginning found itself unable to supply necessities to all its troops, who sometimes fought without boots. *See, e.g.,* DOUGLAS B. BALL, *FINANCIAL FAILURE AND CONFEDERATE DEFEAT* (1991), at 202–03 & *passim*; WILLIAM C. DAVIS, *LOOK AWAY! A HISTORY OF THE CONFEDERATE STATES OF AMERICA* (2002), at 194–224, 280–316, 323–40.

55. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

56. In the election of 1860 all major parties had a platform plank endorsing the completion of a railway to the Pacific.

sas was the effect of the Act in upending the settled understandings on which the Union had been depending.

It is true that the weakness of the ties that bound the nation together should have been apparent long before 1854. Certainly by 1850 the fabric of national institutions was obviously fraying and beginning to part, tearing along the sectional fault line. The big churches were already breaking up, splitting into Northern and Southern factions. In the 1850s the comity of American courts was collapsing as well, the judges in each section becoming less willing to defer to the laws of the other.⁵⁷ One sees this phenomenon in the South in the first *Dred Scott* litigation. It will be recalled that *Dred Scott* was first tried in the Missouri state courts. In that earlier litigation, the Missouri Supreme Court, reversing the judgment below in Scott's favor, rejected its own former rule of liberty, "once free, always free." Application of that rule would have liberated Scott, given the facts of his case.⁵⁸ After all, Scott had been brought voluntarily by his owner into free territory, and had sojourned there, free in law, for a period of time. Under such circumstances, it had been the long-standing rule in Missouri and many other Southern courts as well, that the alleged slave had become free and could not be reenslaved. And so the Missouri trial court had held. Yet now the Missouri Supreme Court declared that, to preserve the Union, Missouri must be guided by its own slave policies:

Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.⁵⁹

57. For discussion, see Louise Weinberg, *Of Theory and Theodicy: The Problem of Immoral Law*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* (James A.R. Nafziger & Symeon C. Symeonides eds., 2002), at 473–502; PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981); ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 *MD. L. REV.* 1316 (1997); see also A.E. Keir Nash, In re *Radical Interpretations of American Law: The Relation of Law and History*, 82 *MICH. L. REV.* 274 (1983); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 *WM. & MARY L. REV.* 571 (1982).

58. See *Scott v. Emerson*, 15 Mo. 576 (1852) (reversing the trial court, which had followed the rule of liberty, "once free, always free," recognized in many earlier Southern cases, including Missouri's; now ruling that Missouri would no longer extend comity to the laws of free states or territories); cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560–61 (McLean, J., dissenting) (referring to the rule "once free, and always free" as a Maryland rule, while purporting to show that the rule of liberty was the law in no Southern court). But see Weinberg, *Methodological Interventions*, *supra* note 57, at 1337–42.

59. *Scott*, 15 Mo. at 586.

With the Kansas-Nebraska Act, everything seemed to be on the table again. The old rule of 36°30' was gone, and there were no rules governing the expansion of slavery any more. Under this strain, and with so much at stake, agitation and emotion mounted on both sides. The great national political parties began to crack and fall apart. The Whig Party disappeared, Northern and Southern Whigs irreparably divided on the Kansas-Nebraska Act. The new Republican Party, a purely sectional Northern Party, emerged in specific opposition to the Kansas-Nebraska Act. By 1857, the Democratic Party was, in effect—as many writers point out—the sole surviving national institution.

Antebellum Southern leaders are thought to have been adroit in forging and maintaining a North-South coalition within the Democratic Party. Through control of the Party, through recurrent blackmailing threats of secession, and through sheer sullen wrath, the South seemed remarkably successful in leveraging its political power. However that may be, the Democratic coalition was built solidly on mutual interest. North and South shared a huge stake in American cotton. Northern banks financed Southern cotton and its export; Northern ships carried cotton cargo and brought finished textiles back; and Northern cotton mills were wholly dependent on Southern cotton. The slave system served Northern lords of the loom as well as Southern lords of the lash. It was this shared dependency that enabled the Democratic Party to be a national party. Because of this, the South controlled the presidency for much of the antebellum period, and the Supreme Court as well. The South also retained effective power in the Senate.⁶⁰

And the Democratic Party, the South's great instrument of national power, endured, the only major national institution left standing. The Democratic Party, and in effect the South, won the presidential election of 1856. Their candidate, James Buchanan, a Northerner deeply sympathetic to Southern views, took the solid South, and managed to take a handful of Northern states as well.

VI. THE EFFECT OF *DRED SCOTT*

With the case of *Dred Scott* pending, the country looked to the Supreme Court for resolution of the dispute over the territories. In his inaugural address, President Buchanan, who, notoriously, was corresponding with

60. The South retained control of the Senate even after the election of 1860, until Senators of seceding states absented themselves. Lincoln's coat-tails were insufficiently long—the Republican Party could boast only thirty-one of the Senate's sixty-six pre-secession seats.

two of the Justices, assured the nation that *Dred Scott* would settle the whole controversy. Already aware of the outcome, Buchanan disingenuously declared that he would cheerfully abide by the result, whatever it might be.⁶¹

In *Dred Scott*, the Taney Court proceeded to hand the South virtually all it could have wanted—although Southerners were slow to grasp the case’s full import.⁶² Congress was stripped of power to prohibit slavery in the territories. The logical implication of this was that a territory could not declare its own soil free, either. The territories were creatures of Congress, and Congress could delegate to them no greater power than Congress had. *Dred Scott* had written *finis* to “popular sovereignty.”

All this was reckless in the extreme. With this pronouncement, that Congress was powerless to prohibit slavery in the territories, the Court deprived the country of the chance of a political solution to the territories impasse. This seems to be what is meant when writers blame the war on *Dred Scott*.⁶³ Professor Graber argues that political compromises outside Congress might still have been achieved, notwithstanding *Dred Scott*. But this argument overlooks the fact that all previous compromises over slavery in the territories were shaped and enforced by act of Congress, and that without an act of Congress no informal agreement could have any force or binding effect. It also overlooks the failure of diplomacy during the post-election, pre-war secession crisis. The most important of these last-minute offers of compromise was the so-called Crittenden Compromise of December 18, 1860, proposing six constitutional amendments. These, *inter alia*, would have secured slavery in perpetuity in the states where it existed, and would have opened the Southwest territories to slavery by unamendably extending the old Missouri Compromise line toward the Pacific, up to the boundary of California. As South Carolina was in the very act of seceding,

61. James Buchanan, Inaugural Address (Mar. 4, 1857), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 (James D. Richardson ed., 1897), at 430, 431.

62. See AVERY O. CRAVEN, THE GROWTH OF SOUTHERN NATIONALISM, 1848–1861 (1953), at 280 (pointing out that Southern newspapers and politicians paid scant attention to *Dred Scott* when it was decided). The Kansas-Nebraska Act had already repealed the Missouri Compromise, and Chief Justice Taney’s pronouncements on the incapacity of black persons were unsurprising in the South, harmonizing as they did with traditional Southern views. *Id.*

63. While prepared to grant that *Dred Scott* was not the exclusive cause of the Civil War, current commentators see the case as contributing fatefully to the catastrophe. Cf. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., dissenting) (deploring *Dred Scott*’s “consequences for the nation”: “[B]y foreclosing all democratic outlet for the deep passions this issue arouse[d], by banishing the issue from the political forum . . . , by continuing the imposition of a rigid national rule instead of allowing for regional differences, the [*Dred Scott*] Court merely prolong[ed] and intensif[ed] the anguish.”); see also, e.g., JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 104–05 (1991) (same); Michael Stokes Paulsen, *The Worst Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1024 (2003) (same).

Abraham Lincoln was assuring Thurlow Weed that he would agree to the Crittenden Compromise if it were restricted to the states in which slavery already existed.⁶⁴ But of course it had always been Lincoln's position to accept slavery in the states in which it already existed. During these last days Lincoln also offered the South gradual emancipation, and compensation for unreturned fugitive slaves. None of these proposals stood a chance of averting war. The Crittenden Compromise was defeated on March 2, 1861, two days before Lincoln's inauguration.

I should clarify for the reader who is not a specialist that this holding of *Dred Scott*, that Congress had no power to ban slavery in the territories, was not a description of the general authority of Congress over United States territories. Of course Congress has plenary authority to govern the territories of the United States. Congress may permit a territory its own legislature, but Congress is the underlying source of municipal as well as national governance in a territory, as it is, for example, in Washington, D.C. or the Virgin Islands. In *Dred Scott*, Chief Justice Taney could not find a way to deny Congress's power over the territories, although it was not for want of trying. Taney's perverse and prolix opinion pursues the imbecile goal of congressional powerlessness down one irrelevancy after another. In the end, Taney had to acknowledge that Congress has power, if only by implication. "We do not mean, however," he wound up grudgingly, "to question the power of Congress in this respect."⁶⁵ Instead, he found an *extrinsic limit* on this acknowledged power.

Dred Scott held that Congress could not prohibit slavery in a territory because to do so would be a violation of the *Fifth Amendment*. For the nation to limit property in slaves would be to deprive slaveowners of their property without due process of law—in violation of the Due Process Clause of the Fifth Amendment. As Taney put this, explicitly relying on the Fifth Amendment,

Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.⁶⁶

64. RICHARD N. CURRENT, *THE LINCOLN NOBODY KNOWS* (1958), at 87–92; STEPHEN B. OATES, *WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN* (1977), at 198–200.

65. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447 (1857).

66. *Id.* at 450.

The only territorial act of Congress at issue in *Dred Scott* was the Missouri Compromise of 1820, as it stood before its repeal. The Court struck down this repealed statute as unconstitutional. But as a practical matter, after *Dred Scott* all the old compromises were unconstitutional. All had limited slavery in United States territories. The Northwest Ordinance of 1787, the Missouri Compromise of 1820, the Compromise of 1850 that brought in California—each had abolished slavery somewhere. One Ohio jurist thought his court might just as well declare the Fugitive Slave Act unconstitutional:

From the foundation of the government until within the last ten years, Congress claimed and exercised, without question, full and complete legislative power over the territories of the United States; and as early as 1828, in *American Insurance Company v. Canter*, 1 Peters, 546, the Supreme Court of the United States, Chief Justice Marshall delivering its opinion, unanimously decided that in the territories Congress rightfully exercises the “combined powers of a general and of a state government.” Yet, in the recent case of *Dred Scott v. Sandford*, . . . all this is overturned and disregarded, and the whole past theory and practice of the government in this respect attempted to be revolutionized by force of a judicial *ipse dixit*. We are thus invited by that court back to the consideration of first principles; and neither it nor those who rely on its authority have a right to complain if we accept the invitation.⁶⁷

Even the act that repealed the Missouri Compromise, the Kansas-Nebraska Act of 1854, was unconstitutional, since, by mandating popular sovereignty, Congress had purported to authorize abolition in the territories of Kansas and Nebraska. Far from representing some needed compromise of the slavery expansion issue, *Dred Scott* had suddenly rendered both the Court and Congress powerless to effect any compromise of the issue at all.

It is obviously very hard to read *Dred Scott*, with Professor Graber, as a centrist decision. *Dred Scott* was a radical change in law, and not only because at a blow it delegitimized every one of that long series of acts of Congress compromising the rights of slaveowners. The even more stunning effect of *Dred Scott* was to constitutionalize the sanctity of slave property, as against any act of Congress restricting slavery, not just in the organized territories of the United States, but in every state in the Union, North and South. It is absurd to characterize *Dred Scott* as any sort of compromise, coming down as it did so sweepingly on the pro-slavery side of the controversy.

It might be argued in extenuation that the case—as a practical matter—made very little difference. It is true that the Missouri Compromise—

67. *Ex parte Bushnell*, 9 Ohio St. 77, 228 (1859) (Brinkerhoff, J., dissenting from the failure of the majority to hold the Fugitive Slave Act of 1850 unconstitutional).

the Act struck down on the specific facts of *Dred Scott*—had already been repealed by the Kansas-Nebraska Act. And it is equally true that Congress itself had washed its hands of the problem of the expansion of slavery into Kansas and Nebraska territory. But this does not mean that *Dred Scott* simply rubber-stamped a preexisting disaster. The unwisdom of the Kansas-Nebraska Act to one side, no one had supposed that the Taney Court would strip Congress of constitutional power to enact anything *better*. Nor had anyone dreamed that the Act's shedding of congressional responsibility—and its opening of Northern as well as Southern territory to slavery—were constitutionally *required*. Nor had it ever been supposed that Congress could not protect the free status of a free territory, or prohibit slavery in a particular territory.⁶⁸

Pitched on the Bill of Rights as *Dred Scott* was, Congress could not overturn it by simple legislation. Only a constitutional amendment could do that. But a constitutional amendment could not have been accomplished. The South would always have enough votes in the Senate or among the states to block any proposed amendment that would restore the *status quo ante*; and the Constitution's provision for equal state representation in the Senate was itself unamendable.⁶⁹ It did not seem possible that enough free states could ever be added to the Union to overcome the South's ability to block an amendment overriding *Dred Scott*. Unless some reconstructed Supreme Court should some day overrule *Dred Scott*, the country was stuck with it.

68. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612–13 (1842), is not to the contrary. The Court's several holdings in that case are not relevant to these issues. The Court held, *inter alia*, that the slaveowner's inherent constitutional right of "recaption" of a fugitive slave was self-executing and beyond the power of Congress, and, further, that the power of a state to interfere with slave renditions was preempted. *Id.* at 617–18. The Court also held that Congress could not compel state cooperation in the capture or rendition of a fugitive slave:

[W]hile a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under [the Fugitive Slave Act]; none is entertained by this Court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.

Id. at 622. Today's "anti-commandeering" principle is similar. *Cf.* *New York v. United States*, 505 U.S. 144 (1992).

69. U.S. CONST. art V. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

However comfortable Northerners may have been with Chief Justice Taney's ideas about race, they were hardly as comfortable with *Dred Scott's* bulldozing of foundational understandings as Professor Graber would have us believe. Concededly there were plenty of Northern banking, shipping, and textile men who were happy enough with the Court's effort to appease Southern wrath. And there were many in the North and West who shared Southern concern for the sanctity of property, and deeply respected the Founders' supposed sacred bargain concerning slavery. But the new men, the Republicans, understood *Dred Scott* as an assault on the Union. They also understood the case as an affront to the prime directive of the Republican Party—to arrest the spread of the Slave Power by arresting the spread of slavery into the territories. After all, the Republican Party had arisen, and Abraham Lincoln had come out of political retirement, precisely to oppose the policy—merely statutory⁷⁰—that *Dred Scott* had now held to be *constitutionally required*.⁷¹

As for Lincoln, he never ceased to inveigh against the case from the time it was decided. Lincoln persistently declared from virtually every platform available to him his implacable opposition to *Dred Scott*. He went so far as to accuse President James Buchanan and members of the Taney Court, not without reason, of conspiracy in the case.⁷² Lincoln had long taken the consistent if reluctant position that slavery should be allowed to continue in the Southern states in which it existed.⁷³ After *Dred Scott*, Lincoln feared that *freedom* could not continue in the Northern states in which it existed. He warned that just one more case was all that was needed for the Court to strip the free states of power to prohibit slavery within their

70. See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995), at 126 (discussing the angry Northern reaction to the Kansas-Nebraska Act).

71. Eric Foner, *The Ideology of the Republican Party*, in *THE BIRTH OF THE GRAND OLD PARTY: THE REPUBLICANS' FIRST GENERATION* (Robert F. Engs & Randall M. Miller eds., 2002), at 8, 9.

72. Abraham Lincoln, Speech Delivered to the 1858 Republican State Convention (June 16, 1858) ["A House Divided"], in 1 *COMPLETE WORKS*, *supra* note 17, at 240, 243. Lincoln asked,

Why was the court decision held up? Why even a senator's individual opinion withheld till after the presidential election? . . . Why the outgoing President's felicitation on the indorsement? Why the delay of a reargument? Why the incoming President's advance exhortation in favor of the decision? . . . And why the hasty after-indorsement of the decision by the President and others? . . . [W]e find it impossible not to believe that Stephen [Douglas] and Franklin [Pierce] and Roger [Taney] and James [Buchanan] all understood one another from the beginning, and all worked upon a common plan or draft drawn up before the first blow was struck.

73. Immediately on opening his First Inaugural Address, Lincoln reminded the South of this, on "the most ample evidence . . . in nearly all [my] published speeches" and in the Republican platform of 1860. Lincoln, First Inaugural Address, in 2 *COMPLETE WORKS*, *supra* note 25, at 1.

own borders.⁷⁴ Lincoln and his fellow Republicans were so far from “comfort” with *Dred Scott* that, in Lincoln’s celebrated debates with Stephen A. Douglas, when the two were running for the United States Senate, Lincoln essentially ran against *Dred Scott*,⁷⁵ and was still attacking *Dred Scott* when he gave his great speech at Cooper Union.⁷⁶ In 1860 Lincoln ran for the presidency on a Republican Party platform opposing *Dred Scott* in not one, but *four* planks.⁷⁷ In his First Inaugural Address, while counseling a fitting respect for the Court, Lincoln insisted that *Dred Scott* was only an ordinary litigation between private parties, and as such should not be allowed to set national policy. He wryly instructed his audiences that the Court should not be blamed for *Dred Scott*. The Court, after all, had a duty to decide cases properly before it. The Justices had to decide one way or the other. But for these very reasons, *Dred Scott* must be understood as binding only upon the parties.⁷⁸ In this way Lincoln asserted a most controversial conclusion. He was finding a power and duty, reposing not only in the executive and legislative branches, but even in courts below, to disregard a Supreme Court opinion. It is due our reverence for Lincoln to doubt that he would have spun such a piece of whole cloth, subversive of

74. See Lincoln, “A House Divided,” in 1 COMPLETE WORKS, *supra* note 17, at 244. “Put this and that together,” said Lincoln, “and we have another nice little niche, which we may, ere long, see filled with another Supreme Court decision declaring that the Constitution of the United States does not permit a State to exclude slavery from its limits.” *Id.* It is widely speculated that a much-followed New York case might have become that next case. *Lemmon v. People*, 20 N.Y. 562 (1860). In *Lemmon*, local authorities confiscated slaves attending a master who was merely stopping over briefly in New York, awaiting the arrival of the next ship to a Southern port. The judicial failure in *Lemmon* to extend comity to Southern interests even in the absence of actual “sojourn,” furnishes an extreme example of the collapse of comity in the late antebellum period. After the New York court’s ruling in *Lemmon*, a group of New York businessmen raised a compensatory fund for the slaveowner, and the case settled before it could reach the Supreme Court. Lincoln may have feared, perhaps, that the Court would find an implied constitutional right to slave property, given the Court’s thinking in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612–13 (1842) (Story, J.) (holding that slaveowners have an implied self-executing right of “recaption” to enter another state and recapture a fugitive slave, forcibly if necessary). Alternatively, Lincoln may have been warning that in some such case as *Lemmon*, the Court would overturn *Barron v. Baltimore*, as some Southerners were demanding, and simply apply the Fifth Amendment directly to the states. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.).

75. See THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 (Paul M. Angle ed., 1991) (1958), at 4–7, 28–29, 36–37, 77–79, 70, 120, 217–18, 309–11, 328–29, 333, 335, 337–38, 394.

76. See Lincoln, Address at Cooper Institute, in 1 COMPLETE WORKS, *supra* note 17, at 599, 600–07.

77. See Republican Platform of 1860, in NATIONAL PARTY PLATFORMS, *supra* note 47, at 32, para. 2 (calling attention to the provision of the Declaration of Independence that “all men are created equal”); *id.* at para. 5 (deploring “the intervention of Congress and of the Federal Courts of the extreme pretensions of a purely local interest . . .”); *id.* at para. 7 (denouncing “the new dogma that the Constitution . . . carries slavery into any or all of the territories of the United States” as “a dangerous political heresy”); *id.* at para. 8 (declaring the determination of Republicans to oppose the Taney Court’s interpretation of the Due Process Clause of the Fifth Amendment).

78. Lincoln, First Inaugural Address, in 2 COMPLETE WORKS, *supra* note 25, at 5.

the rule of law, had he been talking about any other case, but this, the Supreme Court's worst.⁷⁹

To Southerners, *Dred Scott* was the purest exposition of the Constitution. But the case was in peril. Chief Justice Taney was elderly and frail. Another Justice or two might resign or die.⁸⁰ It depended on the presidential election of 1860 what sort of Supreme Court would be sitting if and when an opportunity to overrule *Dred Scott* should arise. As Stephen A. Douglas put this, "Mr. Lincoln intimates that there is another mode by which he can reverse the Dred Scott decision. How is that? Why, he is going to appeal to the people to elect a President who will appoint judges who will reverse the Dred Scott decision."⁸¹ A Supreme Court reconstituted by that "black Republican," Abraham Lincoln, was greatly to be feared.

VII. THE BREAKUP OF THE DEMOCRATIC PARTY

Meanwhile, to Southerners *Dred Scott* seemed also to be in peril from a very different source. It was Southern reaction to this additional perceived peril that in the crisis of 1860 precipitated the breakup of the Democratic Party.

Professor Graber asserts that the dispute over the pro-slavery Lecompton constitution for Kansas caused the breakup of the Democratic Party. But that is simply not true, although that belief is not uncommon.⁸² I pass over the fact that the internal ideological contradictions of the North-South Democratic coalition had begun to tell at least as early as 1836,⁸³ when the

79. See recently, for example, Paulsen, *The Worst Decision*, *supra* note 63.

80. Justice Daniel died before the election on May 31, 1860, but President Buchanan, not liking to appoint midnight judges, left the naming of Daniel's successor to the next President. Justice McLean died suddenly of pneumonia on April 4, 1861, a month after Lincoln's inauguration. With the outbreak of war, Justice Campbell resigned. Of these, only McLean had dissented in *Dred Scott*. Chief Justice Taney hung on, a thorn in Lincoln's side, finally dying on October 12, 1864.

81. Stephen Douglas, Speech at Springfield, Illinois (July 17, 1858), in COMPLETE LINCOLN-DOUGLAS DEBATES, *supra* note 75, at 43, 55. Douglas was probably referring to Abraham Lincoln, Speech in Reply to Senator Douglas, delivered at Chicago (July 10, 1858):

What are the uses of decisions of courts? They have two uses. As rules of property they have two uses. First—they decide upon the question before the court. They decide in this case that Dred Scott is a slave. Nobody resists that. Not only that, but they say to everybody else that persons standing just as Dred Scott stands are as he is. That is, they say that when a question comes up upon another person, it will be so decided again, unless the court decides in another way, unless the court overrules its decision. Well, we mean to do what we can to have the court decide the other way. That is one thing we mean to try to do.

Id., in 1 COMPLETE WORKS, *supra* note 17, at 247, 255.

82. Cf. JOHN UPDIKE, MEMORIES OF THE FORD ADMINISTRATION (1992) (fiction, providing a parallel narrative concerned with the life of James Buchanan and viewing Buchanan's insistence on the Lecompton constitution as splitting the Democratic Party).

83. See, e.g., 1 JOHN ASHWORTH, SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC: COMMERCE AND COMPROMISE, 1820–1850 (1995), at 424–26 (discussing the schism between the "Van Burenites" and the "Calhounites").

Van Buren Democrats fell out with the Calhoun Democrats. And I pass over the fact that the Democratic Party split again in 1844, when a large part of the Party abandoned incumbent President John Tyler for James Polk.⁸⁴

Concededly, President James Buchanan was determined to force Kansas to accept the Lecompton slave constitution, and was opposed in this by Stephen A. Douglas. It is also true that by the last year of Buchanan's presidency the two men were battling for control of the Democratic Party. But by 1860 the fight for Kansas was substantially over. Kansans had roundly rejected the pro-slavery Lecompton constitution in August of 1858.⁸⁵ Two years later, in 1860, Kansas's big problem was drought,⁸⁶ not the Lecompton constitution. True, a Kansas constitution was stalled in the Senate at the time, but it was a new anti-slavery constitution, not the rejected Lecompton constitution. Kansas would finally be admitted to the Union when, with the post-election secession of the Deep South, sufficient Southern Senators cleared out of the Senate. James Buchanan signed the required legislation on January 29, 1861.⁸⁷

Buchanan's dogged opposition to Douglas in 1860 was certainly impolitic. Douglas, the Democrats' front runner, offered the Party its best hope of retaining the presidency. And it is also true that there were enough anti-Douglas delegates at the Party's convention in Charleston to defeat Douglas's nomination there. The Charleston convention adjourned after fifty-seven fruitless ballots without a nominee. Douglas's nomination had to await the reconvening of the Democratic Party—an event dominated by Douglas men—on June 18, 2006, in Baltimore. The Party was indeed split over Douglas. However, the sectional dispute within the Party went much deeper than the dispute over Douglas's candidacy; and the dispute over Douglas went much deeper than Buchanan's refusal to back him, or the old imbroglio over the Lecompton constitution for Kansas.

The fact is that by 1860 Southerners did not need Buchanan to tell them they did not like Douglas. Douglas had been written off by Southern-

84. 2 DIARY OF GIDEON WELLES (Howard K. Beale ed., 1960), at 387 (tracing the beginning of the 1860 breakup of the Democratic Party to 1844 and the abandonment of the incumbent Tyler by most Democrats, who favored Polk).

85. Stephen A. Douglas organized opposition in Congress to the pro-slavery Lecompton constitution, arguing that Kansans had not had a fair opportunity, on the principle of "popular sovereignty," to decide for themselves. Congress called an election in Kansas on the issue, and in August 1858, Kansans overwhelmingly defeated the Lecompton pro-slavery constitution by a vote of some 11,000 to 1,800. DAMON WELLS, STEPHEN DOUGLAS: THE LAST YEARS, 1857–1861 (1971), at 43, 81 n.1.

86. James C. Malin, *Dust Storms, Part One: 1850–1860*, 14 KAN. HIST. Q. 129, 133 (1946) (referring to the "great drought of 1860").

87. These events are recounted in ELBERT B. SMITH, THE PRESIDENCY OF JAMES BUCHANAN (1975), at 31–46.

ers at least since 1858, but Southern antipathy did not flow in the main from Douglas's position *vis-à-vis* Kansas. Southerners had bigger quarrels with him, quarrels having to do with *Dred Scott*. On December 9, 1858, the Democratic caucus in the Senate removed Douglas from his chair of the key Senate Committee on Territories.⁸⁸ This rebuke had everything to do with his position *vis-à-vis Dred Scott*.

First, both in and out of Kansas, Douglas was still clinging to his *idée fixe*, "popular sovereignty." "Popular sovereignty" flew in the face of the newer Southern view, which Lincoln shared,⁸⁹ that *Dred Scott* had stripped territory men of the popular sovereignty they were afforded under the Kansas-Nebraska Act—a power to abolish as well as to choose slavery within their own territories. With Congress's power of abolition gone, together with a territory's own power of abolition, free status became unavailable to a territory. After *Dred Scott*, a territory seemed to have no realistic free-state option. Given this one-way quality of *Dred Scott*, so gratifying to Southerners, Douglas's adherence to "popular sovereignty" was now simply unacceptable. Before *Dred Scott*, "popular sovereignty" had been the Democratic Party's—and the South's—rallying cry. But opposition to popular sovereignty now became the test of Democratic Party loyalty.

Second, and even less forgivable in Southern thinking, was Douglas's "Freeport Doctrine." At Freeport, Illinois, during the great Lincoln-Douglas debates of 1858, when the two men were running in Illinois for the United States Senate,⁹⁰ Douglas—still the Democratic Party's darling at the time—was driven by an adroit question from Lincoln to defend his pet project, "popular sovereignty." Douglas found himself downplaying *Dred Scott*—the South's holy of holies—and arguing that *Dred Scott* was no real help to the South. Douglas took the position that *slavery required the support of pro-slavery law*.⁹¹ A state or territory, therefore, could defeat *Dred*

88. 1 NEVINS, THE EMERGENCE OF LINCOLN, *supra* note 49, at 425.

89. See Abraham Lincoln, Reply in the Ottawa Debate, in 1 COMPLETE WORKS, *supra* note 17, at 286, 294; see also Republican Platform of 1860, in NATIONAL PARTY PLATFORMS, *supra* note 47, at 32, para. 7.

[T]he new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country.

90. United States Senators were then elected by the several state legislatures. U.S. CONST. art. 1, § 3. (Senators have been elected directly by voters only since 1913. U.S. CONST. amend. XVII, § 1.)

91. "The next question propounded to me by Mr. Lincoln is, Can the people of a Territory in any lawful way, against the wishes of any citizen of the United States, exclude slavery from their limits prior to the formation of a State constitution?" Stephen Douglas, Reply to Lincoln in the Freeport Debate (Aug. 27, 1858), in COMPLETE LINCOLN-DOUGLAS DEBATES, *supra* note 75, at 152. To this question Douglas replied,

Scott simply by omitting to enact laws friendly to the rights of the slave-owner.⁹² The Lincoln-Douglas debates were much noted, and Southern leaders quickly grasped the import of what they came to call Douglas's "Freeport Doctrine." A territory might indeed effectually resist *Dred Scott*. The South's own ideology of states' rights, with its subsidiary concepts of "interposition" and "nullification,"⁹³ analogously suggested as much. Douglas's hypothesis so seriously undermined Southerners' confidence in *Dred Scott* that they blamed him for it as if it were a disingenuous and subversive invention of his own, while simultaneously crediting the existence of the nullifying power he had identified. In the wake of Freeport, William Lowndes Yancey, the Alabama "Fire-Eater,"⁹⁴ renewed the extraordinary demand he had first made in 1848 for a federal slave code to protect slave property in any territory or state that would not do so.⁹⁵ Southerners rallied around *Dred Scott* and abandoned Douglas.

If Professor Graber means to say that the collapse of Southern Democratic support for Douglas caused the fateful breakup of the Democratic

[S]lavery 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.

Douglas was building here on a remark by Lord Mansfield in 1772 in *Somerset's Case*—the case that abolished slavery in England. Lord Mansfield there remarked that slavery "is so odious, that nothing can be suffered to support it, but positive law." *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772). Mansfield's remark was widely repeated in American courts both North and South. See Weinberg, *Methodological Interventions*, *supra* note 57, at 1326–27 (citing cases).

92. Douglas's Reply, in COMPLETE LINCOLN-DOUGLAS DEBATES, *supra* note 75, at 152.

93. Senator John C. Calhoun relied on these subversive ideas in his anonymously submitted *Exposition and Protest*, reprinted in UNION AND LIBERTY, *supra* note 39, at 311. This was a report adopted by South Carolina's legislature in reaction to the so-called Tariff of Abominations of 1828. Calhoun's thinking traced back to the Virginia and Kentucky Resolutions of 1798, authored, respectively, by James Madison and Thomas Jefferson. The 1798 Resolutions did not achieve adoption in any state, but had become, and remain, the intellectual foundation of states' rights theory. In particular, Calhoun pushed Jefferson's Kentucky Resolution to its limit, arguing that each state had a duty to "interpose" its own law between the people and unjust federal law, or "nullify" the effect of unjust federal law within its borders. Providing a specific procedure for "nullification," Calhoun argued that, should these efforts prove unavailing, the state had a right of "secession."

94. The term refers to extremist Southern politicians and orators, long-time advocates of secession, most notably Laurence Massilon Keitt, Robert Barnwell Rhett, Edmund Ruffin, Robert Toombs, and William Lowndes Yancey. See LORMAN A. RATNER, & DWIGHT L. TEETER, JR., FANATICS & FIRE-EATERS: NEWSPAPERS AND THE COMING OF THE CIVIL WAR (2003); JAMES L. ABRAHAMSON, THE MEN OF SECESSION AND CIVIL WAR 1859–1861 (2000); DAVID S. HEIDLER, PULLING THE TEMPLE DOWN: THE FIRE-EATERS AND THE DESTRUCTION OF THE UNION (1994). See also, for a Fire-Eater's memoir, ROBERT BARNWELL RHETT, A FIRE-EATER REMEMBERS (William C. Davis ed., 2000). But it is suggested that these men, although influential, were not close to the small clique that represented the deeper politics of actual Southern power. MILTON, THE EVE OF CONFLICT, *supra* note 5, at 478–79.

95. For the development of this position and Yancey's secessionist views, see, recently, ERIC H. WALTHER, WILLIAM LOWNDES YANCEY AND THE COMING OF THE CIVIL WAR (2006). See also ABRAHAMSON, MEN OF SECESSION, *supra* note 94, at 56; JOSEPH HODGSON, THE CRADLE OF THE CONFEDERACY (1876).

Party in Charleston, that account, despite its seeming plausibility, does not quite square with the facts. The Party convened in Charleston on April 23, 1860, in the Hall of the South Carolina Institute, Caleb Cushing presiding. At that convention, fifty Southern delegates, led by self-styled “Fire-Eater” William Lowndes Yancey, famously bolted. They did this, according to the recorded Proceedings of the convention—and by their own accounts⁹⁶—because the convention repeatedly rejected the pro-slavery party platform, the so-called “Alabama” platform proposed by the Majority Report of the Committee on Resolutions.⁹⁷ That Committee was the convention’s platform committee. It was dominated by Fire-Eaters—Yancey as well as Robert Barnwell Rhett of South Carolina, and Senator Robert Toombs of Georgia. The “Alabama platform” would have cured the supposed defect in *Dred Scott* identified by Douglas at Freeport. It was quickly dubbed by Douglas’s men “a Congressional slave code.”⁹⁸ The Douglas delegates, for their part, came up with a Minority Report favoring popular sovereignty, and it was this that was adopted by the convention, 165 to 138.⁹⁹ With this

96. See OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, HELD IN 1860, AT CHARLESTON AND BALTIMORE (John G. Parkhurst ed., 1860), at 59 (Alabama delegates led by Yancey beginning a series of withdrawals from the convention); *id.* at 61 (withdrawal of Florida); *id.* at 65 (states withdrawing on success of motion to set aside their favored platform); see also William Lowndes Yancey, Speech of Protest in the Charleston Convention (1860), in 9 THE WORLD’S FAMOUS ORATIONS: AMERICA II, 1818–1865 (William Jennings Bryan ed., 1906), at 192, 200–01. Yancey stated,

We simply claim that we, being coequal with you in the Territories, we having property which is as sacred to us as yours is to you, that is recognized as such by the Constitution of our common country—shall enjoy, unmolested, the rights to go into the Territories, and to remain there, and enjoy those rights as citizens of the United States, as long as our common government holds those Territories in trust for the States of which we are citizens. That is all.

We shall go to the wall upon this issue if events shall demand it . . .

97. Throughout the heated debate at Charleston, Southern delegates rose to support the resolutions the Majority Report offered as platform planks, and these were repeatedly rejected. Among other things, these resolutions variously supported the decision in *Dred Scott* denying the power of Congress or a territory to exclude slavery from any territory or state or abolish slavery; proclaiming the duty of Congress to protect slaveowners’ rights of property everywhere and to provide effective enforcement of the Fugitive Slave Act; and, less frequently, demanding reopening of the slave trade. See OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, *supra* note 96, *passim*. But see Editorial, *The National Convention*, VALLEY SPIRIT, May 2, 1860, at 4, available at <http://valley.vcdh.virginia.edu/Browser1/frbrowser/may60.html> (drawing an attenuated connection between Southern platform demands and the dispute over the Lecompton constitution). According to this writer,

If the policy of the administration upon the Lecompton question had been acquiesced in by all the leading men of our party, there would have been no contention in the National Convention about a platform. That policy would not have made a permanent addition of one foot of slave territory to the Union, but it would have prevented the demand made upon us by the extreme South for a Congressional slave code. Out of the opposition to it have grown all the difficulties that lie in the way of harmonious action at Charleston.

98. OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, *supra* note 96, at 42 (Mr. Montgomery of Pennsylvania “did not regard as a compromise, a proposition for a Congressional slave code and the re-opening of the African slave trade.”).

99. *Id.* at 52.

defeat, spokesmen for the Southern delegations stated their grievance, and then the full delegations of Alabama, Florida, Mississippi, and Texas, with the majority of delegates from Georgia, South Carolina, and Virginia, and a few delegates from Arkansas and Delaware, walked out of the convention. The effort to nominate Douglas began only *after* the Southerners bolted, but there were enough anti-Douglas men to put over a two-thirds rule for the nomination, and enough delegates committed to one or another of the welter of alternative candidates whose names had also been offered in nomination, to defeat Douglas—for the time being. There is no reference to Kansas or to the Lecompton constitution in the record of the proceedings at Charleston, or in subsequent explanations of the walkout by Southern leaders.¹⁰⁰

On May 9, 1860, shortly after the debacle in Charleston, a group of conservative Unionist delegates from twenty Southern and border states, joined by a few old Whigs and “Know Nothings,”¹⁰¹ gathered in Baltimore and formed the Constitutional Unionist party. Their convention had been planned in 1859 at a meeting of fifty Unionist Democrats led by John Crittenden of Kentucky. The nominee of this convention was John Bell, Senator from Tennessee, who had briefly served in 1841 as Secretary of War in the Harrison and Tyler administrations. Like Lincoln, Bell was an old Whig who had come out of political retirement to fight the Kansas-Nebraska Act. But Bell was a rich slaveholder, and his hostility to Douglas was exceeded only by his hostility to Lincoln. His objection to “popular sovereignty” was that it opened the territories to abolition, while Lincoln’s objection was that it opened the territories to slavery.

100. See Yancey, *Speech of Protest*, *supra* note 96, at 197 (discussing the South’s proposed platform plank, repeatedly rejected at the Charleston Convention: “And what was that plank? It was that Congress should not intervene to establish or abolish slavery in State or Territory.”). Jefferson Davis, the chief author of the pro-slavery platform adopted later by the Breckenridge Democrats at Richmond, somewhat opaquely explained the reasons for the Charleston walkout in an address to the Democratic members of Congress delivered on the steps of City Hall in Washington, D.C., shortly after the Richmond convention. Whatever he meant, he made no reference to the Lecompton constitution or Kansas:

The delegations of eight States, together with a portion of that of Delaware, faithful adherents of our party and firm supporters of its principles, were thus, by sheer force of votes cast by delegates from States that will certainly vote for the republican candidates, compelled to withdraw from the Convention, because, in the language of a distinguished delegate [Ethelbert Barksdale], they felt “that it was a burning imputation upon the honor and patriotism of the party, that, claiming to be national, and claiming to have principles for its guide, it should acknowledge for its declaration of faith a creed upon which are placed two distinctly opposite interpretations by its own advocates.”

Jefferson Davis, *Address to the National Democracy* (May 7, 1860), *reprinted in* 6 *THE PAPERS OF JEFFERSON DAVIS 1856–1860* (Lynda Lasswell Crist & Mary Seaton Dix eds., 1989), at 289, 290–91.

101. The Know-Nothings were generally free-soilers who opposed immigration and slavery alike, believing both to be detrimental to American workers. *ENCYCLOPEDIA OF AMERICAN PARTIES, CAMPAIGNS, AND ELECTIONS* (William C. Binning et al. eds., 1999), at 248.

On May 16, 1860, the fledgling Republican Party¹⁰² convened at the “Wigwam” in Chicago. This wholly Northern Party then proceeded to insult Southern feelings by running a candidate, Abraham Lincoln, about whom little was known except that he was utterly opposed to any compromise that would permit slavery in any of the territories, whether chosen by “popular sovereignty” or not—a candidate who did not trouble to put his name on the ballot in ten Southern states.¹⁰³ (Although not relevant to the breakup of the Democratic Party, it should be noted that the Republican platform did deal with Kansas.¹⁰⁴)

On June 11, 1860, the Deep South delegates who had quit the convention in Charleston held a rump convention in Richmond (often erroneously reported as having occurred in Charleston, as if immediately upon their walkout). In an effort not to appear extremist, the delegates nominated John C. Breckenridge, James Buchanan’s Vice President, as their candidate. But here in Richmond the Yanceyites substantially achieved their desired platform.¹⁰⁵ The Breckenridge faction’s platform flaunted two planks amounting, indeed, to a “Congressional slave code,” just as the Douglas men had charged at Charleston. The platform took the position, consistent with *Dred Scott*, that Congress could not abolish or restrict slavery in a territory, and that Congress should protect slave property everywhere its constitutional power extended—in other words, in every state and territory. In addition, the Breckenridge platform demanded that new states be admitted to the Union on an equal footing with the original thirteen, the formula used in the Missouri Compromise, to endow new slave states with the protections of the original understandings.¹⁰⁶ All this was as confrontational and ex-

102. In 1856 the new Republican Party convened in Philadelphia to nominate its first presidential candidate, John Fremont, a free-soiler, soldier, inventor, explorer, and something of a character. The big issue at this inaugural Republican convention was the expansion of slavery into the territories. Another new party arising from the ashes of the old Whig party, the nativist anti-slavery “Know-Nothings,” nominated an ex-President, Millard Fillmore, who had been a Whig. The election went to James Buchanan, the South-leaning nominee of the Democratic Party, who was able to take the solid South plus a handful of Northern states.

103. John C. Breckenridge, the candidate of the Deep South in 1860, mirrored this sad record; he was not on the ballot in a like number of Northern states.

104. See Republican Platform of 1860, in NATIONAL PARTY PLATFORMS, *supra* note 47. This platform, referring to Kansas, labeled “popular sovereignty” a “fraud” in view of the Governor’s “vetoes” of the people’s will, *id.* at para. 10, and demanded that Kansas be admitted as a free state forthwith. *Id.* at para. 11. The reference in *id.* at para. 4, deploring violent invasion of any state, could be read as a reference to the violence in Kansas rather than to John Brown’s raid at Harper’s Ferry, since some of the language echoes that of the Republican Party Platform of 1856 dealing explicitly with Kansas. See Republican Platform of 1856, in NATIONAL PARTY PLATFORMS, *supra* note 47, at 27, 27–28.

105. Democratic Platform of 1860 (Breckenridge Faction), in NATIONAL PARTY PLATFORMS, *supra* note 47, at 31, 31, para. 1.

106. *Id.* at paras. 2–3.

trema as the Breckenridge faction could make it. But Kansas was not mentioned. The only place mentioned by name in the Breckenridge platform was Cuba, by 1860 a focus of Southern territorial ambition.¹⁰⁷ Neither was there some *tacit* reference to Kansas.¹⁰⁸ Rather, the Breckenridge platform had everything to do with endorsing, securing, and extending *Dred Scott*. The main line of fracture within the Democratic Party can be traced along this position of the Deep South. It had nothing to do with the Lecompton constitution in Kansas and everything to do with *Dred Scott*.

On June 18, 1860, when the Democratic Party formally reconvened in Baltimore at the Front Street Theater, the Yanceyites showed up and demanded entry. The convention Proceedings report that “[w]hen the State of South Carolina was called, the Chair [Caleb Cushing] directed that only those States be called which were present at the adjournment of the Convention at Charleston; consequently, South Carolina, Georgia, Florida,

107. See Democratic Platform of 1860 (Breckenridge Faction), in NATIONAL PARTY PLATFORMS, *supra* note 47, at 31 (advocating the acquisition of Cuba in an unnumbered second resolution). The interest in Cuba emerged strongly in the 1850s. During the Pierce administration in 1854, James Buchanan, then ambassador to the Court of St. James, met in Belgium with America’s ambassadors to France and Spain, John Y. Mason and Pierre Soulè. The trio authored a secret plan for the acquisition of Cuba, which, when leaked, became known as the “Ostend Manifesto.” H.R. Exec. Doc. No. 33-93, at 127 (1854). According to this plan, the United States would offer Spain \$130 million for Cuba, and, if spurned, were recommended to “wrest” Cuba from Spain, for “Cuba is as necessary to the North American republic as any of its present members, and . . . it belongs naturally to that great family of States of which the Union is the providential nursery.” *Id.* at 128. The Ostend Manifesto became a heavy charge laid at the door of “the Slave Power.” Anti-slavery men decried it as the “manifesto of brigands.”

108. The Breckenridge platform resolved, in pertinent part,

1. That the Government of a Territory organized by an act of Congress is provisional and temporary, and during its existence all citizens of the United States have an equal right to settle with their property in the Territory, without their rights, either of person or property, being destroyed or impaired by Congressional or Territorial legislation.

2. That it is the duty of the Federal Government, in all its departments, to protect, when necessary, the rights of persons and property in the Territories, and wherever else its constitutional authority extends.

3. That when the settlers in a Territory, having an adequate population, form a State Constitution, the right of sovereignty commences, and being consummated by admission into the Union, they stand on an equal footing with the people of other States, and the State thus organized ought to be admitted into the Federal Union, whether its Constitution prohibits or recognizes the institution of slavery.

The Breckenridge platform thereafter proceeded in unnumbered paragraphs:

Resolved, That the Democratic party are in favor of the acquisition of the Island of Cuba, on such terms as shall be honorable to ourselves and just to Spain, at the earliest practicable moment.

Resolved, That the enactments of State Legislatures to defeat the faithful execution of the Fugitive Slave Law are hostile in character, subversive of the Constitution, and revolutionary in their effect.

Democratic Platform of 1860 (Breckenridge Faction), in NATIONAL PARTY PLATFORMS, *supra* note 47, at 31.

Alabama, Louisiana, Mississippi, and Texas, were not called.”¹⁰⁹ Presumably this was in disapproval of the rump convention held the previous week in Richmond, as well as the walkout in Charleston. Some of the Southern states had sent replacement delegations to this Baltimore convention, but the Yanceyites insisted that their credentials remained good and should be honored. After a credentials fight, when the Alabama and Louisiana defectors from Charleston were excluded, the Yanceyites withdrew for good, and the Virginia delegation decided to walk out with them.¹¹⁰

Even so, Douglas’s nomination failed again of the necessary two-thirds vote. His candidacy was achieved by a simple majority vote on a resolution. Perhaps in reaction to this *coup de main*, Caleb Cushing resigned. Stephen A. Douglas had his candidacy, but only Northern Democrats would adhere to him. The three-way split in the Democratic Party was complete.

The Southerners’ destruction of the Democratic Party—the South’s passport to power and the key to the Southern ascendancy in national government—remains one of the most mysterious events in the story. It may have been done quite casually, seeing that the Party had survived previous rifts.¹¹¹ Or it may have been the consequence of hysteria, or an insistence on principle, or a deliberate move toward eventually throwing the election to the House,¹¹² or some combination of these. Or it may have been simply, as it appears, a reflection of irreconcilable differences.¹¹³ But this suicidal wrecking of the Democratic Party rendered virtually inevitable the election of a Republican, and in fact made inevitable the election of Abraham Lincoln, the candidate Southerners most hated and feared. But any Republican candidate would have been likely to appoint Supreme Court Justices who would overrule *Dred Scott* if given the chance. It is often said that all the electoral votes of the Southern candidates combined could not have defeated Lincoln.¹¹⁴ However, this does not take into consideration the likelihood that, had the Democratic Party united behind a single candidate in a

109. OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, *supra* note 96, at 93. For a blow-by-blow account of this Baltimore convention, see MILTON, THE EVE OF CONFLICT, *supra* note 5, at 469–79 (describing the bolters’ demand for admission, the credentials contest, the second bolting of the Yanceyites, and the resignation of Caleb Cushing from the Chair). See also OLLINGER CRENSHAW, THE SLAVE STATES IN THE PRESIDENTIAL ELECTION OF 1860 (1969) (1945), at 14, 15.

110. MILTON, THE EVE OF CONFLICT, *supra* note 5, at 474–75.

111. For previous rifts in the Democratic Party, see *supra* notes 83–84 and accompanying text.

112. See William E. Dodd, *The Fight for the Northwest, 1860*, 16 AM. HIST. REV. 774, 788 (1911). The House would vote by states, rather than as a whole, thus giving the South a realistic chance. See U.S. CONST. amend. XII.

113. Cf. CRENSHAW, SLAVE STATES, *supra* note 109, at 61.

114. For this view, see, for example, DWIGHT LOWELL DUMOND, THE SECESSION MOVEMENT, 1860–1861 (1963) (1931), at 112.

given state, the possibility otherwise open to Lincoln of obtaining a plurality in that state might have been foreclosed. Some writers speculate that the Fire-Eaters deliberately sought to break up the Democratic Party because they wanted Lincoln to be elected. In this view, they were trying to create a pretext for secession. If so, one can only say that secession, for them, must have become an obsession and end in itself.¹¹⁵

The Yanceyites must have understood the almost certain prospect of war. As Lincoln explained to the as-yet-unseceded states of the Upper South in his First Inaugural Address, the Constitution bound him to defend the Union:

. . . I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part; and I shall perform it so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it will constitutionally defend and maintain itself.

In doing this there needs to be no bloodshed or violence; and there shall be none, unless it be forced upon the national authority.¹¹⁶

Then, too, the Yanceyites should have understood the utter futility of secession, if the concern was political power to secure economic advantages and to defend against fiscal overreaching. As Lincoln put it to the South in his First Inaugural Address, “Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends?”¹¹⁷ And there was the futility of war itself. Lincoln pointed this out as well. “Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions as to terms of intercourse are again upon you.”¹¹⁸

From the Southern point of view, in 1860 the most important support of the South’s future political power and the future of slavery itself was not the Democratic Party. It was *Dred Scott*—a *Dred Scott* ideally shored up by a Congressional slave code. And the only force that could destroy *Dred Scott* was a Supreme Court that would overrule it—a Supreme Court reconstituted by Lincoln. Yet, perversely, by splitting the Democratic Party, the

115. This last possibility is also suggested in JOHN G. NICOLAY, *THE OUTBREAK OF REBELLION* (1995) (1881), at 4. See also CRENSHAW, *SLAVE STATES*, *supra* note 109, at 60.

116. Lincoln, First Inaugural Address, in 2 *COMPLETE WORKS*, *supra* note 25, at 3.

117. *Id.* at 6.

118. *Id.*

South had laid itself open to a Lincoln victory and a Lincoln Supreme Court.¹¹⁹

We can now see more clearly that the election of 1860 was very much about the future of *Dred Scott*. President James Buchanan thought support of *Dred Scott* would win the Democrats the presidency,¹²⁰ and John Breckenridge's demand for a positive slave code in the territories was offered to extend and support *Dred Scott* in response to Douglas's "Freeport Doctrine." Although Lincoln followed tradition and did no active campaigning after he was nominated in 1860, in effect he continued his earlier campaign and ran against *Dred Scott*. In his Cooper Union speech in New York, Lincoln adopted an argument that Salmon P. Chase was making, pointing out that the founding generation itself, in the Confederation Congress, had abolished slavery in the organic law of the Northwest Territory. From this he concluded that the Founders themselves did not see any infirmity in exercise of a national power of abolition in a territory.¹²¹ Lincoln ran on a Republican platform which emphatically opposed and rejected *Dred Scott*.¹²² And, as we have seen, in his First Inaugural Address, Lincoln famously argued the freedom of political actors to disregard the case.¹²³

119. For a rundown of all the other outrages a Lincoln presidency might inflict on the South, see RICHARD H. SEWELL, *A HOUSE DIVIDED: SECTIONALISM AND CIVIL WAR, 1848–1865* (1988), at 77–78.

120. See Letter from James Buchanan to M. Johnson (Sept. 19, 1858), *quoted in* STEVEN A. CHANNING, *CRISIS OF FEAR: SECESSION IN SOUTH CAROLINA* (1974) (1970), at 199.

121. See *Birney v. Ohio*, 8 Ohio 230, 232–33 (1837) (Salmon P. Chase for the plaintiff in error).

122. The Republican Party resolved, in pertinent part,

7. That the new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country.

8. That the normal condition of all the territory of the United States is that of freedom: That, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that "no persons should be deprived of life, liberty or property without due process of law," it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States.

Coming in for particular rebuke in the Republican Party Platform were President James Buchanan, as well as the Congress that enacted the Kansas-Nebraska Act, and the Justices who decided *Dred Scott*:

5. That the present Democratic Administration has far exceeded our worst apprehensions, in its measureless subserviency to the exactions of a sectional interest, as especially evinced . . . in construing the personal relations between master and servant to involve an unqualified property in persons; in its attempted enforcement everywhere, on land and sea, through the intervention of Congress and of the Federal Courts of the extreme pretensions of a purely local interest . . .

Republican Platform of 1860, *in* NATIONAL PARTY PLATFORMS, *supra* note 47, at 32.

123. See Lincoln, First Inaugural Address, *in* 2 COMPLETE WORKS, *supra* note 25, at 5.

The election of 1860 was in actuality two elections. In the North it was an election between Lincoln and Douglas. In the South it was an election between Breckenridge and Bell. Douglas saw rather soon that, in the broken condition of his party, he could not defeat Abraham Lincoln. But rather than follow genteel tradition and decline to campaign, “the Little Giant” campaigned everywhere, North and South, not for himself but for the Union, urging the country to rally around Abraham Lincoln should he be elected.¹²⁴

VIII. THE IRREPRESSIBLE CONFLICT

It does not ring *quite* true to say, with Professor Graber, that the sectional conflict became *irreconcilable* with the breakup of the Democratic Party in 1860. Rather, with the breakup of the Democratic Party the conflict became wholly *sectional*. It was this territorialization of the conflict that made the War *possible*. And almost as important as the breakup of the Democratic Party in making the War *possible* was the earlier dissolution of that other great national party, the Whigs. Northerners and Southerners alike deserted the Whigs in 1854, in headlong flight from each other’s positions on the Kansas-Nebraska Act. The third important factor in making the War *possible* was the rise of the *Republican* party, a wholly sectional, Northern party, out of the ashes of the Whigs.

But in fact the sectional conflict had been understood to be “irreconcilable” for a long time before the breakup of the Democratic Party. Certainly it was not easy to see how it could be resolved. A real solution, one that would strike at the heart of the problem, seemed beyond reach. A compensated emancipation, followed by repatriation to Africa of blacks willing to go, was widely considered the fairest and best solution. But it was understood on all sides that a buyout of the South’s four million slaves was not on the cards, even if slaveowners would accept it. At a conservative valuation of four hundred dollars a head in 1860, it was believed that neither the credit of the United States nor all the state governments combined could raise that kind of money. But slaveowners, who certainly would not divest, would as certainly accept nothing less if they did. Nor was the emigration dream favored by Lincoln and others, realizable. It would have been neither humane nor feasible to deport black Americans in any substantial number to Africa. Most were as ignorant of African languages and cultures as other

124. After the election, Lincoln asked Douglas to tour the border states to encourage them to stay in the Union. In performance of this duty, Douglas contracted typhoid fever and died in Illinois on June 3, 1861.

Americans; and, again, the money, on anything like the scale envisioned, could not be found.

The alternative, to go on muddling through, seemed just as unrealistic. The Union could not long endure dragging the backward South with it into the future. Even more seriously, however closely bound to each other by the “mystic chords of memory,”¹²⁵ North and South were nevertheless separated by a moral as well as a developmental abyss: Lincoln made this plain at Cooper Union: “All they ask we could readily grant, if we thought slavery right; all we ask they could as readily grant, if they thought it wrong. Their thinking it right and our thinking it wrong is the precise fact upon which depends the whole controversy.”¹²⁶ And again, in his First Inaugural Address, “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.”¹²⁷

Even apart from the developmental, moral, and ideological differences between the South and the rest of the country, there had developed a seeming difference between *Southerners* and other Americans. Since the early genteel days of the Old South of the Atlantic seaboard and its Tidewater plantations, slavery had apparently molded the master as well as the slave. In the Southern world of labor coerced by violence, in Southerners’ fears of murder or revolt, in their tacit conspiracy of silence and censorship,¹²⁸ in their fierce devotion to their peculiar institution, in the arms they carried and readily used, in their hotness of temper and exaggerated honor, some Southern men in the late antebellum period seemed so different from other Americans that writers speculated that they remained under the mysterious influence of half-imagined origins among the Cavaliers of seventeenth-century England.¹²⁹ The plain truth was that Southern planters had struggled for generations to wrest their fortunes from the slave system and their land, to expand the slave system westward, and, to these ends, to grasp and hold the reins of national power. They had overcome enormous obstacles and fought hard for what they had. They had to live among a population they could not help but fear, under the moral opprobrium of their own and

125. Lincoln, First Inaugural Address, in 2 COMPLETE WORKS, *supra* note 25, at 7.

126. Lincoln, Address at Cooper Institute, in 1 COMPLETE WORKS, *supra* note 17, at 612.

127. Lincoln, First Inaugural Address, in 2 COMPLETE WORKS, *supra* note 25, at 5.

128. See CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH (1940), at 89–117 (discussing the fear of servile insurrection in the South and Southerners’ attempts to prevent publication of information regarding planned insurrections).

129. See generally KENNETH S. GREENBERG, HONOR & SLAVERY (1998); RICHIE DEVON WATSON, JR., YEOMEN VERSUS CAVALIER: THE OLD SOUTHWEST’S FICTIONAL ROAD TO REBELLION (1993); WILLIAM R. TAYLOR, CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER (1969) (1961).

other nations. Their struggle for ascendancy had been beset with setbacks, and continued to be. Having striven so long and so mightily for their slave empire, they would never give it up.¹³⁰

As for the South's non-slaveholding farmers and its rural poor and "white trash," the one thing they would never give up—would fight and die for—was, paradoxically, racial slavery. When the War came, they would joke ruefully that it was a "rich man's war and a poor man's fight."¹³¹ But they counted themselves as one with the planters, and it was racial slavery that endowed them with this spurious consanguinity. It was the supremacy and brotherhood of the white race that, in their minds, gave them stature and dignity, or, as they said, their "honor."¹³² Secessionist intellectuals had understood the appeal of the slavery issue to non-slaveholding Southerners for a long time, and had helped to popularize the concept of racial supremacy. In 1862 an anonymous journalist in a popular publication of that period, recalled, "Mr. Calhoun, after finding that the South could not be brought into sufficient unanimity by a clamor about the tariff, selected slavery as the better subject for agitation."¹³³ But this writer was assuming that the War was really about the "terms of intercourse," when, as Lincoln explained, it was not that simple. It was slavery, rather, that was at the bottom of it.¹³⁴

New York Senator William H. Seward, who would serve as Lincoln's Secretary of State, was warning about something more deeply rooted than a merely ideological difference when he said,

They who think [this sectional collision] is accidental, unnecessary, the work of interested or fanatical agitators, and therefore ephemeral, mistake the case altogether. It is an irrepressible conflict between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slaveholding nation, or entirely a free-labor nation.¹³⁵

Irreconcilable means one thing—*inevitable* another. Realistically, war became *inevitable*, or nearly so, only with *Dred Scott*. Although it is often

130. The story is told in JAMES OLIVER HORTON & LOIS E. HORTON, *SLAVERY AND THE MAKING OF AMERICA* (2005). See also ROTHMAN, *SLAVE COUNTRY*, *supra* note 24, at 165–216; J. WILLIAM HARRIS, *THE MAKING OF THE AMERICAN SOUTH: A SHORT HISTORY, 1500–1877* (2006).

131. See, e.g., DAVID WILLIAMS, *RICH MAN'S WAR: CLASS, CASTE, AND CONFEDERATE DEFEAT IN THE LOWER CHATTAHOOCHEE VALLEY* (1998), at 18–19 (recognizing the appeal of white supremacy to the poor and attributing to the planter class the selling of this idea to the poor).

132. Cf. JAMES M. MCPHERSON, *WHAT THEY FOUGHT FOR 1861–1865* (1995) (1994), at 52–54.

133. *The Character of the Rebellion, and the Conduct of the War*, 95 N. AM. REV. 500, 525 (1862) [unsigned].

134. Lincoln, Second Inaugural Address, in 2 *COMPLETE WORKS*, *supra* note 25, at 657.

135. William Henry Seward, "The Irrepressible Conflict" (Oct. 25, 1858), in 4 *THE WORKS OF WILLIAM H. SEWARD: 1853–84* (George E. Baker ed., 1855), at 289, 292. Seward, of course, was echoing Lincoln in "A House Divided," in 1 *COMPLETE WORKS*, *supra* note 17, at 240.

carelessly said that *Dred Scott* caused the Civil War, the actual connections between *Dred Scott* and the probability of the War have not always been clearly explained. These connections can be seen by considering them as disempowering government. First, by pitching *Dred Scott* on the Constitution, and holding that the Constitution forbade legislative restrictions on slave property, the Taney Court all but destroyed the option of any *legislative* compromise of the conflict. Second, the Court simultaneously all but destroyed the chance of a meaningful *judicial* approach to the problem, short of a direct overruling of the case by the Supreme Court. Thus, in 1857 *Dred Scott* substantially blocked any effectual peaceful exit from the impasse. What was left but self-help, violence, terrorism, war? A final redundant boulder rolled into place in 1860 with the election of Abraham Lincoln. With Lincoln at the head of the *executive* branch there could be no hope of any compromise, constitutional or not, that the President would sign. Lincoln would never compromise his position against the expansion of slavery. That was the core principle of the Republican Party, the rock on which it was founded,¹³⁶ the resolution enshrined in the platform on which he had run, the principle he had come out of political retirement to fight for and had never stopped fighting for. He could not break faith on this most fundamental point—with his Party, with the people, or with himself.

At the same time, the Deep South was clearly done with compromise as well. In the late 1850s, Southern courts and pulpits were declaring that slavery was ordained by God.¹³⁷ By 1860 Southern leaders were insisting

136. The Republican Platform of 1856, in NATIONAL PARTY PLATFORMS, *supra* note 47, at 27, at its founding convention in 1856, declared,

This Convention of Delegates, assembled in pursuance of a call addressed to the people of the United States, without regard to past political differences or divisions, who are opposed to the repeal of the Missouri Compromise; to the policy of the present Administration; to the extension of Slavery into Free Territory; in favor of the admission of Kansas as a Free State; of restoring the action of the Federal Government to the principles of Washington and Jefferson; and for the purpose of presenting candidates for the offices of President and Vice-President, [are]

.....

Resolved: . . . That we deny the authority of Congress, of a Territorial Legislation, of any individual, or association of individuals, to give legal existence to Slavery in any Territory of the United States, while the present Constitution shall be maintained.

Resolved: That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery.

Id.

137. See Joseph H. Lumpkin, *Report on Law Reform*, 1 U.S. MONTHLY L. MAG. 68, 77–78 (1850) (“The conscience of the whole South, after having been thoroughly aroused to the most earnest and intense investigation of this subject by the merciless and unremitting assaults of our relentless foes, have [*sic*] become thoroughly satisfied that this institution—like government itself—is of God.”). See generally MITCHELL SNAY, *GOSPEL OF DISUNION: RELIGION AND SEPARATISM IN THE ANTEBELLUM SOUTH* (1993).

that they would destroy the Union rather than give up their demand for a Congressional slave code to secure and advance *Dred Scott*.¹³⁸

With the election of Abraham Lincoln, the tragic hemorrhaging of the Union began.

CODA: THE RUSH TO SECESSION

By 1860, reportedly significant anti-slavery forces were stirring in the South.¹³⁹ Upland yeomen, and thinking men in the South's not very numerous bourgeoisie,¹⁴⁰ were beginning to see that the region would not develop as long as the costly anachronism of slavery was the basis of its agricultural economy. Hinton Helper's *The Impending Crisis*,¹⁴¹ a book quickly and angrily suppressed in the South, was an example of this kind of insight, even on the part of a man who, like other Southerners, resented the North, and grounded his honor and sense of self in white supremacy.¹⁴² It is precisely against this background that some commentators have argued that political leaders were steamrolling the South into secession before the South's internal anti-slavery forces could coalesce.¹⁴³

As we have seen, the Fire-Eaters tended to blame Southern poverty not on slavery, but on the South's own "enslavement" by the North. For them the one intolerable outcome of the sectional conflict would be that the South should come to lie under Northern domination and control, to be mulcted without end. But in this, Southern leaders and writers were expressing what they must have known to be only half truths. That the South's fiscal anxieties were largely pretextual seems substantiated by the failure of either the Breckenridge or the Bell platforms of 1860 to refer to them. Horace Greeley remarked dryly on this. "Why not tell us what is the Democratic doctrine with regard to . . . the Tariff bill now pending in the

138. See *supra* note 96 for Yancey's determination in 1860 to "go to the wall" for or "accept defeat" over the Fire-Eaters' demand for protection of slave property in the territories.

139. See 1 JOHN W. BURGESS, *THE CIVIL WAR AND THE CONSTITUTION 1859-1865* (1901), at 34-35.

140. See JONATHAN DANIEL WELLS, *THE ORIGINS OF THE SOUTHERN MIDDLE CLASS 1800-1861* (2004) (arguing that the South's small middle-class favored neither secession nor war, concerned as it was with stability and progress).

141. For Helper, see *supra* note 34.

142. For recent consideration of this phenomenon, see AMY S. GREENBERG, *MANIFEST MANHOOD AND THE ANTEBELLUM AMERICAN EMPIRE* (2005). See also WILLIAMS, *RICH MAN'S WAR*, *supra* note 131, at 71; ULRICH BONNELL PHILLIPS, *The Central Theme in Southern History, in THE COURSE OF THE SOUTH TO SECESSION* (E. Merton Coulter ed., 1939), at 151.

143. See, e.g., NICOLAY, *THE OUTBREAK*, *supra* note 115, at 4.

Senate?”¹⁴⁴ Southern thinking, in reality, always circled back to slavery. Southerners gave every indication of understanding, deep down, that Northern economic domination mattered only because it threatened Northern political domination; and Northern political domination posed a far greater threat to them than anything as trivial as a high tariff. They must have understood that, whether or not white supremacy was a useful proxy for economic and political resentments, those resentments, in turn, were surrogates for a deeper commitment to black slavery. What was Southern political power *for*, after all, but to let a white man keep what he had? What was Northern political domination *about*, except the ultimate abolition of slavery and extinction of the Southern way of life?

Secession, when it came, was a precipitate but long-contemplated flight from the South’s loss of its economic race with the North,¹⁴⁵ from its consequent loss of population and power, and thus its loss of the presidency and loss of the House. There was also the loss of its Northern allies. In its isolation it sought escape from its own helplessness to prevent other, even more serious Northern triumphs. It fled from the apparition of a future wholly subordinate to Northern ambitions, interests, and prejudices—a future in which the South must lose the Court as well, a future in which *Dred Scott* would be overruled, the white race leveled and “dishonored,” and men stripped of the right to own slaves. Upon the news of Abraham Lincoln’s election, some Southern editorials duly sounded the expected note of despair. But a few observers reported widespread rejoicing.¹⁴⁶ It was as if Southerners were thinking, “Now at last we have our pretext; now at last we shall break away and have our own country, our slave republic. Now our honor will be safe, and we will be free of the Northern yoke and Northern aggression.”

It was a miscalculation of stupendous proportions. Southerners did not anticipate a prolonged struggle, and did not contemplate defeat. Yet in the event of defeat, the South would return to the Union absolutely under its heel. Southern leaders should have understood the risk, at least, of political abasement, since political abasement, after all, was what they were trying to escape. Looking back, we can see the even more terrible risks the South

144. N.Y. DAILY TRIB., June 15, 1860, *quoted in* HUSTON, THE PANIC OF 1857, *supra* note 50, at 236. Of course the Republicans favored a protective tariff. Republican Platform of 1860, *in* NATIONAL PARTY PLATFORMS, *supra* note 47, at 33, para. 12.

145. *See* TROLLOPE, NORTH AMERICA, *supra* note 33, at 347.

I say it with sad regret at the decadence of so vast a population; but I do say that the southern States of America have not been able to keep pace with their northern brethren;—that they have fallen behind in the race, and feeling that the struggle is too much for them, have therefore resolved to part.

146. *See* NICOLAY, THE OUTBREAK, *supra* note 115, at 4.

was running. We know the South's actual future of ruin, confiscation, military occupation, and another century of racial suppression and Southern backwardness.

We are seeing more clearly now the centrality of *Dred Scott* to the crisis of 1860, to the election, and to the coming of the Civil War. *Dred Scott* may not have been a sufficient cause of the War, or the only cause, but it was a cause, a major cause, and in the minds of Americans then it was at the very eye of the storm.

The Civil War was the greatest calamity that ever befell this country. To be sure, slavery was abolished, the treasure of the Civil War Amendments was bequeathed to us, and the Union was preserved. Those are grand things. But the sacrifice of American youth—free and slave, white and black, North and South—was almost beyond bearing, with 620,000 dead, countless others maimed in body and spirit, and whole regions of the country laid waste. *Dred Scott* destroyed whatever peaceful or temporizing options we had, leaving civil war as virtually the only route to resolution of the country's deepest conflict. History has not forgiven the Taney Court for *Dred Scott*, and it never should.