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LINCOLN AND JUDICIAL AUTHORITY

Michael Stokes Paulsen*

INTRODUCTION

The Supreme Court's decision in *Dred Scott v. Sandford*¹ created a crisis of judicial authority. For many, particularly those of the North, who had grown accustomed to deferring to the Court's interpretations of the Constitution, the decision posed an enormous problem for their views of the authority of the federal judiciary—as it likewise should for us today. The grounds on which the Court rested its decision in *Dred Scott* were legally wrong, morally wrong, and seemingly deliberately wrong. Indeed, the Court appeared gratuitously to have gone out of its way to produce the most possible wrong that could be packed into a single decision.²

How should one respond to a decision like *Dred Scott* and others that might be like it?³ What is the proper authority, within our constitutional system, of *wrong* judicial decisions, for future judicial cases and for nonjudicial political actors? Are such interpretations of the

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1 60 U.S. (19 How.) 393 (1857).

2 For a brief summary, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011–12 & n.39 (2003) [hereinafter Paulsen, *Worst Constitutional Decision*]. The definitive treatment of the *Dred Scott* case is DON E. FEHRENBACHER, *THE DRED SCOTT CASE* (1978). Ironically, the *outcome* of the case may well have been defensible on other grounds, as I will argue in future work. Michael Stokes Paulsen, *Was Dred Scott Rightly Decided?* 2 (May 21, 2008) (unpublished manuscript, on file with author) [hereinafter Paulsen, *Was Dred Scott Rightly Decided?*]; see also *infra* note 5.

3 Though *Dred Scott* was, in many ways, a singular judicial atrocity, there are many similar such candidates. See Paulsen, *Worst Constitutional Decision*, *supra* note 2, at 1001.

Constitution authoritative and binding on all other actors in our constitutional system?

For such questions to make sense, one must be willing to assume the ability to say that a judicial decision is, objectively, *wrong*. That is what makes *Dred Scott* a useful paradigm case for considering the problem of judicial authority. Nearly everyone now agrees that, at least in some significant respect, *Dred Scott* produced an interpretation of the Constitution that was flatly and virtually indisputably wrong.⁴ The situation is far enough removed—150 years—to recognize that such a conclusion is not merely partisan, or the trendy fad of the moment. *Dred Scott's* interpretation of the Constitution was, simply put, objectively wrong: no sound argument from the Constitution's text; no legitimate inference from the Constitution's structure; and no logical deduction from an authoritative political decision made in the history of the adoption of the Constitution remotely supports the Court's monstrous constitutional assertions.⁵ The case thus frames the issue

4 See Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271–72 (1997).

5 Note that it is the Court's interpretation of the Constitution in *Dred Scott* that is wrong, not necessarily the result. See *supra* note 2. The Court's two main holdings—that black Americans could not be citizens of the United States or of any state, and thus could not bring suits in such capacity or possess any other constitutional rights; and that the Missouri Compromise's prohibition of slavery in certain federal territories was an unconstitutional denial of the (substantive) "due process" right of white citizens to own slaves—are wrong and almost ridiculous interpretations of the Constitution. See Paulsen, *Worst Constitutional Decision*, *supra* note 2, at 1011–12. There is a plausible argument for the result, nonetheless, based on choice-of-law principles: A Missouri (federal) court might validly apply Missouri substantive law to determine the legal status (as slave or free) of a Missouri domiciliary suing in Missouri; and Missouri law might well have determined, consistent with the Constitution, that Scott remained a slave, having never perfected or obtained free status during his sojourns in Illinois and Minnesota. See Paulsen, *Was Dred Scott Rightly Decided?*, *supra* note 2.

Professor Mark Graber's recent book on the case, MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006), advances the provocative thesis that *Dred Scott* may have been rightly decided on its own terms: Chief Justice Taney's opinion plausibly reflected the spirit of the pro-slavery accommodations the Framers built into the Constitution and contemporaneous attitudes concerning race and slavery. *Id.* at 28–83; see also Graber, *supra* note 4, at 280–315 (analyzing the criticisms of *Dred Scott*). For reasons that would take me far afield from my purpose here, I believe Professor Graber's rather idiosyncratic view is highly unsound, essentially replicating Taney's errors but putting them in modern terms. Taney's opinion, among its many faults, infers/creates a general rule, not present in the text (a constitutional right to slavery in the territories), from specific rules that are present in the text but do not reach that far (e.g., the Fugitive Slave Clause), and from assumed general intentions not enacted into law. See *Dred Scott*, 60 U.S. (19 How.) at 411. Taney's method is not originalist textualism as that methodology is generally understood today. Rather, it is

perfectly: what is the authoritative weight of an atrociously wrong Supreme Court decision for future judicial cases, for the actions of the constitutionally independent political branches of the national government, and for voters and citizens?

Abraham Lincoln wrestled with this question of judicial authority, first, as an aspiring Republican politician in Illinois, hoping to attain a seat in the United States Senate; then, a surprisingly few years later, as President of the United States, presiding over the nation's deepest constitutional crisis—a crisis fueled in part by the *Dred Scott* decision and the Republican Party's (and Lincoln's) repudiation of it. Lincoln's answer to the problem of judicial authority was a hesitant, at first moderate, at times inconsistent, but increasingly radical and complete repudiation of the idea of judicial supremacy in constitutional interpretation.

In this Article, I trace the development of Lincoln's stance on judicial authority, and his eventual repudiation of judicial supremacy, from his first major speech addressing the *Dred Scott* decision in 1857 (Part I), through the Lincoln-Douglas debates of 1858 (Part II), the presidential campaign and "secession winter" of 1860 (Part III), and, finally, during Lincoln's presidency, from his first inauguration in March 1861 to his assassination in April 1865 (Part IV). The moral of this story, I conclude (Part V), is one I have advanced in other writing: the President, and other nonjudicial political actors swearing an oath to the Constitution and acting within the spheres of their separate constitutional powers, are not constitutionally bound by erroneous decisions of the Supreme Court that they in good faith conclude are antithetical to the Constitution and harmful to the nation.⁶

a poor caricature of today's original-meaning textualism. It more resembles the text-as-springboard, penumbras-and-emanations approach of today's less text-bound approaches. Graber, for his part, assumes the propriety of the latter approach, and therefore finds it possible to defend Taney's opinion on those terms. See Graber, *supra* note 4, at 280–315. I would find, quite the reverse, that Taney's manipulative approach to legal texts illustrates the unsoundness of Graber's modern interpretive views. For an explication and defense of original-meaning textualism, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–33 (2003).

6 See Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003) [hereinafter Paulsen, *Irrepressible Myth*]; Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993) [hereinafter Paulsen, *The Merryman Power*]; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*]; Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1345–69 (1999) [hereinafter Paulsen, *Nixon Now*]; Michael Stokes Paulsen, *The Civil*

One may reject this proposition—nearly all constitutional scholars, judges, and elected officials today do—but only by rejecting one of Lincoln's most important political and constitutional positions, fundamental to everything else he said and did as President. Lincoln's rejection both of *Dred Scott* specifically and more generally of judicial supremacy in constitutional interpretation was an essential part of the platform on which Lincoln rose to national prominence and was elected President. That stance, and Lincoln's election on such a platform, was featured among prominent Southerners' purported constitutional justifications for secession: the nation had just elected a lawless, anticonstitutional President who would invade the South's constitutional rights, as duly determined by the United States Supreme Court, with respect to slavery.⁷ The decision by Lincoln and the Union to fight secession thus depends, for *its* legitimacy, on a rejection of the Southern position on the legitimacy of Lincoln's constitutional views.

The judicial supremacist stance accepted by most people today is the anti-Lincoln stance. It is the position of Lincoln's early political arch-adversary, Senator Stephen Douglas, in support of the binding authority of *Dred Scott* and of any subsequent decision of the Supreme Court extending slavery throughout the nation.⁸ And it is the position of Jefferson Davis and the South, in opposition to the constitutional legitimacy of a President and party elected on a platform of opposition to the controlling force of the Supreme Court's interpretations of the Constitution.⁹ In short, *if* the Douglas-Davis view is right—that judicial decisions bind subsequent judicial actors, and all political actors—then Lincoln was wrong in nearly everything he stood for. Indeed, Lincoln's election as President rested on fundamentally anticonstitutional premises. If judicial supremacists are correct, the South was not only within its rights in seceding, but did so for just constitutional cause—rebellng against an administration and government premised on a grave breach of the Constitution.

War as Constitutional Interpretation, 71 U. CHI. L. REV. 691, 695, 712–20 (2004) (book review) [hereinafter Paulsen, *The Civil War as Constitutional Interpretation*].

7 See *infra* Part III.

8 See, e.g., Third Lincoln-Douglas Debate, Jonesboro, Illinois (Sept. 15, 1858) [hereinafter Third Lincoln-Douglas Debate], in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 586, 633–34 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN 1832–1858] (reply of Mr. Douglas).

9 See *infra* Part III.

I. 1857: LINCOLN'S RESPONSE TO *DRED SCOTT*

On March 6, 1857, the United States Supreme Court dropped a constitutional bombshell on a divided nation. In *Dred Scott*, the Court held, in a suit for freedom by a Missouri slave whose master voluntarily had taken him to a free state (Illinois) and to free federal territory under the terms of the Missouri Compromise (present-day Minnesota) before returning to Missouri, that Dred Scott and his family were not legally entitled to freedom.¹⁰ Chief Justice Roger Taney's outrageous opinion for the Court ranged broadly in its numerous pro-slavery rulings, but the key holdings were two. First, the Court held that Negroes, *whether slave or free*, could not, because of their race, be citizens of the United States for any purpose under the Constitution.¹¹ This included the privilege to file lawsuits for freedom in the courts of the nation (that is, federal courts) or to be counted as citizens of any *state* for purposes of invoking the constitutionally authorized jurisdiction of federal courts over suits between citizens of different states.¹² (Dred Scott had invoked the diversity jurisdiction of federal courts after an unsuccessful suit against a different defendant in Missouri state courts.)¹³ The Court held, infamously, that the Constitution was framed for the benefit of the white race only.¹⁴ The black race was comprised of "beings of an inferior order" who were "unfit to associate with the white race, either in social or political relations."¹⁵ Blacks, Taney wrote, had always been regarded by the Constitution as having "no rights which the white man was bound to respect."¹⁶ Accordingly, "the negro might justly and lawfully be reduced to slavery for his benefit."¹⁷ Thus, not only were slaves unable to bring suits for their freedom in federal courts, but free blacks also had no constitutional rights that slave states were bound to enforce under the Privileges and Immunities Clause of Article IV of the Constitution.¹⁸

10 See *Dred Scott*, 60 U.S. (19 How.) at 431, 454.

11 See *id.* at 404-07.

12 See *id.* at 430.

13 See *id.* at 398-401. The Missouri state court suit, in addition to being brought against a different party, evidently never reached final judgment in the state court system either. See FEHRENBACHER, *supra* note 2, at 250-66. Apparently, under the law of judgments at the time, the Missouri Supreme Court decision was not res judicata as against the later federal diversity action. See Paulsen, *Was Dred Scott Rightly Decided?*, *supra* note 2, at 2-3, 9.

14 See *Dred Scott*, 60 U.S. (19 How.) at 407.

15 *Id.*

16 *Id.*

17 *Id.*

18 See *id.* at 404-07.

In a second holding, the Court went on to rule, on the merits, that neither the Federal Missouri Compromise nor Illinois state law could confer freedom on Scott.¹⁹ The Missouri Compromise was unconstitutional, Taney's opinion declared, because Congress constitutionally could not violate slaveholders' constitutional rights to take their slave property with them into federal territory and there legally hold and possess such persons as property. Infamously and implausibly, Taney located this substantive federal constitutional right to slavery in the Due Process Clause of the Fifth Amendment—the first example in what would become a long line of instances in which the Court would invalidate legislative enactments on the basis of notions of “substantive due process.” Taney wrote:

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.²⁰

The invalidation of the Missouri Compromise had huge national political consequences. Congress *could not* exclude slavery from present or future federal territories and thus effectively could not prevent such territories from seeking admission to the Union as slave states. The ruling essentially declared the core principles of the new Republican free-soil party unconstitutional. What's more, Taney's opinion seemed to have gone a long way out of the way to reach out and decide this issue: if it were really true that blacks could not be citizens of the United States and therefore could not be citizens of any state for purposes of bringing suit in federal courts founded on diversity jurisdiction, then the federal courts were without jurisdiction and the Missouri Compromise holding was unnecessary dictum. Moreover, the *Dred Scott* opinion's final holding, that Illinois's free-state law did not have extraterritorially binding effect on a Missouri adjudication of Scott's status, would seem equally applicable to the Federal Missouri Compromise statute, which contained a similar prohibition on slavery *in federal territory*, but did not in terms purport to effect extraterritorial

19 See *id.* at 447–53.

20 *Id.* at 450.

legal emancipation of slaves who had once set foot on free federal soil.²¹

The *Dred Scott* decision provoked a firestorm of angry Northern responses.²² Lincoln was something of a late entrant, waiting several months to digest the opinions and commentary and to weigh his own response,²³ which he finally delivered in early summer at Springfield, Illinois, on June 26, 1857.²⁴ The speech was cast, in part, as a reply to one by Stephen Douglas two weeks earlier—prefiguring the 1858 pattern of the famous Lincoln-Douglas debates.²⁵ Lincoln began by addressing Douglas's positions on Utah and Kansas, using the former situation to needle Douglas about his "popular sovereignty" stance of territorial self-determination with respect to domestic institutions: why should a territory be any less free to choose to permit polygamy than to choose to permit slavery?²⁶ After a few remarks on the "farce" of the Kansas constitutional convention, Lincoln then turned to *Dred Scott*, concisely setting forth the holdings and deftly setting aside extended discussion of the merits:

And now as to the Dred Scott decision. That decision declares two propositions—first, that a negro cannot sue in the U.S. Courts; and secondly, that Congress cannot prohibit slavery in the Territories. It was made by a divided court—dividing differently on the different points. Judge Douglas does not discuss the merits of the decision; and, in that respect, I shall follow his example, believing I could no more improve on McLean and Curtis, than he could on Taney.²⁷

21 As noted above, this ruling may in fact be right: the legal status (slave or free) of a Missouri domiciliary, bringing suit in Missouri courts (state or federal) quite plausibly could be thought governed by Missouri substantive law and Missouri choice-of-law principles. See *supra* note 5. If free status had not been legally perfected in Illinois or in Wisconsin Territory—if something more was required than breathing free-soil air in order to create a status binding on Missouri under the Full Faith and Credit or Privileges and Immunities Clauses of Article IV—then there would be nothing wrong with Missouri courts choosing to apply Missouri law to determine the Scotts' status. And the Missouri Supreme Court had already determined that the Scotts remained slaves under Missouri law. See *Scott v. Emerson*, 15 Mo. 576 (1852).

22 For samples of harsh, angry Northern commentary, see FEHRENBACHER, *supra* note 2, at 417–32.

23 For Lincoln's lack of immediate response, see DAVID HERBERT DONALD, LINCOLN 199–201 (1995).

24 See Abraham Lincoln, Speech on the Dred Scott Decision at Springfield, Illinois (June 26, 1857) [hereinafter Lincoln, Dred Scott Speech], in LINCOLN 1832–1858, *supra* note 8, at 390.

25 See *id.*

26 See *id.* at 390–91.

27 *Id.* at 392.

Lincoln correctly noted that the different holdings of *Dred Scott* were supported by different groups of Justices, though as Professor Fehrenbacher's magnificent study shows, Chief Justice Taney's opinion for the Court *was* the opinion *of the Court*—reflecting the apparent support or acquiescence of a majority for all its points.²⁸ McLean's and Curtis's dissents were long and powerful, emphasizing different points. Lincoln took his audience to be familiar enough with these arguments, and to be sympathetic to his position that the majority opinion was simply wrong. Lincoln's concern in the speech was a different issue: *what is the binding force of an atrociously wrong Supreme Court decision, where there exists widespread, vehement, and (by assumption) legitimate popular dissent from it?* Referencing Douglas, Lincoln immediately turned to this core issue: "He [Douglas] denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him?"²⁹ Lincoln thus began by clearing away from the discussion any suggestion that a final judicial decision is not binding *in the particular case*, a concession he continually repeated in later years, most clearly in his First Inaugural.³⁰ In the speech on *Dred Scott* at Springfield in 1857, Lincoln conceded explicitly that judicial decisions are binding in this case-specific sense, but then quickly proceeded to question whether they are binding in any *other* sense: "Judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called 'precedents' and 'authorities.'"³¹ Lincoln's concern was with that second use of judicial decisions: the force of precedent, as a judicial matter and as a political matter, apart from deciding the specific case before the Court.

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, *when fully settled*, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amend-

28 See FEHRENBACHER, *supra* note 2, at 322–34.

29 Lincoln, *Dred Scott Speech*, *supra* note 24, at 392.

30 I shall return to this point below; it is one on which I disagree with Lincoln—and on which, as it turned out, President Lincoln eventually ended up disagreeing, in practice, with Senate-candidate Lincoln. See *infra* Part IV.A.

31 Lincoln, *Dred Scott Speech*, *supra* note 24, at 392.

ments of the Constitution as provided in that instrument itself. More than this would be revolution.³²

The language I have italicized—“*when fully settled*”—sets forth an important, subtle qualification (a classic Lincoln move) that weakens dramatically the force of the apparent concession to judicial authority. Lincoln then proceeded immediately to sketch out when decisions should *not* be regarded as fully settled. That portrait leaves relatively few situations in which resistance in fact *would* be “revolution.”

Lincoln’s first brush stroke, for example, was a broad one: is the precedent an erroneous one which it would be open to the Court itself to overrule? Lincoln set forth an instructive, sophisticated theory of judicial stare decisis—better than anything the Supreme Court has ever come up with, before or since. Lincoln’s description captures well the reality of judicial practice and the limited nature of the judicial commitment to precedent. To pick up the above quoted passage where we left off:

But we think the Dred Scott decision is erroneous. We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it to over-rule this.

We offer no *resistance* to it. Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.³³

Here, in the space of barely more than two paragraphs, is a full, practical treatment of judicial precedent. It has several distinct elements. First, *precedents* (as opposed to *judgments*) are not absolute.³⁴

32 *Id.* at 392–93 (emphasis added).

33 *Id.* at 393.

34 For a thorough, more recent defense of exactly this line, see Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

No precedent is beyond the Court's power of reconsideration if the Court becomes persuaded that the earlier decision was erroneous. The Court has often been so persuaded, as Lincoln observed. Indeed, what was true in Lincoln's day remains quite obviously true today: the Court frequently overrules decisions it becomes persuaded were erroneous.³⁵ Precedents are not sacrosanct.

Second, some judicial decisions obviously are entitled to less deference than others. In Lincoln's words, cases are "of greater or less authority as precedents, according to circumstances."³⁶ This, Lincoln observed, was consistent with both common sense and the tradition of the legal profession.³⁷ The extent to which a precedent commanded unanimous or near-unanimous support among the Justices is a relevant circumstance.³⁸ Division, and especially partisan division, weakens the force of precedent. The fact that a precedent decision was a departure from "legal public expectation" or "steady practice" of the government "throughout our history" also makes it less worthy of respect and deference.³⁹ And finally, it is important that a decision not have been based on false premises—"assumed historical facts which are not really true."⁴⁰ If a decision fails on some or all of these grounds, Lincoln maintained, there is nothing at all wrong with regarding it as having not set forth a settled judicial rule.⁴¹

35 Is it really necessary to collect examples? See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); see also *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[T]his Court has never felt constrained to follow precedent." (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)); *id.* at 828 & n.1 (listing thirty-three previous Supreme Court decisions which had been overruled). For further discussion, see generally Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *YALE L.J.* 1535, 1537-51 (2000).

36 Lincoln, *Dred Scott Speech*, *supra* note 24, at 393.

37 *See id.*

38 *See id.*

39 *See id.*

40 *Id.*

41 *See id.* Contemporary Supreme Court doctrine is similar to Lincoln's views in some respects and different from his views in others. As to the degree of judicial unanimity: where the Court had been and remains divided on an issue, the policy of stare decisis is regarded as having a weaker application. See *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991) (treating the policy of adherence to precedent as weaker when the precedent cases were "decided by the narrowest of margins, over spirited dissents"). As to legal public expectation: members of the Court sometimes have suggested that stare decisis is weaker when the precedent under review had been a sudden and dramatic departure from legal expectation. See *id.* at 834-35 (Scalia, J., concurring) (describing the majority's approach to stare decisis as "the application to judicial precedents of a more general principle that the settled practices and expecta-

The third feature of Lincoln's theory of stare decisis is in some ways the most interesting, and the most debatable: even where a decision is "wanting in some of these" features—that is, the precedent is deficient in reasoning, support, consistency with past practice, conformity with present expectation, or factual integrity—if it "had been before the court more than once, and had there been affirmed and re-affirmed through a course of years," it then "might be, perhaps would be" factious or revolutionary not to acquiesce in it.⁴² Thus, even *badly wrong* precedents, Lincoln seems to have said, sometimes can acquire a status as settled, if consistently reaffirmed over a course of years. An incorrect, astonishing departure from prior legal expectation, made by a divided Court, and based on false factual premises, may come to be regarded as settled precedent!

Lincoln did not quite go this far. As was his habit in preparing and delivering written speeches, Lincoln was careful both to pepper his more sweeping statements with briefly stated qualifications (leaving him useful and necessary escape routes) and generally to refrain from overstatement. His formulation thus should be read with care, both for what it says and what it does not say. Lincoln did not say, for example, that repeated reaffirmation definitively settles an issue, or bars overruling, or establishes a particular interpretation as *right*. He acknowledged only that, at some (unspecified) point, it "might," or "*perhaps* would," become "factious" or "revolutionary" not to acquiesce. Note that Lincoln did not even say, at least not quite, that it would be *wrong* or *improper* not to acquiesce; he concedes only that one might fairly be regarded as inordinately contrary or obstinate—

tions of a democratic society should generally not be disturbed by the courts"); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231–34 (1995) (opinion of O'Connor, J.) (defending the propriety of overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), in part on the ground that it had been a departure from prior understandings). On the other hand, the Court sometimes has suggested precisely the reverse, that dramatic departures from prior expectations acquire a "watershed" status from which it would be politically improvident for the Court to retreat. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."). Finally, the Court has consistently held that false, mistaken, or changed factual premises or predicates weaken precedents' weight. *See id.* at 860–64 (discussing *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896)). For a thorough critique of the modern judicial doctrine of stare decisis, see Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. (forthcoming 2008) (symposium on precedent and the Roberts Court).

42 Lincoln, *Dred Scott Speech*, *supra* note 24, at 393.

perhaps even downright rebellious—to persist in resisting, past some reasonable cutoff point. Again, though, Lincoln did not say what that cutoff point might be.

Lincoln's bow toward precedent served his rhetorical, and ultimately political, purposes. As we shall see below, part of Lincoln's political argument in the United States Senate campaign against Douglas, a year later in 1858, would be that there was a real *danger* that the *Dred Scott* decision might be reaffirmed and even extended to require free states to tolerate slavery, if it was not opposed in the political sphere.⁴³ The Supreme Court's decision might well *become* a settled precedent if "sustained" at the polls, but would not so become if rejected at the polls.⁴⁴

At Springfield in 1857, Lincoln's point was narrower—to defend the propriety of not treating *Dred Scott* as the final, authoritative word on the issues it addressed.⁴⁵ Lincoln's object was not to set forth a comprehensive theory of when precedent *must* be obeyed, as if to persuade his audience that failure to follow judicial decisions was the great evil to be remedied. Rather, he was giving up some ground in order to set up his main point, drawing a pointed contrast between *Dred Scott* and the possible claims of authority that other judicial precedents might be thought to possess.⁴⁶ This is clear in Lincoln's punch line to this passage: "But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as *not having yet quite established a settled doctrine for the country.*"⁴⁷

That was Lincoln's point. *Dred Scott* should not be considered authoritative, final, and binding, except with regard to the specific case decided. It has been noted frequently by Lincoln scholars that one of his preferred modes of argument, both as a lawyer and as a politician, was to concede (or appear to concede, for the sake of argument) one or more minor points, in order to clear the case of distractions, to dismiss the point conceded as unimportant, or to set up a

43 See *infra* text accompanying notes 78–82.

44 See Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858) [hereinafter Lincoln, "House Divided" Speech], in LINCOLN 1832–1858, *supra* note 8, at 426, 430 ("This point is made, not to be pressed *immediately*; but, if acquiesced in for a while, and apparently *indorsed* by the people at an election, *then* to sustain the logical conclusion that what *Dred Scott's* master might lawfully do with *Dred Scott*, in the free State of Illinois, every other master may lawfully do with any other *one*, or one *thousand* slaves, in Illinois, or in any other free State.").

45 See Lincoln, *Dred Scott* Speech, *supra* note 24, at 391–403.

46 See *id.* at 393.

47 *Id.* (emphasis added).

rhetorical contrast.⁴⁸ Lincoln then would focus on his primary point, having removed the obstacles and distractions in his path.⁴⁹

Lincoln's discussion of judicial stare decisis in his Springfield speech on the *Dred Scott* case was precisely in this pattern. Bear in mind that Lincoln was answering Douglas's charge of disrespect for the judiciary. (In the next paragraph of the speech, Lincoln quotes Douglas's position at length.)⁵⁰ That charge would have had considerable political force. Lincoln did not want the charge to stick, and was therefore perfectly willing to concede as much ground as he reasonably could to judicial authority in order to maintain a moderate stance and keep the focus on the propriety of refusing to acquiesce to *Dred Scott*. He obviously wanted to deprive Douglas of the leverage of being able to charge Lincoln with complete disregard for the judiciary. Accordingly, Lincoln placed the fulcrum as far toward Douglas's position as possible, leaving Douglas no room to argue about anything other than the binding, authoritative status of *Dred Scott*. As we shall see, Lincoln continued this strategy in his 1858 debates with Douglas, effectively pushing Douglas into the opposite extreme corner: complete willingness to accept judicial decisions *no matter what*—no matter how horrible they might be—including a decision forcing slavery upon the whole nation, North as well as South.⁵¹

Lincoln's formulation of stare decisis in the Springfield speech is thus best understood as stating a "safe harbor" in which disagreement with Supreme Court precedent is unquestionably legitimate. His discussion of the status of judicial precedent is best stated as a negative proposition about when precedent is not binding, which is the point to which this passage is directed. The absence of a long period of sustained judicial embrace of a questionable doctrine is an important factor against according such decisions strong stare decisis weight. While a case that has been reaffirmed often and regularly may enjoy substantial deference—Lincoln does not actually concede that such decisions are irreversible—a relatively recent case lacking such confirmation is certainly not entitled to any strong presumption of settledness.⁵²

48 See, e.g., DOUGLAS L. WILSON, *LINCOLN'S SWORD* 143–61 (2006).

49 See *id.* (giving examples).

50 See Lincoln, *Dred Scott Speech*, *supra* note 24, at 393–96.

51 See *infra* notes 107–73 and accompanying text.

52 Nothing in Lincoln's discussion forecloses the position that some judicial decisions and doctrines might be so wrong as to be unworthy of the respect usually accorded longstanding precedents. It is nearly inconceivable, for example, that Lincoln actually would have regarded *Dred Scott* as stating a settled rule even if the Court had reaffirmed it in a series of subsequent cases. To be sure, he was very concerned

Lincoln goes on to address the clash with Douglas's position. "Judge Douglas considers this view awful."⁵³ He then quoted Douglas's position at length, as a counterpoise:

"The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence. I repeat, therefore, that if resistance to the decisions of the Supreme Court of the United States, in a matter like the points decided in the *Dred Scott* case, clearly within their jurisdiction as defined by the Constitution, shall be forced upon the country as a political issue, it will become a distinct and naked issue between the friends and the enemies of the Constitution—the friends and the enemies of the supremacy of the laws."⁵⁴

Lincoln's 1857 position, a position from which he never retreated (but from which he did *advance* to a yet more aggressive stance in later years),⁵⁵ is best defined as the negation of the Douglas position. For Lincoln, the Court's authority to interpret the law was not, as Douglas had suggested, exclusive and supreme in the sense that no other political authority legitimately could contest it. To disagree with the Court on a constitutional matter of fundamental importance; to resist its decision as precedent binding for all political purposes; to seek to have it overruled, was not, for Lincoln, a "blow" to republican government or a call for "passion, anarchy and violence."⁵⁶ To contest the authority and finality of *Dred Scott* as a rule binding the government, and to make a political issue of disagreement, was not merely to be an enemy of the Constitution; it was to be an enemy of the

to prevent such reaffirmations from occurring, recognizing that such a pattern of decisions would make it increasingly more difficult to dislodge the original error, it having then become more deeply entrenched. But that is different from conceding that the error actually does become entrenched by repetition, in a way that all must regard as binding and immune from reconsideration. To take a more modern example, *Plessy* endured for fifty-eight years, and was a premise for many subsequent decisions of the Supreme Court before *Brown v. Board of Education*, 347 U.S. 483 (1954), interred "separate but equal." Lincoln's speech on *Dred Scott* cannot fairly be quoted as suggesting that the force of precedent should have required the *Brown* Court to accept *Plessy* as settled and final.

53 See Lincoln, *Dred Scott Speech*, *supra* note 24, at 393.

54 See *id.* (quoting Douglas).

55 See *infra* Part IV.

56 See Lincoln, *Dred Scott Speech*, *supra* note 24, at 393.

Supreme Court's decision. For Lincoln, there was nothing at all improper about such a stance.

Lincoln then pointed out the inconsistency between Douglas's position with respect to *Dred Scott* and his earlier position supporting political repudiation of judicial decisions with which the Democratic Party disagreed, including President Andrew Jackson's famous rejection of the Supreme Court's decision in *McCulloch v. Maryland*⁵⁷ upholding the constitutionality of the Bank of the United States.⁵⁸ Lincoln skillfully turned these political precedents on Douglas, simultaneously converting them into affirmative support for Lincoln's own position. How could it be said, as Douglas had, that opposition to the Supreme Court's decision and refusal to be bound by it as a political rule made one an enemy of the Constitution, when Jackson and Douglas had done precisely this on the Bank question?⁵⁹

Why this same Supreme court once decided a national bank to be constitutional; but Gen. Jackson, as President of the United States, disregarded the decision, and vetoed a bill for a re-charter, partly on constitutional ground, declaring that each public functionary must support the Constitution "as he understands it." But hear the General's own words. Here they are, taken from his veto message:

"It is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled."⁶⁰

Lincoln then quoted President Jackson's defense of the coordinate, coequal authority of each of the branches of the national government to interpret the Constitution, each for itself:

"If the opinion of the Supreme court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive, and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the

57 17 U.S. (4 Wheat.) 316 (1819).

58 Lincoln, *Dred Scott* Speech, *supra* note 24, at 393-94; see *McCulloch*, 17 U.S. (4 Wheat.) at 436-37.

59 See Lincoln, *Dred Scott* Speech, *supra* note 24, at 393-94.

60 *Id.* (quoting Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581 (James D. Richardson ed., Wash., D.C., Gov't Printing Office 1896) [hereinafter MESSAGES AND PAPERS]).

Constitution, swears that he will support it as he understands it, and not as it is understood by others.”⁶¹

Andrew Jackson had achieved something of an iconic, almost legendary status in American politics. Even among those who had disagreed with the politics of Jackson’s party, the Jackson name commanded respect decades after his presidency. Lincoln’s invocation of Jackson’s stance was thus a useful rhetorical move, which he employed to good effect against Douglas.

Again and again have I heard Judge Douglas denounce that bank decision, and applaud Gen. Jackson for disregarding it. It would be interesting for him to look over his recent speech, and see how exactly his fierce philippics against us for resisting Supreme Court decisions, fall upon his own head.⁶²

Thus, Douglas too, by his own standard, was guilty of having “fought in the ranks of the enemies of the Constitution,” and with none other than the famed General Jackson himself.⁶³

Lincoln’s invocation of Jackson was more than just good political jujitsu. On the question of judicial authority, Lincoln appears to have fully embraced Jackson’s position as his own, a pattern he repeated on other important issues of presidential and national governmental power a few years later when Lincoln, as President, followed Jackson’s stance on the indissolubility of the Union, the supremacy of national authority over the states, and the propriety of using national power to coerce state obedience.⁶⁴ On the matter of precedent and judicial authority, it is striking how closely Lincoln’s 1857 formulation paralleled Jackson’s 1832 stance in the bank veto message: precedent should not be regarded as deciding questions of constitutional power, except where public political acquiescence can be deemed well settled (Jackson’s words).⁶⁵ Where lacking the requisite claims to public confidence, precedent should be treated as not establishing settled doctrine for the nation (Lincoln’s words).⁶⁶ Except where fully settled by broad, deep, universal acceptance, the Supreme Court’s decisions do

61 *Id.* at 394 (quoting Jackson, *supra* note 60, at 582).

62 *See id.*

63 *See id.* at 395.

64 *See* 1 WILLIAM J. BENNETT, *AMERICA: THE LAST BEST HOPE* 234–40 (2006) (discussing Jackson’s position and noting its influence on Lincoln); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 249–50 (1988) (comparing Jackson’s and Lincoln’s view on the authority and permanency of the Union and on federal power to coerce the states).

65 *See* Jackson, *supra* note 60, at 582.

66 *See* Lincoln, *Dred Scott Speech*, *supra* note 24, at 393; *supra* notes 32–33 and accompanying text.

not control the interpretation of the Constitution by other political actors or by the people.⁶⁷ Each branch of government, each public official, each voter, must be guided by the Constitution as he faithfully understands it, not as it is understood by others.⁶⁸

As we shall see, Lincoln refined and expanded this position in subsequent years, becoming less and less reserved in its application. But already by 1857, in response to the atrocity of *Dred Scott*, Lincoln had firmly rejected the naive position of reflexive judicial supremacy in constitutional interpretation and any notion that judicial decisions are binding beyond the specific case decided. Instead, Lincoln defended the propriety of political resistance to Supreme Court decisions. This would become one of the distinguishing themes in Lincoln's famous debates with Douglas in the Senate campaign of 1858.

II. 1858: THE LINCOLN-DOUGLAS DEBATES

The central issue of the Lincoln-Douglas debates, indeed of the entire 1858 Illinois senatorial campaign, was the proper stance of the national government toward the expansion of slavery into federal territories. Compressing almost ridiculously the most marvelous series of formal political debates in American history: Stephen Douglas, the incumbent and author of the 1854 Kansas-Nebraska Act⁶⁹ repealing the Missouri Compromise's prohibition of slavery north of 36° 30', argued that the question of slavery in the territories should be resolved by local "popular sovereignty."⁷⁰ By this term Douglas meant the right of the (white) people of each territory to decide for themselves whether or not to permit slavery, pending application for statehood. The federal government should not prohibit the introduction of slavery into *any* national territory and should admit new states irre-

67 See Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 321-23 (2005).

68 See Jackson, *supra* note 60, at 582. The echoes of Andrew Jackson's position can be heard quite distinctly in Lincoln's First Inaugural:

[I]f the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) [hereinafter Lincoln, First Inaugural], in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 215, 221 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN 1859-1865].

69 Ch. 59, 10 Stat. 277 (1854).

70 See, e.g., *infra* note 74.

spective of whether they choose slavery or freedom. Any contrary view, Douglas argued—such as the Republican Party’s—was anti-democracy, sectional, abolitionist, extremist, a threat to the peace of the Union, and an embrace of the horrors of complete social equality among whites and blacks.⁷¹

What’s more, Douglas maintained, such a position was an assault on the Constitution, because contrary to its authoritative exposition by the Supreme Court in *Dred Scott*. The Court’s decision was binding, Douglas argued.⁷² While *Dred Scott* did not settle every question, the Court’s decision clearly denied congressional power to prohibit slavery in the territories. The Republican stance, urging such a prohibition, was for Douglas the moral equivalent of resistance to the Constitution itself, and a grave threat to constitutional government and the rule of law.⁷³ (Douglas desperately, and unpersuasively, tried to dodge the reality that *Dred Scott* also contradicted his “popular sovereignty” stance, rendering popular choice a one-way street: the people of a territory were free to choose slavery, but they were not free to choose freedom.)⁷⁴

71 See, e.g., *infra* note 164 and accompanying text.

72 See *infra* notes 135–36, 161–63 and accompanying text.

73 See, e.g., *infra* note 164 and accompanying text.

74 The Court had held that neither Congress nor a territorial legislature could prohibit slavery in federal territory. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857) (“And if Congress itself cannot [ban slavery in the territories]—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them.”). Lincoln, of course, noted the irony that *Dred Scott* skewered Douglas’s position, too. See Lincoln, “House Divided” Speech, *supra* note 44, at 429 (“Under the *Dred Scott* decision, ‘squatter sovereignty’ squatted out of existence”); Abraham Lincoln, Speech at Springfield, Illinois (July 17, 1858) [hereinafter Lincoln, Speech at Springfield], in LINCOLN 1832–1858, *supra* note 8, at 460, 464 (“[D]oes [Douglas] mean to say that he has been devoting his life to securing to the people of the territories the right to exclude slavery from the territories? If he means so to say, he means to deceive; because he and every one knows that the decision of the Supreme Court, which he approves and makes especial ground of attack upon me for disapproving, forbids the people of a territory to exclude slavery. . . . He sustains the decision which declares that the popular will of the territories has no constitutional power to exclude slavery during their territorial existence.”); Third Lincoln-Douglas Debate, *supra* note 8, at 617–20 (reply of Mr. Lincoln) (noting that *Dred Scott* held that neither Congress nor territorial legislatures could exclude slavery from the territories).

In the second formal debate, at Freeport, Lincoln artfully put the question to Douglas as his second “interrogatory”: “Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State Constitution?” Second Lincoln-Douglas Debate, Freeport, Illinois (Aug. 27, 1858) [hereinafter Second Lincoln-Douglas Debate], in LINCOLN 1832–1858, *supra* note 8, at 537, 541–42 (speech of Mr. Lin-

Lincoln, the challenger, argued for the restoration of the Missouri Compromise, for the constitutional power of Congress to prohibit slavery in the territories, and for the exercise of such power to prohibit slavery in *all* territories, wherever possible. This was the core of Lincoln's stance, and it flew squarely in the face of *Dred Scott*. Lincoln, an antislavery moderate, conceded both the right of states to choose slavery, immune from federal interference, and the constitutional entitlement of slaveholders to a Federal Fugitive Slave Act.⁷⁵ He also was prepared to concede, in the main, the inherent social and political inferiority of African-Americans.⁷⁶ And he was, further, will-

coln). Douglas's confusing answer was "emphatically" that the people of a territory *could*, "by lawful means, exclude slavery from their limits prior to the formation of a State Constitution." *Id.* at 551 (reply of Mr. Douglas). This was because "slavery cannot exist a day or an hour anywhere, unless, it is supported by local police regulations." *Id.* at 552. Such regulations required action by local legislatures. Thus, the people might, by "unfriendly legislation effectually prevent the introduction of [slavery] into their midst. . . . Hence, no matter what the decision of the Supreme Court may be on that abstract question, still the right of the people to make a slave territory or a free territory is perfect and complete under the Nebraska bill." *Id.* This hypertechnical, implausibly narrow reading of *Dred Scott*, in order to save Douglas's "popular sovereignty" position, may have been useful for the 1858 Illinois senatorial campaign, but this "Freeport Doctrine" (as it came to be called), along with Douglas's refusal to support congressional "slave code" legislation for the territories, contributed to Douglas's undoing with Southern Democrats in the 1860 presidential campaign. See FEHRENBACHER, *supra* note 2, at 494-96, 536-38.

⁷⁵ Lincoln, First Inaugural, *supra* note 68, at 215-16 (Fugitive Slave Clause); *id.* at 222 (right of states to choose slavery); Seventh Lincoln-Douglas Debate, Alton, Illinois (Oct. 15, 1858) [hereinafter Seventh Lincoln-Douglas Debate], in LINCOLN 1832-1858, *supra* note 8, at 774, 806 (reply of Mr. Lincoln).

⁷⁶ Even our heroes have their cancers. See First Lincoln-Douglas Debate, Ottawa, Illinois (Aug. 21, 1858) [hereinafter First Lincoln-Douglas Debate], in LINCOLN 1832-1858, *supra* note 8, at 495, 511 (reply of Mr. Lincoln) ("This is the whole of it, and anything that argues me into his idea of perfect social and political equality with the negro, is but a specious and fantastic arrangement of words . . ."); Second Lincoln-Douglas Debate, *supra* note 74, at 539 (speech of Mr. Lincoln) ("I think, under the Constitution of the United States, the people of the Southern States are entitled to a Congressional Fugitive Slave Law."); Third Lincoln-Douglas Debate, *supra* note 8, at 619-20 (reply of Mr. Lincoln) (acquiescing to the validity of the Fugitive Slave Law); see also Fourth Lincoln-Douglas Debate, Charleston, Illinois (Sept. 18, 1858) [hereinafter Fourth Lincoln-Douglas Debate], in LINCOLN 1832-1858, *supra* note 8, at 636, 636-37 (speech of Mr. Lincoln) ("I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races. . . . [T]here is a physical difference between the white and black races which I believe will for ever forbid the two races living together on terms of social and political equality. . . . I as much as any other man am in favor of having the superior position assigned to the white race."). But see Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858) [hereinafter Lincoln, Speech at Chicago], in LINCOLN 1832-1858, *supra* note 8, at 439, 458 ("Let us discard all this quibbling about this man

ing to countenance the admission into the Union of new slave states.⁷⁷ But Lincoln insisted that slavery was wrong in principle, and should be limited to where it already existed, whenever politically possible. The *Dred Scott* decision was wrong, should be overruled, and should not be regarded as a binding rule for the nation. Indeed, Lincoln argued, the greater danger was that, if the *Dred Scott* decision were acquiesced to and not challenged politically, the Court would extend the *Dred Scott* decision and make slavery lawful, as a matter of constitutional right, in Northern states as well as in the territories.⁷⁸ The tendency was in such a direction, Lincoln argued. “A house divided against itself cannot stand,” Lincoln stated, quoting Jesus.⁷⁹ “I believe this government cannot endure, permanently half *slave* and half *free*.”⁸⁰ One of two things would happen. Either, by limiting the spread of slavery into territories and new states, the institution would be set on a course toward its gradual extinction, a process that probably would take at least one hundred years;⁸¹ or, by expanding its spread, the Supreme Court, aided by willing and enthusiastic politicians, would soon make slavery the national rule in America.⁸²

It is no exaggeration to say that the meaning and authoritative force of the Supreme Court’s decision in *Dred Scott* was the crux of the Lincoln-Douglas debates.⁸³ If Douglas’s view was right, the Court’s decision utterly foreclosed the Republicans’ position and rendered it an assault on the Constitution. If Lincoln’s view was right, the Court’s decision was utterly wrong and was itself an assault on the Constitution, which it was *not* improper to resist with political force.

A survey of key passages from the 1858 campaign speeches and debates illustrates the central points. There is much repetition, and some refinement, of the respective positions of Douglas and Lincoln during the course of the summer and fall of 1858. In the main, Lincoln’s statements on the authoritativeness of judicial decisions built

and the other man—this race and that race and the other race being inferior, and therefore they must be placed in an inferior position Let us discard all these things, and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal.”).

77 See Second Lincoln-Douglas Debate, *supra* note 74, at 538, 540 (expressing reluctance, but willingness, to admit new slave states).

78 See *infra* notes 84–86, 109–15 and accompanying text.

79 Lincoln, “House Divided” Speech, *supra* note 44, at 426 (quoting *Luke* 11:17; *Mark* 3:25; *Matthew* 12:25).

80 *Id.*

81 See Fourth Lincoln-Douglas Debate, *supra* note 76, at 677 (rejoinder of Mr. Lincoln).

82 See *id.*

83 Accord FEHRENBACHER, *supra* note 2, at 485–96.

on, and to a large extent simply repeated, the themes of his 1857 speech on the *Dred Scott* case. Douglas's position too remained largely consistent. But under the press of each candidate's challenges directed to the other, the respective positions became even more specific and crisply drawn.

It began at Springfield, with Lincoln's famous "House Divided" speech on June 6, 1858, at the close of the Republican state convention naming him as their party's candidate for Senate. Lincoln's theme was the specter of a tacit conspiracy to nationalize slavery. He linked Douglas's Nebraska bill to the Supreme Court's decision in *Dred Scott*, to the outgoing and incoming Presidents' prior endorsements of the Court's decision, and to a possible "second *Dred Scott*" case requiring Northern state acceptance of slavery.⁸⁴ "Such a decision is all that slavery now lacks of being alike lawful in all the States,"⁸⁵ Lincoln said, and Douglas's position was preparing the public mind to accept such a subsequent decision:

Welcome or unwelcome, such decision *is* probably coming, and will soon be upon us, unless the power of the present political dynasty shall be met and overthrown.

We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*, and we shall *awake* to the *reality*, instead, that the *Supreme Court* has made *Illinois* a *slave State*.

To meet and overthrow the power of that dynasty, is the work now before all those who would prevent that consummation.⁸⁶

84 See Lincoln, "House Divided" Speech, *supra* note 44, at 426–34. Many, if not most, historians doubt whether a true "conspiracy" existed. See FEHRENBACHER, *supra* note 2, at 438 (noting this view, but arguing that Northern fears of slavery nationalization were justified); MCPHERSON, *supra* note 64, at 180–81 (discussing the views of historians, but siding with the plausibility of the Republicans' fears). It is clear, however, that President-elect Buchanan lobbied Northern Justices to join the Southern majority in reaching out to declare the Missouri Compromise unconstitutional in excluding slavery from northern territories. See FEHRENBACHER, *supra* note 2, at 311–14. Buchanan was informed by Justice Grier of the result in advance, and Buchanan called for acceptance of the Court's decision in his inaugural address, just days before the decision was announced. See *id.* at 314. Whether Stephen Douglas was privy to any of this plotting is more doubtful, but Lincoln's point was narrower: Douglas's prior actions and words provided the perfect "niche" for insertion of the *Dred Scott* decision; his present stance was unrestrained support of the decision; and the position further committed Douglas to accepting a future decision of the Court extending *Dred Scott* to require acceptance of slavery in Northern states. See *infra* notes 119–25 and accompanying text.

85 See Lincoln, "House Divided" Speech, *supra* note 44, at 432.

86 *Id.*

These are strong words—a direct and rather pointed challenge to judicial authority. Lincoln did not, directly, call for the “overthrow” of the Supreme Court’s power. But he did, by clear implication, identify the Court’s actions and power as part of a concerted plan to nationalize slavery. It is hard to avoid the conclusion that Lincoln viewed the Supreme Court as part of the “present political dynasty” that needed to be “met and overthrown.” In a sense, Douglas was right: Lincoln’s position *was* a thinly veiled assault on the authority of the Supreme Court. Its decision in *Dred Scott* was to be met and overthrown, lest it be accepted and extended.

At Chicago on July 10, still before Douglas had agreed to the series of seven formal debates, Lincoln elaborated the difference between his and Douglas’s positions on *Dred Scott*.⁸⁷ Lincoln did not “resist” the decision in the literal sense of proposing “to take Dred Scott from his master.”⁸⁸ But he did resist it “as a political rule.”⁸⁹ Thus, Lincoln proclaimed that if he were in Congress, “and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should.”⁹⁰

This was Andrew Jackson’s position put into action: the decision of the Court on constitutional questions could not constrain the action of a coordinate department. Moreover, in Lincoln’s hands, the Jackson position became a sword as well as a shield. Jackson had said that the Court’s decision *upholding* some action as constitutional did not bar political branches from *declining* to take such action on the basis of a different judgment that such action would be unconstitu-

87 See Lincoln, Speech at Chicago, *supra* note 76, at 450–55.

88 *Id.* at 450.

89 *Id.* Lincoln was continuing to adhere to the distinction between a decision as controlling the specific case as opposed to determining a general rule. As I have set forth elsewhere (and will reprise below), this plausible cutoff point to Lincoln’s logic collapses when one leans on it hard. See Paulsen, *The Merryman Power*, *supra* note 6, at 103–06; *infra* note 277 and accompanying text. If the wrongness—the *unconstitutionality*—of a judicial decision, combined with the coequal status of coordinate branches, permits (and perhaps requires) the political branches of the federal government to refuse to abide by such decision as a prospective, general rule, in the exercise of their legislative and executive powers, it is hard to see why that same reasoning should not apply in the particular case decided. If a President, confronted with an anticonstitutional judicial decision ordering a free man into slavery, is called upon to use his *independent executive* power to enforce it, why should the judiciary’s decision control his different constitutional understanding, within the sphere of his separate, independent powers? For an extended defense of this position, see Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 272–84.

90 Lincoln, Speech at Chicago, *supra* note 76, at 450–51.

tional. Lincoln's corollary, as applied to the Court's decision in *Dred Scott*, was that the Court's decision *invalidating* legislative action as *unconstitutional* did not control the legislature's subsequent judgment that *enacting* such legislation was *constitutional*—a crucial additional step, though certainly a logical one.⁹¹

Lincoln did not directly address whether political officials could enforce such legislation if the Supreme Court were to hold it unconstitutional—certainly a predictable outcome, given *Dred Scott*. Rather, he merely stated that “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.”⁹² Lincoln contrasted this view with Douglas's position that “all hands must take this extraordinary decision, made under these extraordinary circumstances, and give their vote in Congress in accordance with it, yield to it and obey it in every possible sense.”⁹³ Lincoln denied this, again using Douglas's—and Jackson's—continued resistance to the constitutionality of a national bank as his example.⁹⁴ Again, the argument was not (yet) for congressional or executive action in defiance of a specific judgment of the Court; it was for the propriety of political action notwithstanding a conflicting Supreme Court precedent, coupled with the intention to seek to have that precedent overturned.⁹⁵

In a July 17 speech back in Springfield, Lincoln, still shadowing Douglas, said much the same thing as he had at Chicago.⁹⁶ He would not interfere with the rights of property established in a specific decision as to *Dred Scott* and his family, but he rejected Douglas's position that would “have the citizen conform his vote to that decision; the Member of Congress, his; the President, his use of the veto power.”⁹⁷ The allusion to Jackson's bank bill veto is clear, and Lincoln made it explicit a few minutes later. Lincoln told his audience that he had “reminded [Douglas] of a Supreme Court decision which he opposed for at least several years”⁹⁸—meaning *McCulloch*, the decision which

91 Stephen Douglas would eventually point out the fact that Lincoln's position was a step beyond Jackson's, and distinguishable. See *infra* notes 154–58 and accompanying text. To peek ahead in the story: as President, Lincoln put his views into action, signing into law legislation passed by Congress banning slavery in the territories and in the District of Columbia. Congress debated the constitutional issues to some extent, but the direct conflict between such legislation and the *Dred Scott* decision was not among the major points of discussion. See *infra* Part IV.C.

92 Lincoln, Speech at Chicago, *supra* note 76, at 451.

93 See *id.* at 452.

94 See *id.*

95 See *id.* at 450–52.

96 See Lincoln, Speech at Springfield, *supra* note 74, at 472–76.

97 *Id.* at 473.

98 *Id.*

Jackson had refused to regard as binding his constitutional judgment as President.⁹⁹

Lincoln then conscripted a new iconic authority to accompany Jackson on “this question of judicial authority”¹⁰⁰—the immortal Thomas Jefferson. “I wish to show that I am sustained by authority, in addition to that heretofore presented,” Lincoln said, and begged the indulgence of his audience to read Jefferson’s 1820 letter to William Charles Jarvis thanking him for a book, but challenging the author on a critical point.¹⁰¹ Here is Lincoln, reading Jefferson’s letter to Jarvis:

I feel an urgency to note what I deem an error in it, the more requiring notice as your opinion is strengthened by that of many others. You seem in pages 84 and 148, to consider the judges as the ultimate arbiters of all constitutional questions—a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, “boni iudicis est ampliare jurisdictionem”; and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves.¹⁰²

Lincoln then twisted the knife: “Thus we see the power claimed for the Supreme Court by Judge Douglas, Mr. Jefferson holds, would reduce us to the despotism of an oligarchy.”¹⁰³ Lincoln placed his own views within what we today would call Jefferson’s “departmentalist” position: “I have said no more than this—in fact, never quite so much as this—at least I am sustained by Mr. Jefferson.”¹⁰⁴

Lincoln’s embrace of Jefferson is significant. Jefferson’s letter to Jarvis was no aberration; Jefferson had said many such things before,

99 See *supra* notes 57–68 and accompanying text.

100 Lincoln, Speech at Springfield, *supra* note 74, at 473.

101 See *id.*

102 *Id.* at 473–74 (quoting Jefferson’s letter to Jarvis). Translated, the Latin phrase means “it is the duty of a good judge to expand his jurisdiction.” Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Stafford Trial*, 69 U. CHI. L. REV. 2057, 2079 n.75 (2002) (book review). For Jefferson’s letter in Jefferson’s papers, see Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON 1816–1826, at 160, 160–61 (Paul Leicester Ford ed., N.Y., G.P. Putnam’s Sons 1899).

103 Lincoln, Speech at Springfield, *supra* note 74, at 474.

104 *Id.*

and as President had acted on his views.¹⁰⁵ Perhaps no early President was more firmly opposed to the idea of judicial supremacy, more committed to the right and power of the other branches of government to interpret the Constitution independently of the courts, and more prepared to exercise such prerogative, than Jefferson.¹⁰⁶ For Lincoln to view his position as “sustained by Mr. Jefferson” is for Lincoln to stand against the binding authority of Supreme Court decisions on the President. Lincoln was not quite there yet in 1858—thus his remark that he had said “never quite so much as this”—but he was well on his way to where he would end up less than three years later as President.

In the next few weeks of the summer, Douglas finally acceded to a series of seven formal debates with Lincoln, which would begin on August 21, 1858, and continue into the fall. Lincoln’s notes for a draft speech show his preparation for the debates of the same points discussed above—his refusal to accept *Dred Scott* “as a political rule,”¹⁰⁷ the positions of Jefferson and Jackson “against [Douglas] on the binding political authority of Supreme Court decisions,”¹⁰⁸ and the inconsistency of Douglas’s own past conduct with his newfound insistence on judicial supremacy. Lincoln also developed a refined point, linking his “House Divided” charge of a slavery-nationalizing conspiracy (including Douglas) with his attack on judicial supremacy.¹⁰⁹ The object of nationalizing slavery, Lincoln wrote,

can be done by a Supreme Court decision holding that the United States Constitution forbids a State to exclude slavery; and probably it can be done in no other way. . . . *To such a decision, when it comes, Judge Douglas is fully committed. Such a decision acquiesced in by the people effects the whole object.*¹¹⁰

And Douglas, with his stance on the authority of *Dred Scott*, was preparing the public to accept precisely such a decision.¹¹¹

105 See Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 255–57 (collecting several of Jefferson’s statements—from before, during, and after his presidency—defending the independence of the several branches of the federal government in constitutional interpretation and criticizing the notion of judicial supremacy).

106 See *id.* at 255 (“Perhaps the most direct, forthright advocate of independent executive branch interpretative power during the founding era was Thomas Jefferson.”).

107 Abraham Lincoln, Draft of a Speech (Aug. 1858), in LINCOLN 1832–1858, *supra* note 8, at 487, 492.

108 *Id.*

109 See *id.* at 490–93.

110 *Id.* at 491–92 (emphasis added).

111 Specifically, Lincoln wrote:

In this age, and this country, public sentiment is every thing. *With it, nothing can fail; against it, nothing can succeed. Whoever moulds public senti-*

This would become a standard part of Lincoln's debate repertoire. In the first debate, at Ottawa, Douglas's opening speech charged Lincoln with "warfare on the Supreme Court of the United States and its decision [in *Dred Scott*]."112 Lincoln's reply developed the point he had prepared in advance:

Then what is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision. It is merely for the Supreme Court to decide that no *State* under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial Legislature can do it. When that is decided and acquiesced in, the whole thing is done.¹¹³

Douglas, Lincoln charged, was exerting his influence on public sentiment, preparing it to accept such a second *Dred Scott* decision. Such influence was important: "In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions."¹¹⁴ And Douglas was preparing the public to acquiesce to the nationalization of slavery by the trick of arguing for public acceptance of the Supreme Court's decisions, no matter how wrong they might be.

This man sticks to a decision which forbids the people of a Territory from excluding slavery, and he does so not because he says it is right in itself—he does not give any opinion on that—but because it has been *decided by the court*, and being decided by the court, he is, and

ment, goes deeper than he who enacts statutes, or pronounces judicial decisions. He makes possible the enforcement of these, else impossible.

Judge Douglas is a man of large influence.

Id. at 493. As we shall see, Lincoln employed nearly identical language in his debates with Douglas. See *infra* note 114 and accompanying text.

112 First Lincoln-Douglas Debate, *supra* note 76, at 504 (speech of Mr. Douglas). Douglas's point of attack was Lincoln's disagreement with the Court's holding that blacks could not be citizens, which Douglas twisted into an untrue assertion that Lincoln favored universal black citizenship. The Little Giant was a giant racist demagogue. Throughout the debates, Douglas—seizing on Lincoln's less restrained statements about the equality of all men under the Declaration of Independence—sought to push Lincoln into the radical-abolitionist corner. It was Lincoln's resistance to this characterization that provoked him into several regrettable racist remarks of his own, made in the course of distinguishing the equal rights of all to freedom from any assertion of complete racial, social, and political equality. See JAMES OAKES, *THE RADICAL AND THE REPUBLICAN* 119–31 (2007) (discussing, and not excusing, Lincoln's racist statements in the debates with Douglas); *supra* note 76 (collecting some of Lincoln's embarrassingly racist statements).

113 First Lincoln-Douglas Debate, *supra* note 76, at 524 (reply of Mr. Lincoln).

114 *Id.* at 524–25.

you are bound to take it in your political action as *law*—not that he judges at all of its merits, but because a decision of the court is to him a “*Thus saith the Lord.*” [Applause.] He places it on that ground alone, and you will bear in mind that thus committing himself unreservedly to this decision, *commits him to the next one* just as firmly as to this. He did not commit himself on account of the merit or demerit of the decision, but it is a *Thus saith the Lord.* The next decision, as much as this, will be a *thus saith the Lord.*¹¹⁵

Lincoln then invoked again Jackson and Jefferson—and Douglas’s own actions as an Illinois Supreme Court judge—against any absolutely binding quality to judicial decisions.¹¹⁶ “But I cannot shake Judge Douglas’s teeth loose from the Dred Scott decision,” Lincoln perorated, to his audience’s apparent delight:

Like some obstinate animal (I mean no disrespect,) that will hang on when he has once got his teeth fixed, you may cut off a leg, or you may tear away an arm, still he will not relax his hold. . . . He hangs to the last, to the Dred Scott decision. [Loud cheers.] These things show there is a purpose *strong as death and eternity* for which he adheres to this decision, and for which he will adhere to *all other decisions* of the same Court. [Vociferous applause.]¹¹⁷

Lincoln’s final warning was that if Douglas succeeded “in bringing public sentiment to an exact accordance with his own views” concerning the authoritativeness of Supreme Court decisions and indifference to slavery, “then it needs only the formality of the second Dred Scott decision, which he endorses in advance, to make Slavery alike lawful in all the States—old as well as new, North as well as South.”¹¹⁸

Lincoln continued to press the “second *Dred Scott*” variation on the conspiracy-to-nationalize-slavery theme throughout the debates. As noted above, some historians have doubted whether there was genuinely any “conspiracy” to nationalize slavery.¹¹⁹

Moreover, it can be debated whether *Dred Scott*’s logic truly implied a constitutional right to transport slavery to Northern states, as well as federal territories. The Court’s opinion did not say that in terms, and the (pretextual) textual hook for invalidating the Missouri Compromise prohibition, the Fifth Amendment Due Process Clause, limited federal action, not states.¹²⁰

115 *Id.* at 525.

116 *See id.*

117 *Id.* at 526.

118 *Id.* at 527.

119 *See supra* note 84.

120 *See Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247–48 (1833).

But Lincoln's points were certainly fair. He made clear that he did not personally know of an actual conspiracy, but that he *believed* there was at least a partial agreement, or tacit complicity, in measures designed (by some) to achieve the nationalization of slavery.¹²¹ And his argument that the "logic" of *Dred Scott* (such as it was) could very well be used to support such a result is a strong one. The Court made up its law in *Dred Scott* and could extend its made-up law, or decline to, as it wished—especially if the public could be expected to acquiesce in whatever the Court proclaimed. And if it really were true (as the Court's opinion averred) that the constitutional right to slavery was "distinctly and expressly affirmed" in the Constitution,¹²² then no Northern state's laws could impair that right any more than congressional or territorial legislation could do so.¹²³ Finally, at least one case pending in the state courts of New York presented the question of whether state law could deprive a slave owner traveling through New York of his slave property the moment he set foot on Yankee soil.¹²⁴ It was not in the least farfetched to imagine the United States Supreme Court concluding, on any of a number of grounds, that such a state law violated the constitutional rights of the slave owner.¹²⁵

121 First Lincoln-Douglas Debate, *supra* note 76, at 519 (reply of Mr. Lincoln) ("I do not say that I *know* such a conspiracy to exist. To that, I reply *I believe it*.").

122 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857).

123 See U.S. CONST. art. VI, cl. 2. In the fifth debate, Lincoln would offer this reasonably straightforward syllogism, building from the premises of the Court in *Dred Scott*:

Nothing in the Constitution or laws of any State can destroy a right distinctly and expressly affirmed in the Constitution of the United States. [Lincoln invoked Article VI's Supremacy Clause in support of this proposition.]

The right of property in a slave is distinctly and expressly affirmed in the Constitution of the United States; [Lincoln quoted *Dred Scott* for this proposition.]

Therefore, nothing in the Constitution or laws of any State can destroy the right of property in a slave.

Fifth Lincoln-Douglas Debate, Galesburg, Illinois (Oct. 7, 1858) [hereinafter Fifth Lincoln-Douglas Debate], in LINCOLN 1832–1858, *supra* note 8, at 687, 714 (reply of Mr. Lincoln). For further discussion, see *infra* notes 145–48 and accompanying text.

124 See *Lemmon v. People*, 20 N.Y. 562 (1860).

125 Cf. *id.* at 607–15 (opinion of Denio, J.) (rejecting arguments based upon the Privileges and Immunities and Full Faith and Credit Clauses of Article IV and the Commerce Clause of Article I); *id.* at 625–28 (opinion of Wright, J.) (same). Although the Court's decision in *Dred Scott* did not formally resolve the question presented in *Lemmon*, it is not hard to imagine the *Dred Scott* Court determining that the right to own slaves—protected by the Constitution—was a privilege and immunity entitled to full faith and credit as citizens migrated from Southern to Northern states. See Paulsen, *Worst Constitutional Decision*, *supra* note 2, at 1015 n.51.

Accordingly, in the second debate, at Freeport, Lincoln propounded the following as one of his famous “interrogatories” for Douglas to answer: “If the Supreme Court of the United States shall decide that States can not exclude slavery from their limits, are you in favor of acquiescing in, adopting and following such decision as a rule of political action? [Loud applause.]”¹²⁶

Douglas dodged: “I am amazed that Lincoln should ask such a question,” he responded.¹²⁷ No one would ever pretend to support such an outrageous proposition. Lincoln’s very question, said Douglas,

casts an imputation upon the Supreme Court of the United States by supposing that they would violate the Constitution of the United States. I tell him that such a thing is not possible. (Cheers.) It would be an act of moral treason that no man on the bench could ever descend to.¹²⁸

Lincoln’s rebuttal that day sought to show that the claimed constitutional right was scarcely unimaginable—on the contrary, precisely this position was asserted in the *Washington Union* (known to be the house organ of the Buchanan administration), and Douglas had read this position into the record of congressional debates as an “authoritative” statement of just such views.¹²⁹ The position Douglas had branded treason was very much part of public debate. Lincoln thereby implied that Douglas ought to be expected to answer; the hypothetical was not absurd.

A law professor, of course, might expect a student to answer the hypothetical, regardless of its plausibility, so as to arrive at the relevant point of principle. *What if* the Supreme Court *did* commit the unthinkable, morally treasonous act of issuing a decision violating the Constitution of the United States? Should such a decision be accepted as binding law? (And why is not that hypothetical precisely the situation posed by *Dred Scott*?) Was Douglas’s position that the Supreme Court’s decisions must be accepted no matter what outrageous thing the Court might say or do?

Lincoln was as skilled a cross-examiner as any law professor. His Freeport question is a perfect logical trap for Douglas. Lincoln thought “that the peculiar reasons put forth by Judge Douglas for endorsing this decision, commit him in advance to the next decision,

126 Second Lincoln-Douglas Debate, *supra* note 74, at 542 (speech of Mr. Lincoln).

127 *Id.* at 553 (speech of Mr. Douglas).

128 *Id.* at 554.

129 *See id.* at 577–80 (rejoinder of Mr. Lincoln).

and to all other decisions emanating from the same source” and that the reasoning of *Dred Scott* could prove “equally applicable to the Free States as to the Free Territories.”¹³⁰ If judicial supremacy is the rule, and unthinking acceptance of Supreme Court decisions required, then the Supreme Court very well *could* make slavery national.

Douglas continued to embrace judicial supremacy while evading answering whether this principle would include a second *Dred Scott* decision. In the third debate, at Jonesboro, Douglas gave the following explanation of his position, in terms that sound remarkably like modern academic and judicial arguments for judicial supremacy:

[Lincoln] makes war on the decision of the Supreme Court in the case known as the *Dred Scott* case. I wish to say to you, fellow-citizens, that I have no war to make on that decision, or any other ever rendered by the Supreme Court. *I am content to take that decision as it stands delivered by the highest judicial tribunal on earth, a tribunal established by the Constitution of the United States for that purpose, and hence that decision becomes the law of the land, binding on you, on me, and on every other good citizen, whether we like it or not.* Hence I do not choose to go into an argument to prove, before this audience, whether or not Chief Justice Taney understood the law better than Abraham Lincoln. (Laughter.)¹³¹

130 Abraham Lincoln, Portion of Speech at Edwardsville, Illinois (Sept. 11, 1858), in LINCOLN 1832–1858, *supra* note 8, at 580, 584.

131 Third Lincoln-Douglas Debate, *supra* note 8, at 597–98 (emphasis added) (speech of Mr. Douglas); *see also id.* at 600 (“Judge Taney expressly lays down the doctrine. I receive it as law . . .”). For modern echoes, see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867–68 (1992) (speaking of the Court’s authority to “speak before all others” as to the meaning of the Constitution and the expectation that citizens’ loyalty to the Constitution is “tested by following” the Court’s decisions, notwithstanding disagreement); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (equating the Supreme Court’s decisions with the Constitution itself as “supreme law of the land,” binding on all). The Supreme Court’s modern assertions of judicial supremacy, since *Cooper* first took such a stance, are now commonplace. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”); *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.” (quoting *Miller v. Johnson*, 515 U.S. 900, 922–23 (1995))); *United States v. Nixon*, 418 U.S. 683, 703 (1974) (indicating that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” over and above the interpretations of the executive branch (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (describing the Court as the “ultimate interpreter of the Constitution”).

For academic arguments echoing Douglas at Jonesboro, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (emphasizing the need for judicial supremacy in order to establish authoritative finality in law’s dispute-resolution function); Daniel A. Farber, *Judicial*

Douglas's argument, stripped of its rhetoric, is, first, that the Supreme Court is the "tribunal established" by the Constitution for purposes of deciding the proper interpretation of the document—a textual and structural argument (albeit not an especially strong one);¹³² and second, an implicit argument of superior judicial competence, framed as an *ad hominem* dig at Lincoln, the Illinois country-bumpkin lawyer in contrast to the learned Chief Justice.¹³³ Both arguments find their echoes in modern defenses of judicial supremacy.¹³⁴ What the Lincoln-Douglas debate over *Dred Scott* demonstrates so powerfully, however, is that the Supreme Court's decisions *can* violate the Constitution, exposing the weak intuitive textual claim of judicial supremacy as almost absurdly contrary to every principle of separation of powers and limited, constitutional government bounded by the text of the Constitution. Douglas's laugh line that it is hardly necessary to prove that the Supreme Court understood the law better than poor Abraham Lincoln is also given the lie both by Lincoln's cogent arguments and by the better judgment of history.

Lincoln, somewhat disappointingly, did not pick up on this thread of the argument in the third debate, at Jonesboro, choosing to emphasize other points. This gave Douglas a chance to elaborate on his judicial supremacist position in his rejoinder. Douglas framed his point in the form of questions directed at Lincoln, knowing that under the debate arrangements to which the two men had agreed, Lincoln would not have a chance to speak again until the next debate.

Review and Its Alternatives: An American Tale, 38 WAKE FOREST L. REV. 415, 429–30 (2003) (emphasizing the need for some authoritative decisionmaker and pointing to Article III of the Constitution as strongly suggesting that the Supreme Court is the tribunal established by the Constitution for this purpose).

132 See generally Paulsen, *The Most Dangerous Branch*, *supra* note 6 (addressing at length the textual, structural, historical, and precedential arguments asserted for judicial supremacy).

133 See Third Lincoln-Douglas Debate, *supra* note 8, at 598 (speech of Mr. Douglas).

134 See *supra* note 131. On supposedly superior judicial competence, see Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 389–93 (1994) (critiquing the "comparative competence" suggestion); see also Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 916 (1990) (criticizing the notion that the judiciary consists of more competent constitutional interpreters). For a particularly amusing, and uncommonly insightful, criticism of the "superior competence" argument, see Gary Lawson, *Interpretive Equality as a Structural Imperative (or "Pucker Up and Settle This!")*, 20 CONST. COMMENT. 379, 381 n.10, 383–84 (2003) ("The best candidate for supreme interpreter is, obviously, me. The second best candidate is probably Mike Paulsen . . .").

Again, Douglas's position merits quotation at length, for it closely tracks modern arguments for judicial supremacy:

I want to know whether [Lincoln] is not bound to a decision which is contrary to his opinions just as much as to one in accordance with his opinions. (Certainly.) If the decision of the Supreme Court, the tribunal created by the constitution to decide the question, is final and binding, is he not bound by it just as strongly as if he was for it instead of against it originally. Is every man in this land allowed to resist decisions he does not like, and only support those that meet his approval? What are important courts worth unless their decisions are binding on all good citizens? It is the fundamental principles of the judiciary that its decisions are final. It is created for that purpose so that when you cannot agree among yourselves on a disputed point you appeal to the judicial tribunal which steps in and decides for you, and that decision is then binding on every good citizen. It is the law of the land just as much with Mr. Lincoln against it as for it. . . . I am willing to take the decision of the Supreme Court as it was pronounced by that august tribunal without stopping to inquire whether I would have decided that way or not. I have had many a decision made against me on questions of law which I did not like, but I was bound by them just as much as if I had had a hand in making them, and approved them.¹³⁵

135 Third Lincoln-Douglas Debate, *supra* note 8, at 633–34 (rejoinder of Mr. Douglas). Douglas scored a good debater's turnaround on Lincoln on this point. Much of Lincoln's speech had been directed at urging that Douglas's commitment to *Dred Scott* logically required him, by virtue of his oath, not only to deny the validity of local territorial legislation interfering with slavery but also to support *federal* legislation effectuating the constitutional right to slavery in the territories. *See id.* at 619–20 (reply of Mr. Lincoln) ("What do you understand by supporting the Constitution of a State or of the United States? Is it not to give such constitutional helps to the rights established by that Constitution as may be practically needed? Can you, if you swear to support the Constitution, and believe that the Constitution establishes a right, clear your oath, without giving it support? . . . How could you, having sworn to support the Constitution, and believing it guaranteed the right to hold slaves in the Territories, assist in legislation *intended to defeat that right*? That would be violating your own view of the constitution. . . . Lastly I would ask—is not Congress, itself, under obligation to give legislative support to any right that is established under the United States Constitution? . . . A member of Congress swears to support the Constitution of the United States, and if he sees a right established by that Constitution which needs specific legislative protection, can he clear his oath without giving that protection?").

Yet Lincoln's artfully drawn line with respect to the authority of *Dred Scott*—that it was law for the case (but not law for the land) and that a "mob" could not by force rightfully overturn the Court's judgment with respect to Scott's slave status—ran into somewhat the same difficulty. Said Douglas:

Well if you (turning to Mr. Lincoln) are not going to resist the decision, if you obey it, and do not intend to array mob law against the constituted

In this passage, Douglas made unambiguously explicit the claim of judicial supremacy: “It is the fundamental principles of the judiciary that its decisions are final.”¹³⁶ To the arguments made in his opening speech—the suggestion that the Constitution’s text and structure anoint the judiciary as the final interpreter; the assertion of superior interpretive competence on the part of the courts; and the necessity of unquestioned finality in order to serve the function of resolving disputes—Douglas added two related hobgoblins: first, the specter of chaos if decisions are not final;¹³⁷ and second, the fear that anything other than unthinking acceptance of the Court’s decisions would render the judiciary useless.¹³⁸

Considered as a whole, these arguments are not bad, but there are ready responses to them. The idea that judicial decisions might legitimately be resisted by the political branches is not an invitation to “chaos.”¹³⁹ Rather, it can be seen as a logical, even desirable, consequence of the separation of powers and attendant checks and balances, applied to the *shared* incidental power of constitutional interpretation.¹⁴⁰ Nor does this make the judiciary a useless branch; quite the contrary, it only means that the judiciary is not ultimately an all-powerful branch.¹⁴¹ It means that judicial decisions are check-

authorities, then, according to your own statement, you will be a perjured man if you do not vote to establish slavery in these territories.

Id. at 633 (rejoinder of Mr. Douglas). As I discuss in Part IV, Lincoln’s position that the Court’s judgment in the specific case must be obeyed and enforced, but that its constitutional interpretation need not be followed by political actors in their subsequent actions in other individual cases, tends to collapse in practice (and did for Lincoln, upon becoming President). See Paulsen, *The Merryman Power*, *supra* note 6, at 98–99; *infra* Part IV.

136 Third Lincoln-Douglas Debate, *supra* note 8, at 633 (rejoinder of Mr. Douglas).

137 See *id.* (“Is every man in this land allowed to resist decisions he does not like, and only support those that meet his approval?”).

138 See *id.* (“What are important courts worth unless their decisions are binding on all good citizens?”). Again, modern echoes of Douglas are plentiful. On “chaos,” see Easterbrook, *supra* note 134, at 918 (“Tension and enduring disagreement are not chaos.”); Paulsen, *Irrepressible Myth*, *supra* note 6, at 2738–39 (distinguishing chaos from “a decentralized approach to constitutional interpretation”). For an argument that if the judiciary’s decisions are not binding on all other political actors the judiciary is a useless cipher, see Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 *CARDOZO L. REV.* 43, 71 (1993). For a response, see Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 300–03.

139 See Easterbrook, *supra* note 134, at 918; Paulsen, *Irrepressible Myth*, *supra* note 6, at 2738–39.

140 See Paulsen, *Irrepressible Myth*, *supra* note 6, at 2738–39; Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 321–31.

141 See *supra* note 138.

able—a vision far more consonant with separation of powers and constitutional supremacy than is the idea of complete judicial supremacy over the Constitution. It is also consistent with the Framers' observation that the judiciary's powers would in fact be the "least dangerous" of any branch¹⁴²—observations that make no sense at all under a view of complete judicial supremacy.

Lincoln's refutation of Douglas's contention was an inspired rhetorical variation on this theme: he sought to illustrate the absurdity of a requirement of absolute acceptance of judicial decisions *no matter what* by demonstrating the logical consequence of such a stance. And so he returned, finally, in the fifth debate, at Galesburg, to his third interrogatory at Freeport: "If the Supreme Court of the United States shall decide that the States cannot exclude slavery from their limits, are you in favor of acquiescing in, adhering to and following such decision, as a rule of political action?"¹⁴³ Lincoln noted that Douglas's only response, in three debates, had been to "sneer" at the question.¹⁴⁴ It was here, in the fifth debate, that Lincoln set forth his famous syllogism in support of the plausibility of the Supreme Court reaching precisely such a conclusion.¹⁴⁵ Major premise (from the Supremacy Clause of the Constitution): "Nothing in the Constitution or laws of any State can destroy a right distinctly and expressly affirmed in the Constitution of the United States."¹⁴⁶ Minor premise (from the Court's decision in *Dred Scott*): "The right of property in a slave is distinctly and expressly affirmed in the Constitution of the United States."¹⁴⁷ Conclusion: "Therefore, nothing in the Constitution or laws of any State can destroy the right of property in a slave."¹⁴⁸

Lincoln then confronted Douglas's judicial supremacy argument directly and denied it emphatically. Charging Douglas with "preparing the public mind for that new *Dred Scott* decision," Lincoln repeated his demand of Douglas for "the reasons for his firm adher-

142 See Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 219.

143 Fifth Lincoln-Douglas Debate, *supra* note 123, at 713 (reply of Mr. Lincoln) (quoting Second Lincoln-Douglas Debate, *supra* note 74, at 542 (speech of Mr. Lincoln)).

144 See *id.*; Second Lincoln-Douglas Debate, *supra* note 74, at 553–54 (reply of Mr. Douglas); *supra* notes 126–28 and accompanying text.

145 See Fifth Lincoln-Douglas Debate, *supra* note 123, at 714–15 (reply of Mr. Lincoln); see also *supra* note 123.

146 Fifth Lincoln-Douglas Debate, *supra* note 123, at 714 (reply of Mr. Lincoln).

147 *Id.*

148 *Id.*

ence to the Dred Scott decision as it is."¹⁴⁹ Drawing on what had by this time become stock arguments, Lincoln continued:

I have turned his attention to the fact that General Jackson differed with him in regard to the political obligation of a Supreme Court decision. I have asked his attention to the fact Jefferson differed with him in regard to the political obligation of a Supreme Court decision. Jefferson said, that "Judges are as honest as other men, and not more so." And he said, substantially, that "whenever a free people should give up in absolute submission to any department of government, retaining for themselves no appeal from it, their liberties were gone." . . .

So far in this controversy I can get no answer at all from Judge Douglas upon these subjects. Not one can I get from him, except that he swells himself up and says, "All of us who stand by the decision of the Supreme Court are the friends of the Constitution; all you fellows that dare question it in any way, are the enemies of the Constitution." [Continued laughter and cheers.] . . . And the manner in which he adheres to it—not as being right upon the merits, as he conceives (because he did not discuss that at all), but as being absolutely obligatory upon every one simply because of the source from whence it comes—as that which no man can gainsay, whatever it may be,—this is another marked feature of his adherence to that decision. It marks it in this respect, that it commits him to the next decision, whenever it comes, as being as obligatory as this one, since he does not investigate it, and won't inquire whether this opinion is right or wrong. So he takes the next one without inquiring whether *it* is right or wrong. [Applause.] He teaches men this doctrine, and in so doing prepares the public mind to take the next decision when it comes, without any inquiry. In this I think I argue fairly . . . that Judge Douglas is most ingeniously and powerfully preparing the public mind to take that decision when it comes . . .¹⁵⁰

Lincoln thus mocked the idea that the Supreme Court necessarily spoke, correctly, for the Constitution. With Jefferson, he regarded the idea of "absolute submission" to the Court as giving up the people's liberties—a theme he would develop, deliberately but carefully, in his First Inaugural.¹⁵¹ And Lincoln pointed directly to what he feared would be given up almost immediately: the right of Northern states to exclude slavery from their soil. Lincoln, unquestionably, stood opposed to "this doctrine" of judicial supremacy, which Douglas was

149 *Id.* at 715.

150 *Id.* at 715–17. Lincoln's paraphrase of Jefferson appears to derive from Jefferson's letter to William Charles Jarvis, which Lincoln had read aloud in his speech at Springfield, before the formal debates. See *supra* note 102 and accompanying text.

151 See *infra* Part IV.A.

using to prepare the public to accept the judicial nationalization of slavery.

Douglas's rejoinder at Galesburg again denied the validity of the hypothetical, again accused Lincoln of attempting "to bring the Supreme Court into disrepute among the people,"¹⁵² and argued that Lincoln's position would take an "appeal from the Supreme Court of the United States to every town meeting in the hope that he can excite a prejudice against that court, and on the wave of that prejudice ride into the Senate of the United States, when he could not get there on his own principles, or his own merits."¹⁵³

Douglas then offered a sound distinction between Jackson's veto of the bank bill (notwithstanding *McCulloch*) and Lincoln's refusal to be bound by *Dred Scott*.¹⁵⁴ Jackson did not refuse to enforce a judicial decision; he simply declined to agree to the bank's reauthorization, based on his different assessment of the constitutional propriety of using a means he thought not truly "necessary and proper."¹⁵⁵ Jackson thus used his different constitutional assessment as a shield, not as a sword. "Is Congress bound to pass every act that is constitutional?" Douglas asked.¹⁵⁶ Lincoln's defiance was different: "And because General Jackson would not do a thing which he had a right to do, but did not deem expedient or proper, Mr. Lincoln is going to justify himself in doing that which he has no right to do. (Laughter.)"¹⁵⁷ Douglas then reiterated his arguments that the Supreme Court was empowered to decide "all constitutional questions in the last resort, and when such decisions have been made, they become the law of the land, . . . and you, and he, and myself, and every other good citizen are bound by them."¹⁵⁸

By the last two debates, the argument over the authoritativeness of the Supreme Court's decision in *Dred Scott*, and the authoritativeness of a hypothetical second *Dred Scott* case, was familiar and thoroughly played out. At Quincy, Lincoln repeated his stance that he opposed *Dred Scott* as a rule of political action, but that it would be

152 Fifth Lincoln-Douglas Debate, *supra* note 123, at 727 (rejoinder of Mr. Douglas).

153 *Id.* at 728.

154 *See id.* at 728-29.

155 *See id.*

156 *Id.* at 728.

157 *See id.* at 728-29.

158 *Id.* at 729; *see supra* note 93 and accompanying text.

improper to interfere with the execution of the judgment itself.¹⁵⁹ He also repeated his charge of Douglas's inconsistency on this point, given his own prior stance against the Bank and his own appointment to the Illinois Supreme Court to reverse an earlier decision.¹⁶⁰

Douglas likewise repeated his position that the Supreme Court's decisions were final and binding on everyone, whether one agreed with them or not. "The Dred Scott decision was pronounced by the highest tribunal on earth," Douglas put it.¹⁶¹ "From that decision there is no appeal this side of Heaven. . . . It is not for me to inquire after a decision is made whether I like it in all the points or not."¹⁶² Rather, it was "the duty of every law-abiding man" to "take the decisions of the Supreme Court as the law of the land" and "to obey them as such."¹⁶³ Douglas then added, rather dramatically, that anything less than complete, unquestioning acceptance of the Supreme Court's decisions was an attempt to stir up "rebellion in the country against the constituted authorities" and to instigate "resort to violence and to mobs instead of to the law."¹⁶⁴ And as to Lincoln's charge that this committed Douglas to accepting a second *Dred Scott* decision, Douglas held to his response that it was inconceivable that the Supreme Court could "degrade itself so low as to make a decision known to be in direct violation of the constitution."¹⁶⁵

159 See Sixth Lincoln-Douglas Debate, Quincy, Illinois (Oct. 13, 1858) [hereinafter Sixth Lincoln-Douglas Debate], in LINCOLN 1832-1858, *supra* note 8, at 730, 741 (speech of Mr. Lincoln).

160 See *id.* at 767-68 (rejoinder of Mr. Lincoln). Lincoln argued that Douglas's appointment to the Illinois Supreme Court had resulted from a concerted political effort to have a particular decision of that court overruled. See *id.*

161 *Id.* at 754 (reply of Mr. Douglas).

162 *Id.* at 754-55.

163 *Id.* at 755.

164 *Id.*

165 *Id.* This provoked a comment from a member of the crowd: "A VOICE.—The same thing was said about the Dred Scott decision before it passed." *Id.* Touché! See *supra* note 84 and accompanying text (noting that the prospect of a second *Dred Scott* decision was hardly unimaginable). Douglas repeated the heckler's charge, and began to answer in the form of defending the correctness of the *Dred Scott* decision and its consistency with earlier decisions, see Sixth Lincoln-Douglas Debate, *supra* note 159, at 755-56 (reply of Mr. Douglas) ("[T]he Dred Scott decision on that point [Negro citizenship] only affirmed what every court in the land knew to be the law"), before he caught himself: "But, I will not be drawn off into an argument upon the merits of the Dred Scott decision," *id.* at 756. He then returned to his standard of unquestioning acceptance of Supreme Court decisions without acknowledging that such a view *did* in principle commit him to acceptance even of decisions he might regard as ridiculous or "in direct violation of the constitution." *Id.* at 755; see also *id.* at 756 ("It is enough for me to know that the Constitution of the United States created the Supreme Court for the purpose of deciding all disputed questions touching

The seventh and final debate, at Alton on October 15, 1858, was one of the best, for its discussions of slavery, the Declaration of Independence, Douglas's conflict with the Buchanan administration, and the specifics of Lincoln's precise position on all these points. The binding force of Supreme Court decisions received only glancing mention by Lincoln, but it is an intriguing glance. Building on Douglas's awkward, disingenuous, "Freeport doctrine" insistence that territories remained free to pass legislation unfriendly to slavery;¹⁶⁶ and adding to his own argument at Jonesboro that if Douglas accepted *Dred Scott*, it was then a violation of his constitutional oath of office to refuse to support legislation protecting the right of slavery in the territories, Lincoln clinched the point at Alton in a way that clearly repudiates any binding, prospective force to Supreme Court decisions on disputed constitutional questions:

I do not believe it is a constitutional right to hold slaves in a Territory of the United States. I believe the decision was improperly made and I go for reversing it. Judge Douglas is furious against those who go for reversing a decision. But he is for legislating it out of all force while the law itself stands. I repeat that there has never been so monstrous a doctrine uttered from the mouth of a respectable man. [Loud cheers.]

. . . And if I believed that the right to hold a slave in a Territory was equally fixed in the Constitution with the right to reclaim fugitives, I should be bound to give it the legislation necessary to support it. I say that no man can deny his obligation to give the necessary legislation to support slavery in a Territory, who believes it is a constitutional right to have it there. . . . I defy anybody to go before a body of men whose minds are educated to estimating evidence and reasoning, and show that there is an iota of difference between the constitutional right to reclaim a fugitive, and the constitutional right to hold a slave, in a Territory, provided this *Dred Scott* decision is correct. [Cheers.] I defy any man to make an argument that will justify unfriendly legislation to deprive a slaveholder of his right to hold his slave in a Territory, that will not equally, in all its length, breadth and thickness furnish an argument for nullifying the fugitive slave law. Why there is not such an Abolitionist in the nation as Douglas, after all. [Loud and enthusiastic applause.]¹⁶⁷

the true construction of that instrument, and when such decisions are pronounced, they are the law of the land, binding on every good citizen.”).

166 See *supra* note 74.

167 Seventh Lincoln-Douglas Debate, *supra* note 75, at 812-15 (reply of Mr. Lincoln).

Douglas was in a pickle. He could save his cherished “popular sovereignty” only by chiseling on *Dred Scott*; and he could only truly embrace judicial supremacy if he gave up popular sovereignty. His mugwump position was the worst of both worlds. As Lincoln skillfully pointed out, if *Dred Scott* was binding, it legally entitled slave owners to their constitutional rights to slavery in the territories and Douglas’s Freeport doctrine, tolerating unfriendly territorial legislation, was utterly unprincipled. (It *was* unprincipled; Southerners could see it too, and this fact contributed to Douglas’s undoing in the Democratic presidential contest of 1860.)¹⁶⁸ Douglas, trapped, ended the debates on a low note. Avoiding any response on *Dred Scott*, Douglas resorted to terrible ad hominem slanders against Lincoln, accusing Lincoln—because of his criticism of the Mexican War while a congressman—of “tak[ing] sides with the common enemy against his own country in time of war.”¹⁶⁹ The smears were all the worse because, Douglas speaking last, Lincoln did not have the opportunity to address them in the debate.

Lincoln was not similarly in a *Dred Scott* dilemma, because he denied that Supreme Court decisions authoritatively determine the law of the Constitution. One can see, through the course of the Lincoln-Douglas debates, a steady sharpening and hardening of Lincoln’s position against the authority of Supreme Court decisions. The tone and tenor of Lincoln’s opposition intensified by the end of Lincoln’s unsuccessful (at least in its immediate objective) 1858 United States Senate campaign.¹⁷⁰ What began in 1857 as a position that judicial decisions are final as to the parties, but only politically final once fully settled by a course of decisions became, by steps, a charge of a sinister judicial conspiracy, a denial of any authority of the Court to bind political actors by erroneous decisions, and a call to “overthrow” the political dynasty of which the Court was a part through electoral repudiation of its decisions.¹⁷¹ He enlisted Jackson in his cause, and pushed him a step further.¹⁷² He then enlisted Jefferson as well, increasingly adopting the stronger Jeffersonian ground that not merely denied judicial

168 See *supra* note 74 and accompanying text.

169 Seventh Lincoln-Douglas Debate, *supra* note 75, at 816 (reply of Mr. Douglas). Douglas also falsely accused Lincoln of selling out Henry Clay in Whig presidential politics of 1849. See *id.* at 817.

170 See DONALD, *supra* note 23, at 227–29 (recounting the results of the 1858 election). Historians appear agreed that Lincoln probably won the popular vote and, but for the malapportionment of the Illinois legislature, would have been elected to the Senate. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 410–11 (2005).

171 See *supra* notes 87–96 and accompanying text.

172 See *supra* notes 57–68 and accompanying text.

supremacy *until* Court rulings became accepted but that denied judicial supremacy over the political branches, period.¹⁷³ By the end of the debates, Lincoln had developed the logical argument that if a judicial decision was right, it was constitutionally obligatory for political officials to support its general enforcement—a position somewhat in tension with his earlier line that judicial decisions are binding in the particular case decided but not of controlling prospective force.

Perhaps Lincoln, driven by the logic of his own indictment (or by his rhetorical blows against Douglas), was gradually beginning to see the analytic problem with the concession that a wrong decision could bind executive officers and the public to its *current* enforcement in the specific case, if it could not bind executive and legislative officers as to its *prospective* enforcement in like cases. At any rate, the line Lincoln drew in 1857 and early 1858 became the line he erased in 1861.

III. 1860: CANDIDATE AND PRESIDENT-ELECT LINCOLN AND THE IRE OF THE SOUTH

The story of Lincoln's rise to the presidency is a familiar one. The debates with Douglas propelled Lincoln to national notice in Republican circles. He became Illinois's favorite-son candidate for the presidential nomination, and won at the convention in Chicago over better known antislavery politicians William H. Seward (of New York) and Salmon P. Chase (of Ohio), who were perceived to be more radical in their antislavery politics.¹⁷⁴

Lincoln's anti-judicial supremacy, anti-*Dred Scott* stance, so thoroughly explicated in the 1858 Senate campaign, was well known. The debates with Douglas had been distributed nationally in newspaper, pamphlet, and book form.¹⁷⁵ In part for this reason, and in part because it was more the custom for men to "stand" for the presidency rather than campaign overtly,¹⁷⁶ there is little new material from Lincoln during the election campaign of 1860. What there is confirms the anti-judicial supremacy position he stated throughout the debates with Douglas.

If anything was new, it was the emerging Southern consensus that a stance like Lincoln's, disputing the binding authority of *Dred Scott*, was a violation of the Constitution and of Southern constitutional rights—a grave breach of the constitutional compact, justifying the

173 See *supra* notes 100–06 and accompanying text.

174 For excellent renderings of the familiar story, see DORIS KEARNS GOODWIN, *TEAM OF RIVALS* 200–56 (2005); MCPHERSON, *supra* note 64, at 179–89, 213–33.

175 See HAROLD HOLZER, *LINCOLN AT COOPER UNION* 44–45 (2004).

176 See *id.*

conclusion that the bargain was at an end. This was the Douglas position put into action. The violation of the right demanded a remedy, and the remedy for so grave a violation was secession from a pledged anticonstitutional administration.

The most prominent “campaign” speech by Lincoln during this period, his notable address at Cooper Union in New York City in February 1860, responded to this already nascent, developing line of attack from Southerners. In language presaging his First Inaugural, Lincoln addressed “a few words to the Southern people” on this point (and others):

But you will break up the Union rather than submit to a denial of your Constitutional rights.

That has a somewhat reckless sound; but it would be palliated, if not fully justified, were we proposing, by the mere force of numbers, to deprive you of some right, plainly written down in the Constitution. But we are proposing no such thing.

When you make these declarations, you have a specific and well-understood allusion to an assumed Constitutional right of yours, to take slaves into the federal territories, and to hold them there as property. But no such right is specifically written in the Constitution. That instrument is literally silent about any such right. We, on the contrary, deny that such a right has any existence in the Constitution, even by implication.

Your purpose, then, plainly stated, is, that you will destroy the Government, unless you be allowed to construe and enforce the Constitution as you please, on all points in dispute between you and us. You will rule or ruin in all events.¹⁷⁷

The absence of any “right, plainly written down in the Constitution”—the emphasis on textual silence—would return, just over a year later, in Lincoln’s First Inaugural: “Is it true, then, that any right, plainly written in the Constitution, has been denied?”¹⁷⁸ And again, just as Lincoln emphasized at Cooper Union, he likewise said in the First Inaugural: “If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. But such is not our case.”¹⁷⁹

At Cooper Union, Lincoln clearly marked this line of distinction between the *written Constitution, as properly interpreted*, and an *erroneous*

177 Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860) [hereinafter Lincoln, Address at Cooper Institute], in LINCOLN 1859–1865, *supra* note 68, at 111, 125–26.

178 Lincoln, First Inaugural Address, *supra* note 68, at 219.

179 *Id.*

decision of the Supreme Court, in terms of the legitimacy of any claim that Republicans were disloyal to the Constitution itself. Indeed, the whole burden of the first half of the long Cooper Union address was devoted to proving, systematically, that the Court's interpretation in *Dred Scott* did not comport with the original understanding of the framing generation concerning the constitutional power of the national government to limit or prohibit slavery in federal territories.¹⁸⁰ The Constitution, properly construed, did not make the Missouri Compromise unconstitutional. The Supreme Court's decision was wrong. Lincoln's position, not the Court's, was the one consistent with the intent of "our fathers," from Washington on, until days of late.¹⁸¹

Lincoln then turned to the authoritativeness, of lack thereof, of the *Dred Scott* decision. He acknowledged that the Court had ruled in favor of the Southern position, but soft-pedaled its authority, suggesting (all in one brisk paragraph) that it was dictum, made by a divided Court, subject to conflicting interpretations, and—the truest point, but the most sweeping one—mistaken on the merits:

Perhaps you will say the Supreme Court has decided the disputed Constitutional question in your favor. Not quite so. But waiving the lawyer's distinction between dictum and decision, the Court have decided the question for you in a sort of way. The Court have substantially said, it is your Constitutional right to take slaves into the federal territories, and to hold them there as property. When I say the decision was made in a sort of way, I mean it was made in a divided Court, by a bare majority of the Judges, and they not quite agreeing with one another in the reasons for making it; that it is so made as that its avowed supporters disagree with one another about its meaning, and that it was mainly based upon a mistaken statement of fact—the statement in the opinion that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."¹⁸²

Lincoln then proceeded to argue that the alleged right was not in fact "distinctly and expressly affirmed" by the Constitution. Thus, Lincoln asked rhetorically: "When this obvious mistake of the Judges shall be brought to their notice, is it not reasonable to expect that they will withdraw the mistaken statement, and reconsider the conclusion based upon it?"¹⁸³

180 See Lincoln, Address at Cooper Institute, *supra* note 177, at 111–20.

181 See *id.* at 119–20.

182 *Id.* at 126 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857)).

183 *Id.* at 127.

As an argument against the prospective force of *Dred Scott* as the governing judicial interpretation of the law, Lincoln was preaching to a Northern choir.¹⁸⁴ Northerners, persuaded of *Dred Scott's* wrongness, might *wish* that a reasonable Court would reconsider its own plain error. Many could express such a fervent hope, and perhaps even cast it as a reasonable expectation. But the real rhetorical appeal of the suggestion, to a sympathetic audience, was not in the expectation that the Court, as constituted, would take any such step; the appeal of the argument was its suggestion of the propriety of not acquiescing in the decision, with the hope of having it overruled eventually by changing the political composition of the Court.¹⁸⁵

There is no reason, however, to think that *Southerners* would find it “reasonable to expect” that the Court would reconsider and reverse its expressed view in *Dred Scott* and decide the issue the other way, let alone that it *should* do so. Quite the contrary, prominent Southern politicians thought the decision was right, that they had won the constitutional debate fair and square, and that it was now the duty of all fair-minded political actors and officials to obey and implement the constitutional holdings of the *Dred Scott* case.¹⁸⁶ Anything less was a breach of constitutional faith. To Lincoln’s further rhetorical question, supposedly directed to the people of the South—“do you really feel yourselves justified to break up this Government, unless such a court decision as yours is, shall be at once submitted to as a conclusive and final rule of political action?”¹⁸⁷—many of the prominent politi-

184 See HOLZER, *supra* note 175, at 132 (noting how Lincoln’s words, though in form directed at the South, were really “an elaborate attempt to ingratiate himself with his Northern audiences by rallying them around rational, unifying sentiments that the South *should* entertain if only they were only reasonable on the issue of slavery, and believed what the ‘fathers’ really intended”).

185 Senator William H. Seward, a leading contender for the Republican nomination for President and the man who later would become Lincoln’s Secretary of State, expressed the anticipated method for having the Supreme Court reconsider and overrule its decision, in 1858: “[W]e shall reorganize the court, and thus reform its political sentiments and practices,” he said. FEHRENBACHER, *supra* note 2, at 454 (quoting CONG. GLOBE, 35th Cong., 1st Sess. 943 (1858)). The means of accomplishing this would be “to take the government out of unjust and unfaithful hands, and commit it to those which will be just and faithful.” *Id.* As Fehrenbacher summed it up: “[T]he Republican remedy for the *Dred Scott* decision was to win the election of 1860, change the personnel of the Court, and have the decision reversed.” *Id.* As shown above, this is consistent with Lincoln’s 1858 statements in the Lincoln-Douglas debates, both that Republicans would seek to have the decision overruled and that he expected the decision would not be sustained if the Democratic Party supporting it was not sustained in the elections. See *supra* notes 86–95 and accompanying text.

186 See *infra* text accompanying notes 192–213.

187 Lincoln, Address at Cooper Institute, *supra* note 177, at 127.

cal men of the South would answer, emphatically, *yes*. Indeed, that threat already existed at the time Lincoln spoke at Cooper Union, nearly eight months before the election. Lincoln recognized as much: “But you will not abide the election of a Republican president!”¹⁸⁸

Indeed, they would not—and did not. Lincoln, the surprise Republican presidential nominee at Chicago, then benefited from a split in the national Democratic Party and won the presidential election with a sweep of the northern tier of states and virtually no votes south of the Mason-Dixon line.¹⁸⁹ The election of Lincoln was the trigger for secession. On November 10, 1860—just four days after the election—the South Carolina legislature called for a state convention to consider secession.¹⁹⁰ Within a month, every state in the deep south had started down the road to secession.¹⁹¹

To many Southerners, the fact that Lincoln was an antislavery Republican was itself sufficient provocation—an outrage upon Southern rights and dignity, and a dagger pointed at their very lives. Others, more concerned to cast secession in *constitutional* terms, found in Lincoln’s anti-judicial supremacy, anti-*Dred Scott* stance the legal justification for invoking the supposed Jeffersonian-Calhounian power of each state to judge that the constitutional compact had been violated by the national government, and to choose an appropriate remedy.¹⁹² Thus, in the long secession winter from Lincoln’s election in November 1860 to his inauguration in March 1861, one of the interesting props of the Southern argument for the legal propriety of secession was the illegitimacy of Lincoln’s stance on the constitutional authority of *Dred Scott*.¹⁹³

It would be a mistake to emphasize too greatly the role of high (and low) constitutional theory in the Southern argument for the

188 *Id.*

189 *See* DONALD, *supra* note 23, at 255–56.

190 *See id.* at 257.

191 *See id.* For a history of the Southern states’ preinauguration secession, see generally *id.* at 257–67; MCPHERSON, *supra* note 64, at 234–46.

192 For outstanding treatments of the various Southern constitutional theories underlying the ideas of interposition, nullification, and secession, see DANIEL FARBER, *LINCOLN’S CONSTITUTION* 57–91 (2003); WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR* (1st Harper Torchbook ed. 1968); 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776–1854* (1990); *see also* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM 1829–1861*, at 228–237 (2005) (discussing the constitutional arguments for and against the validity of secession, and siding with the latter position).

193 It was certainly enough of a factor that Lincoln felt compelled to respond to the point at some length in his First Inaugural, as we shall see presently. *See infra* Part IV.A.

validity of secession. The argument for secession was always a mixture of political rhetoric, claims to the right of self-government (in the tradition of the Declaration of Independence), purported moral outrage at the North for real and imagined grievances, and high-flown constitutional argument. Moreover, where Southern political men discussed violations of their “rights,” they did not always distinguish carefully among their claimed political rights, natural law moral rights, and legal constitutional rights; the arguments often interwove these strands.¹⁹⁴ But there is enough of explicitly constitutional argument to make clear that a substantial part of the South’s justification for secession was the claim that the North, by the election of Lincoln, had violated—or soon would—the constitutional compact.¹⁹⁵ And part of that alleged violation was Lincoln’s refusal to accept the Supreme Court’s resolution of the constitutional issues decided in *Dred Scott*.

Consider, for example, the Christmas Eve 1860 congressional speech of Senator Nicholson of Tennessee and the New Year’s Eve 1860 farewell speech of Senator Benjamin of Louisiana. Both speeches invoked the authority of the Supreme Court to resolve—finally, in a binding fashion on the entire nation and upon all political authorities—constitutional controversies that arose within the Court’s jurisdiction. Both speeches also cited the Republicans’ (including the President-elect’s) refusal to accept this fundamental principle as a grave breach of the Constitution, triggering the right of the states to act in response to such violation in ways they judged appropriate.

Hear Senator Nicholson:

This [Republican] party promises us, as the inducement to our repose, that our rights of property in slaves shall not be interfered with in the States, *because* the Constitution recognizes those rights. But *they refuse to extend that promise to our rights of property in slaves outside of the States, although, upon the authority of the high judicial tribunal of the country for deciding constitutional questions, we have exactly the same rights outside of the States, within the jurisdiction of the Federal Government, as the owners of any other species of property have. They concede our rights in the one case, because they are expressly recognized by the Constitution; they deny them in the other, and in so doing, repudiate the authoritative adjudication of the Supreme Court.*

....

194 McPHERSON, *supra* note 64, at 239–46.

195 *See id.* at 245 (noting how the Southern argument fit the description of “pre-emptive counterrevolution”).

. . . It was to secure repose that the South sought for years, and with earnestness, to secure the recognition of congressional non-intervention as the established policy of the country. *Although this principle has been declared by the Supreme Court to be the true intent and meaning of the Constitution, we have failed to secure repose, because the Republican party repudiated that solemn adjudication, and resolved to continue the agitation of the question until its reversal could be secured.*¹⁹⁶

Because of the Republicans' repudiation of the Supreme Court's adjudicated interpretation of the Constitution, the South could not rest assured of its constitutional rights, Nicholson argued. "We can never have repose until the right to hold slaves as other property is placed beyond discussion and agitation. This can only be accomplished by an express constitutional recognition of that right."¹⁹⁷ This, in turn, required the Republicans to repudiate their own platform, as a condition of the Southern states remaining in the Union; anything less would remain a violation of the Constitution as declared by the Supreme Court, and as understood by the slaveholding South.

It is for that reason that the South now demands this express recognition as a necessary condition to a final and satisfactory settlement of the issue between the North and the South, and to the preservation and perpetuation of the Federal Union.

. . . No State in the Confederacy has been more conservative in its sentiments or more earnestly attached to the Federal Union than that which I represent in part. To a just, constitutional Union that attachment is as ardent and as earnest to-day as it ever was. But the late election has been followed by the wide-spread conviction that the principles on which the Republican party triumphed are incompatible with the continued existence of a just, constitutional Union; and hence, in my judgment, the sentiment that is predominant in that State is, that new guarantees for the future, to be ingrafted on the Constitution, and to be unalterable, explicitly recognizing, among others, the principles as to the rights of property in slaves announced by the Supreme Court, in the late Dred Scott case, as the supreme law of the land, must be obtained, or that a sacred regard for the constitutional rights of her people will impel a majority of them to demand a severance of her connection with a Union which will then have ceased to be entitled to their allegiance.¹⁹⁸

To similar effect, Senator Benjamin argued that the Republicans' stance violated the South's constitutional rights as determined by the

196 CONG. GLOBE, 36th Cong., 2d Sess. 187 (1860) (statement of Sen. Nicholson) (emphases added).

197 *Id.*

198 *Id.* at 187-88.

Supreme Court. To telescope Senator's Benjamin's lengthy address: Benjamin argued that secession, as already declared by South Carolina—several other states, including Benjamin's own Louisiana, would follow quickly—was *not* revolution. It was a “right inherent in her under the very principles of the Constitution” as an appropriate remedy for a “clear, palpable” violation of the Constitution, Benjamin maintained, echoing Madison and Jefferson in the Virginia and Kentucky resolutions condemning the Alien and Sedition acts of 1798.¹⁹⁹ Where a matter was susceptible of judicial resolution, the Supreme Court's resolutions were final and binding on all.²⁰⁰ Thus was the case with the Supreme Court's *Dred Scott* opinion concerning the constitutional right to slave property in all federal territories, Benjamin explained.²⁰¹ For the incoming administration to deny that right, and seek to frustrate it, was no different in principle from a hypothetical action of Congress refusing to seat South Carolina's senators.²⁰² If such a violation were one not susceptible of judicial resolution—a political question, in today's parlance—it would fall to the state in question to judge as to the violation of its rights and the appropriate remedy, including withdrawal.²⁰³ And, Benjamin concluded, the same reasoning applied to Lincoln's and the Republicans' refusal to abide the determination of the Court in *Dred Scott*.

Hear Senator Benjamin in his own words on these points:

One State may allege that the compact has been broken, and others may deny it: who is to judge? When pecuniary interests are involved [read: the right of property in slaves], so that a case can be brought up before courts of justice, the Constitution has provided a remedy within itself. . . . [I]t has provided for a supreme judiciary to determine cases arising in law or equity which may involve the construction of the Constitution

199 *Id.* at 214 (statement of Sen. Benjamin). The Virginia and Kentucky Resolutions, including Jefferson's original “nullification” draft, the answers of several other states' legislatures, and Madison's “Report of 1800” for the Virginia legislature are reprinted in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528–80 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891). For a brief analysis of the constitutional arguments for independent state power to interpret the Constitution and resist perceived federal violations, see Paulsen, *Irrepressible Myth*, *supra* note 6, at 2734–38; Paulsen, *The Civil War as Constitutional Interpretation*, *supra* note 6, at 707–15.

200 *See* *CONG. GLOBE*, 36th Cong., 2d Sess. 213 (1860) (statement of Sen. Benjamin).

201 *See id.* at 214–15.

202 *See id.* at 214.

203 *See id.* at 214–15.

But, sir, suppose infringements on the Constitution in political matters, which from their very nature cannot be brought before the court?²⁰⁴

Senator Benjamin's line was clear. In cases susceptible of judicial resolution—like *Dred Scott*—the Supreme Court's determinations are absolutely controlling. In cases not susceptible of judicial resolution (Benjamin probably had a more traditional, nineteenth-century understanding of justiciability than we do today), the issue was left open. Senator Benjamin devoted several more paragraphs of discussion to the Framers' decisions *not* to provide for any authoritative mechanism for resolution of such differences.²⁰⁵ He was headed in the direction of the stock Southern argument that, as to such issues, each state ultimately must be permitted to decide for itself. But, for our purposes, the interesting point that came next was Benjamin's equating of a hypothetical denial by the North to a Southern state of its right to equal representation in the United States Senate with the North's actual or threatened denial of Southern states' rights to extend slavery to the territories, as those rights had been adjudicated by the Supreme Court.

Now, Mr. President, if we admit, as we must, that there are certain political rights guarantied to the States of this Union by the terms of the Constitution itself—rights political in their character, and not susceptible of judicial decision—if any State is deprived of any of those rights, what is the remedy? . . . For the purpose of illustrating the argument upon this subject, let us suppose a clear, palpable case of violation of the Constitution. Let us suppose that the State of South Carolina, having sent two Senators to sit upon this floor, had been met by a resolution of the majority here that, according to her just weight in the Confederacy, one was enough, and that we had directed our Secretary to swear in but one, and to call but one name on our roll as the yeas and nays are called for voting. The Constitution says that each State shall be entitled to two Senators and each Senator shall have one vote. What power is there to force the dominant majority to repair that wrong? Any court? Any tribunal? Has the Constitution provided any recourse whatever? Has it not remained designedly silent on the subject of that recourse? And yet, what man will stand up in this Senate and pretend that if, under these circumstances, the State of South Carolina had declared, "I entered into a Confederacy or a compact by which I was to have my rights guarantied by the constant presence of two Senators upon your floor; you allow me but one; you refuse

204 *Id.* at 213.

205 *See id.* at 213–14.

to repair the injustice; I withdraw;" what man would dare say that that was a violation of the Constitution on the part of South Carolina? Who would say that was a revolutionary remedy? Who would deny the plain and palpable proposition that it was the exercise of a right inherent in her under the very principles of the Constitution, and necessarily so inherent for self-defense?²⁰⁶

Senator Benjamin's argument thus far was a pretty good one. If a state were denied a clear constitutional right, such as equal representation in the Senate—if a state were in effect kicked out of the national government (which is pretty much how the South viewed the election of Lincoln)—would not such a state, in the absence of any judicial remedy, be *constitutionally* justified in seceding, for so material a breach of the Constitution?²⁰⁷

Senator Benjamin's next step was to argue that, in effect, the North's refusal to honor *Dred Scott*, the Supreme Court's authoritative resolution of an issue of property rights, was likewise a material breach of the Constitution (and, by implication, one not readily remediable by further judicial decision):

Suppose this violation occurs under circumstances where it does not appear so plain to you, but where it does appear equally plain to South Carolina: then you are again brought back to the irrevocable point, who is to decide? South Carolina says, "You forced me to the expenditure of my treasure, you forced me to the shedding of the blood of my people, by a majority vote, and with my aid you acquired territory; now I have a constitutional right to go into that territory with my property, and to be there secured by your laws against its loss." You say, no, she has not. Now there is this to be said: that right is not put down in the Constitution in quite so clear terms as the right to have two Senators; but it is a right which she asserts with the concurrent opinion of the entire South. . . . It is a right that she asserts . . . in accordance with the opinion expressed by the Supreme Court of the United States; but yet there is no tribunal for the assertion of that political right. Is she without a remedy under the Constitution? If not, then what tribunal? If none is provided, then natural law and the law of nations tell you that she and

206 *Id.* at 214.

207 Today, lawyers might conjure a decent argument that refusal to seat a state's senators *would* be justiciable, but Senator Benjamin's point remains. See *Powell v. McCormack*, 395 U.S. 486, 516–49 (1969). *But cf.* *United States v. Munoz-Flores*, 495 U.S. 385, 389–96 (1990) (finding a justiciable controversy in the House of Representatives' decision to exclude an elected member).

she alone, from the very necessity of the case, must be the judge of the infraction and of the mode and measure of redress.²⁰⁸

Senators Nicholson and Benjamin are not the only exemplars of these views, but they are among the most lucid and clear. The constitutional argument for the validity of secession because of the Republicans' defiance of the Constitution, as determined by the Supreme Court in *Dred Scott*, was sufficiently pervasive that Professor Harry V. Jaffa, one of the leading historians of the era, has called it "the driving force behind secession."²⁰⁹ Drawing on a wealth of prominent examples, from Senator (and future Confederate President) Jefferson Davis to the secession ordinances enacted by South Carolina and other states, Jaffa notes that the South "consolidated politically under the banner of [the Supreme Court's] interpretation of the 'old Constitution.'"²¹⁰ The Supreme Court's decision in *Dred Scott*, Lincoln notwithstanding, *was* the Constitution. The South "expended boundless moral indignation against the Republicans . . . who dared to question the literal identification of Taney's opinion with the Constitution itself. That Lincoln and the Republican Party intended to deprive them of their constitutional right to extend slavery was the driving force behind secession."²¹¹ The South may have regarded the several states as sovereign for purposes of determining whether to withdraw from the Union for perceived violations of political rights under the Constitution—à la Senator Judah Benjamin. But the underlying *violation* itself was sufficiently established by the refusal of the North to accept the binding constitutional determination of the Supreme Court in *Dred Scott* in favor of the South's understanding of the constitutional compact. The Supreme Court's decision *established the rule*, finally, once and for all. The North's—Lincoln's—refusal to accept the Supreme Court's final authority *established the violation* of that rule, which in turn provided, for many, sufficient *constitutional* justification for invoking the sovereign state prerogative of secession, under standard Calhounian theory. As Professor Jaffa succinctly put it: "The Constitution had established the Supreme Court as the arbiter between the [majority and the minority]. If the antislavery majority refused to accept that arbitration, then it refused to accept the Constitution. That is how the South identified secession from the

208 CONG. GLOBE, 36th Cong., 2d Sess. 214–15 (1860) (statement of Sen. Benjamin).

209 HARRY V. JAFFA, A NEW BIRTH OF FREEDOM 217 (2000).

210 *Id.*

211 *Id.*

Union as a defense of the Constitution.”²¹² Jaffa continues: “And that is the argument that Lincoln tried to defuse, so far as possible,” immediately upon taking office, in his First Inaugural.²¹³

To Lincoln’s Inaugural, and his presidency, we now turn. At every juncture, Lincoln’s stance as President confirmed the South’s fears: as President, Abraham Lincoln never accepted, never acquiesced to, never enforced, sometimes actively opposed, and on occasion directly disobeyed, Supreme Court decisions—most notably *Dred Scott*—that he considered contrary to the Constitution’s proper understanding.

IV. 1861–1865: PRESIDENT LINCOLN

Finally, we reach the words, and actions, of Lincoln as President. With Lincoln’s ascent to the presidency, the secession of the lower South, the firing on Fort Sumter, Lincoln’s call for troops to suppress the rebellion, and the subsequent secession of much of the upper South, issues of constitutional theory became the subjects of Civil War. In the crucible of that war, Lincoln’s theoretical opposition to judicial supremacy, articulated as a Senate candidate back in 1858, reached its apex and received its implementation.

I will consider, and distill, three events. First, Lincoln’s First Inaugural, in an often quoted passage, reiterates his denial of judicial supremacy and his refusal to accept *Dred Scott* as a political rule.²¹⁴ Second, when judicial push came to executive shove at the outbreak of the Civil War, President Lincoln *refused to abide by the final judgment and order of the federal judiciary*. Chief Justice Taney, acting either as Circuit Justice or on his authority as a single Justice of the Supreme Court, had issued a writ of habeas corpus to release an individual held in military custody, declared Lincoln’s suspension of the writ unconstitutional, held one of Lincoln’s generals to be in contempt, and ordered Lincoln to enforce orders of the court.²¹⁵ Lincoln declined to do so. Lincoln’s justification was his disagreement with Taney’s decision on the merits.²¹⁶ Lincoln’s Attorney General, Edward Bates, followed with an elaborate legal opinion that, in addition to defend-

212 *Id.* at 342.

213 *Id.*

214 *See infra* text accompanying notes 222–42.

215 *See Ex parte Merryman*, 17 F. Cas. 144, 149, 152–53 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

216 *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) [hereinafter Lincoln, Message to Congress], in LINCOLN 1859–1865, *supra* note 68, at 246, 252–53.

ing Lincoln's position on the merits of the writ suspension, denied the authority of the judiciary to issue binding orders to the executive.²¹⁷

Third, in at least three distinct situations, Lincoln's administration, sometimes with the active support of Congress, acted in direct contravention of the Court's decision in *Dred Scott*. The Court had held that Congress could not ban slavery in the territories; Congress enacted such a ban on June 19, 1862, and Lincoln signed it into law, in defiance of *Dred Scott*.²¹⁸ The Court had held that blacks could not be citizens of the United States; Lincoln's administration issued patents to blacks, which depended on the conclusion that they were citizens of the United States.²¹⁹ And finally, Lincoln's Emancipation Proclamation, predicated on his military authority as Commander in Chief,²²⁰ at once accepted *Dred Scott's* premise that slaves were property (which is what justified their wartime seizure as enemy materiel) and eviscerated *Dred Scott's* declared constitutional protection of the "due process" right to own such property by ordering its permanent confiscation/liberation.²²¹ Let us consider each of these three episodes in more detail.

A. *Lincoln's First Inaugural*

By Inauguration Day, March 4, 1861, six states had passed ordinances of secession (South Carolina, Florida, Alabama, Georgia, Louisiana, and Texas), joined together as the Confederate States of America under a new constitution, and sworn in Jefferson Davis as their first president.²²² Lincoln faced an unprecedented constitutional crisis. In the four months since his election, the Union had effectively collapsed, at least politically.

217 See 10 Op. Att'y Gen. 74 (1861). On the *Merryman* incident, see *infra* text accompanying notes 243–305.

218 Act of June 19, 1862, ch. 111, 12 Stat. 432; see also David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1147 (2006) ("In the teeth of the *Dred Scott* decision, Congress abolished slavery both in the territories and in the District of Columbia."); *infra* text accompanying notes 306–10.

219 See Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1053 (1987); *infra* text accompanying note 311.

220 See generally Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 814–23 (2006) (explaining and defending the constitutional basis for and the validity of the Emancipation Proclamation); *infra* text accompanying notes 313–16.

221 See Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863) [hereinafter Lincoln, Emancipation Proclamation], in LINCOLN 1859–1865, *supra* note 68, at 424, 424–25.

222 See DONALD, *supra* note 23, at 267.

Lincoln's First Inaugural Address is an outstanding work of *legal* analysis, if less memorable than some of Lincoln's other works as political rhetoric and inspiration. It is mostly *logos*, with very little *pathos* until the peroration. The Address is primarily a legal brief setting forth Lincoln's bedrock constitutional positions: his position on the constitutional status of slavery, including the power of the national government over slavery in the territories; his position on judicial authority (and, implicitly, his views on the *Dred Scott* case); his position on the permanence of the Union and the constitutional illegality of secession; and his position on the resulting authority of the national government, and his personal sworn duty as President, to maintain the Union, by force if necessary.²²³

For my purposes here, the key part of the First Inaugural's legal analysis is Lincoln's discussion of judicial authority. After setting forth his positions on the constitutional status of slavery and the permanence and inviolability of the Union, Lincoln turned to the question of how differences of opinion on constitutional questions are to be addressed and resolved in a democratic government. Lincoln's answer is mildly startling to modern ears. Such constitutional questions, Lincoln said, ultimately are to be resolved by the judgments of a free people, in elections.²²⁴ He did not say—he clearly denied—that such constitutional disagreements “upon vital questions, affecting the whole people” are to be resolved, authoritatively and finally, by the Supreme Court.²²⁵

The final paragraph of the passage set forth below is the one most often quoted as setting forth Lincoln's views on the authority of Supreme Court decisions. But it loses something of its context and punch without the point made in the paragraphs that immediately precede it—the supremacy of popular constitutional interpretation. Lincoln's main point, clinched in the final paragraph, is the rather bracing one that *judicial supremacy is fundamentally inconsistent with constitutional democracy*.

All profess to be content in the Union, if all constitutional rights can be maintained. Is it true, then, that any right plainly written in the Constitution, has been denied? I think not. Happily the

223 Lincoln, First Inaugural, *supra* note 68, at 215–24. For fuller discussion of these legal arguments, see Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 301–25 (2002); Paulsen, *The Civil War as Constitutional Interpretation*, *supra* note 6, at 703–26. For a brilliant analysis of the First Inaugural, including its evolution through early drafts as a window on Lincoln's modes of thought and writing, see WILSON, *supra* note 48, at 42–70.

224 See Lincoln, First Inaugural, *supra* note 68, at 220.

225 *Id.* at 221.

human mind is so constituted, that no party can reach to the audacity of doing this. Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. But such is not our case. . . . Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the territories? The Constitution does not expressly say. *Must* Congress protect slavery in the territories? The Constitution does not expressly say.

From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease. There is no other alternative; for continuing the government, is acquiescence on one side or the other. . . .

Plainly, the central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left.

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all paralel [sic] cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them;

and it is no fault of theirs, if others seek to turn their decisions to political purposes.²²⁶

There is much here. I begin with the neglected point: Lincoln's conclusion, somewhat understated because wrapped in decorous and even a bit elliptical language (Lincoln's original draft made the point more crisply, but also more harshly), is that the claim of judicial supremacy in constitutional interpretation is the inadmissible rule of a minority over a majority—an example of "despotism."²²⁷ The Supreme Court's decisions cannot be supreme over the people. A majority, as determined by free elections, "is the only true sovereign of a free people"—not the decisions of the Court. Lincoln was fully aware of the position, "assumed by some," that the Court's constitutional determinations fix the policy of government. But that view is badly wrong. Accepting it would be to resign popular government into the hands of the Supreme Court.

Lincoln hedged this conclusion carefully, to soften the blow. The Court's decisions are binding on the parties to the case, and they are entitled to respectful consideration by all other branches of government. But no more. The Court's decisions conclude the case. A particular decision—think *Dred Scott*—might be wrong and unjust. But that is tolerable, given that the case may be overruled in a subsequent one, and not become a precedent. (Again, recall that the Republicans were hoping to alter the composition of the Court by attrition, appointments, or perhaps augmenting its membership, eventually overruling *Dred Scott* in such a manner.) What is not tolerable is to

226 *Id.* at 219–21.

227 See WILSON, *supra* note 48, at 63. Wilson reports that Lincoln's draft of this section had read, until late in the process (when he accepted many of Seward's proposed editorial changes), as follows:

But if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, it is plain that the people will have ceased to be their own rulers, *having turned their government over to the despotism of the few life-officers composing the Court.*

Id. (emphasis added). In the draft, the linkage of "despotism" to the individual Justices of the Supreme Court is absolutely explicit. As delivered, the line is softened considerably, with a peculiar obsequious bow in the direction of these despots. The meaning, however, remains reasonably clear:

At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, made in the ordinary course of litigation between parties in personal actions, the people will have ceased to be their own rulers, *having practically resigned their government into the hands of that eminent tribunal.*

Id. (emphasis added).

regard the decision of the Supreme Court as concluding the constitutional question for the whole government.

Lincoln, diplomatically and perhaps a bit disingenuously, said that this stance entailed no "assault" upon the Court, or its judges.²²⁸ It is not the judges' fault; they decide as they think proper; and it is only others who "seek to turn their decisions to political purposes."²²⁹ But of course, Lincoln had said many times before that *Dred Scott* was improper, a lawless "astonisher," and indeed part of a conspiracy to nationalize and entrench slavery through judicial decision.²³⁰ It was the judges themselves who had rendered a political decision without foundation in the Constitution. There *is*, in such view, an assault on the Court. And there is also an assault on the notion of judicial supremacy in constitutional interpretation. That notion was, to Lincoln, antidemocratic. Still worse, it was *despotic*. And *Dred Scott* was the proof.

Lincoln probably could not have retreated from the substance of his 1858 stance against the Court even had he wanted to do so. And there is no evidence that he wanted to retreat. During the secession winter of 1860–1861, when compromises and appeasements of all sorts were being debated in Washington, the word from Springfield had been to remain firm.²³¹ The ground on which the election had been won—the platform of restricting slavery's expansion into the territories—must not be yielded.²³² To so yield would be to negate the value of free elections and constitutional government itself—a theme President Lincoln would invoke often, from his July 4, 1861 message to Congress²³³ to the Gettysburg Address.²³⁴ But that of course also meant refusing to yield to the Court's decision in *Dred Scott* and refus-

228 See Lincoln, First Inaugural, *supra* note 68, at 221.

229 *Id.*

230 See Lincoln, "House Divided" Speech, *supra* note 44, at 426–34; Lincoln, Speech at Chicago, *supra* note 76, at 451.

231 See, e.g., DONALD, *supra* note 23, at 268–70; MCPHERSON, *supra* note 64, at 231.

232 See DONALD, *supra* note 23, at 267–70.

233 See Lincoln, Message to Congress, *supra* note 216, at 260 (insisting "that when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections); *id.* at 261 ("[N]o popular government can long survived a marked precedent, that those who carry an election, can only save the government from immediate destruction, by giving up the main point, upon which the people gave the election.").

234 See Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in LINCOLN 1859–1865, *supra* note 68, at 536 ("[T]hat government of the people, by the people, for the people, shall not perish from the earth.").

ing to bow to the Court's authority to resolve constitutional questions for the nation through the vehicle of adjudicated cases.

There was another, even more fundamental, reason why no retreat was possible from Lincoln's assault on judicial supremacy. It is not often given great attention in the history books, but it surely must have been on Lincoln's mind: to accede to the Court's authority to decide, finally, vital constitutional questions affecting the whole people would mean that the Court could decide on the constitutional validity of secession and federal power to "coerce" states to remain in the Union. *That* was now the vital question of the day, far more immediate and pressing even than the question that had spawned the crisis—the question of power over slavery in the territories. Lincoln was irrevocably committed to the constitutional permanency of the Union and considered it his duty as President to preserve it. These were the central themes of the First Inaugural. If he was to hold and maintain that position, there could be no backtracking on the question of judicial supremacy.

Might the Taney Court actually have held that the national government lacked constitutional authority to coerce seceding states to remain in the Union? That was the issue of the hour, and it is not at all implausible to think the Court would have held against national coercive power. That was, after all, outgoing President Buchanan's position. His final message to Congress blamed the secession crisis on Northern Republicans and the antislavery movement generally.²³⁵ He argued, sensibly, that secession was unconstitutional.²³⁶ But then, in the next breath, he concluded, incredibly, that the federal government lacked any power to prevent it; there was no constitutional authority by which the Union could make war on the states.²³⁷

235 See James Buchanan, Fourth Annual Message (Dec. 3, 1860), in 5 MESSAGES AND PAPERS, *supra* note 60, at 626, 626.

236 See *id.* at 628–34 ("In order to justify secession as a constitutional remedy, it must be on the principle that the Federal Government is a mere voluntary association of States, to be dissolved at pleasure by any one of the contracting parties. . . . Such a principle is wholly inconsistent with the history as well as the character of the Federal Constitution.").

237 See *id.* at 634–37; see also McPHERSON, *supra* note 64, at 248 ("Buchanan's forceful denial of the legality of disunion ended with a lame confession of impotence to do anything about it. Although the Constitution gave no state the right to withdraw, said the president, it also gave the national government no power 'to coerce a State into submission which is attempting to withdraw.'"). Republicans and others rightly ridiculed Buchanan's analysis. See *id.* (noting Seward's sarcastic, skewering characterization of Buchanan's position as being that "no state has the right to secede unless it wishes to" and that "it is the President's duty to enforce the laws, unless somebody opposes him" (internal quotation marks omitted)); see also WILSON, *supra* note 48, at

There is clear historical evidence that Chief Justice Taney held much the same position and had written it up at fair length in private correspondence.²³⁸ There seems little doubt that, had the issue been presented to him in judicial form at the Supreme Court, and if he had had the supporting votes (which was likely, at least before Southern Justices resigned), Taney would have had little hesitation in ruling against the power of the Union to prevent secession by force.²³⁹ Imagine, then, a case brought by Virginia against the United States, seeking to prohibit the “invasion” of federal armies into its territory in transit to make war on another state. Who is to say that the Taney Court might not have held such invasion illegal? Even if the legal reasoning required to support such a conclusion might be thought dubious, or the justiciability of such an issue even more dubious, is it impossible to believe that the Court that decided *Dred Scott* as it did might not reach such a disabling conclusion?

There could be no retreat from Lincoln’s anti-judicial supremacy stance, politically or practically. The First Inaugural Address makes none, other than (perhaps) some cosmetic softening of tone. Lincoln’s position remained firm: secession was unconstitutional; it was unjustified by any legitimate constitutional objection to his substantive positions on slavery (including his opposition to *Dred Scott*); and judi-

50–51 (noting that “Buchanan seemed completely at a loss to know what to do about the secession of the Southern states” and recounting some contemporary criticism of him).

238 See JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY* 180–81, 193–95 (2006).

239 See *id.* at 194–95. Throughout his tenure as Chief Justice, Taney was a strong defender of states’ rights and powers, especially with respect to slavery. Taney had authored an important opinion holding that a constitutional provision that required certain action by states, as a matter of federal law—rendition of fugitives charged with a crime upon request of the governor of the state seeking the fugitive’s return—but that did not expressly authorize federal compulsion to enforce such requirement, left compliance with the federal constitutional requirement to the good faith of the states in question. See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107–08 (1861); *cf.* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536, 626–33 (1842) (Taney, C.J., concurring) (emphasizing states’ duties to return fugitive slaves, and affirming state powers in this area, as long as they were not exercised in a manner contrary to the Constitution’s requirements); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 508 (1841) (Taney, C.J., concurring) (opining that power over slavery “is exclusively with the several states . . . and the action of the several States upon this subject, cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power”). On Taney’s pro-states-rights positions generally, see Carl Brent Swisher, *Mr. Chief Justice Taney*, in *MR. JUSTICE* 35, 38–39, 41–56 (Allison Dunham & Philip B. Kurland eds., rev. ed. 1964). Ironically, as Andrew Jackson’s attorney general, Taney had taken the opposite stance with respect to federal coercive power, during the South Carolina nullification crisis. See SIMON, *supra* note 238, at 15–17.

cial decisions to the contrary were not binding against national authority to enforce the Constitution in accordance with Lincoln's understanding of it, and in accordance with the electoral decisions of the people.²⁴⁰ Lincoln would not be so bound, but would seek to hold federal property and enforce federal law throughout the unbroken Union.²⁴¹ The South was probably right, from its own perspective, in seeing the address as *un-conciliatory*.²⁴² There would be no concession to the South's demands and no retreat from Lincoln's prior positions.

And the war came.

B. *Lincoln's Defiance of Taney's Order in Ex Parte Merryman*

By the time Congress reconvened on July 4, 1861, Fort Sumter had been lost and Lincoln had taken a number of extraordinary actions on his own authority, including suspension of the writ of habeas corpus.²⁴³ That action produced the most notable instance of presidential defiance of judicial authority in our nation's history, arising from Lincoln's noncompliance with Chief Justice Taney's decision in *Ex parte Merryman*,²⁴⁴ purporting to invalidate Lincoln's suspension of the privilege of the writ.²⁴⁵ This event was the most extreme and dramatic instance of Lincoln's denial of judicial supremacy, extending that stance even to final judicial decrees in a particular case—breaking through the limits that Lincoln himself had declared as a Senate candidate responding to *Dred Scott* in 1857 and 1858, and which he had reaffirmed in his First Inaugural barely a month earlier.

I have told this story before, but it is worth repeating in somewhat abbreviated form.²⁴⁶ On April 12, 1861, South Carolina attacked Fort Sumter.²⁴⁷ Thirty-four hours later, the Fort was surrendered to the

240 See Lincoln, First Inaugural, *supra* note 68, at 220–21.

241 See *id.* at 217–18, 220–21.

242 See DONALD, *supra* note 23, at 284.

243 See MCPHERSON, *supra* note 64, 287–90.

244 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

245 See *id.* at 152–53.

246 For the full tale, see Paulsen, *The Merryman Power*, *supra* note 6, at 88–99; see also Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 276–84 (describing *Merryman* and Lincoln's resistance thereto); cf. Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1268–71 (2004) [hereinafter Paulsen, *The Constitution of Necessity*] (discussing the *Merryman* situation in connection with Lincoln's invocation of "necessity"). For other accounts, see DONALD, *supra* note 23, at 296–301; MCPHERSON, *supra* note 64, at 285–88 (1988); SIMON, *supra* note 238, at 177–98.

247 See DONALD, *supra* note 23, at 292.

rebels.²⁴⁸ The attack on Sumter produced a surge of Union patriotism in the North. On April 15, Lincoln issued a proclamation calling for 75,000 militiamen to enforce the laws and suppress the rebellion, to widespread Northern approval.²⁴⁹ But the upper South viewed the action as aggression against its southern neighbors. Within weeks, North Carolina, Tennessee, Arkansas, and, most significantly, Virginia, situated on Washington, D.C.'s southern border, voted to secede as well.²⁵⁰ These actions produced the traitorous defections of numerous important officers in the United States Army, including Robert E. Lee, who had been offered command of Union forces but repudiated his oath of loyalty and accepted command of Confederate forces.²⁵¹

On Washington, D.C.'s northern border—and its western and eastern borders—loomed the state of Maryland, a hotbed of secessionist sympathy. There was a danger that Maryland, too, would seek to secede.²⁵² The capital city was literally surrounded by strong secessionist, anti-Union elements.²⁵³ On April 19, a Massachusetts regiment headed for Washington was attacked by mobs in Baltimore when the regiment transferred train stations.²⁵⁴ In addition, some Marylanders destroyed railroad bridges to keep Northern troops from traveling through the state.²⁵⁵ As historian David Donald describes it: "For nearly a week Washington was virtually under siege. Marylanders destroyed the railroad bridges linking Baltimore with the North and cut the telegraph lines. A Confederate assault from Virginia was expected daily, and everyone predicted that it would be aided by the thousands of secessionist sympathizers in the city."²⁵⁶

It was in this context that Lincoln, on April 27, authorized commanding General Winfield Scott to suspend the writ of habeas corpus "[i]f at any point on or in the vicinity of the military line, which is now used between the City of Philadelphia and the City of Washington," Scott encountered resistance making such suspension necessary for the "public safety."²⁵⁷ In the days and weeks following, the army

248 *Id.*

249 *See id.* at 296.

250 *See id.* at 297.

251 *See id.* at 298.

252 *See id.* at 297.

253 *See id.*

254 *See id.*

255 *See id.* at 298

256 *Id.*

257 Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), in *LINCOLN 1859-1865*, *supra* note 68, at 237, 237.

arrested numerous suspected secessionists, including John Merryman, a lieutenant in a secessionist cavalry company that had burned bridges and ripped down telephone wires.²⁵⁸ Merryman, held at Fort McHenry in Baltimore,²⁵⁹ obtained access to counsel, who filed a petition for a writ of habeas corpus directly with Chief Justice Taney.²⁶⁰ The choice of Taney was an astute one, as judge-shopping goes. The habeas statute permitted a broad choice of judges, the Chief Justice retained considerable prestige by virtue of his position, and the author of *Dred Scott* was known as a fearless and harsh opponent of the Republican administration.²⁶¹ It also appears that Taney had attended college with Merryman's father, years earlier.²⁶²

On May 26, 1861, Taney issued a writ directing the commanding officer at Fort McHenry, General George Cadwaladar, to produce Merryman before him in Baltimore the next day to adjudicate the lawfulness of the detention.²⁶³ General Cadwaladar instead sent a lucky subordinate to inform the Chief Justice that President Lincoln had suspended the writ and to ask for a delay so as to permit military authorities to obtain instructions from President Lincoln.²⁶⁴ Taney, displeased, and evidently impatient as well, directed that an "attachment" issue against General Cadwalader for contempt, returnable the next day.²⁶⁵ Service of the writ was rebuffed at the gate of the Fort,²⁶⁶ and Taney issued an extended ruling from the bench the next day, May 28, before a courtroom packed with spectators and the press.²⁶⁷ Taney held that the general was in contempt of court and that Lincoln's writ suspension was unconstitutional, the suspending power being exclusively Congress's in Taney's view.²⁶⁸ Moreover, Taney declared, the President had the purely ministerial duty to enforce the legal orders and process of the courts.²⁶⁹ Taney ordered General Cadwalader's arrest and further directed that his opinions and orders

258 See Paulsen, *The Merryman Power*, *supra* note 6, at 90.

259 See *Ex parte Merryman*, 17 F. Cas. 144, 147 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

260 See MCPHERSON, *supra* note 64, at 288; Paulsen, *The Merryman Power*, *supra* note 6, at 90.

261 See Paulsen, *The Merryman Power*, *supra* note 6, at 90.

262 See *id.* at 91 n.27.

263 See *Merryman*, 17 F. Cas. at 146.

264 See *id.*

265 See *id.*

266 *Id.* at 147.

267 See *id.*

268 See *id.* at 148.

269 See *id.* at 149.

immediately be transmitted to President Lincoln, with instructions that they be enforced.²⁷⁰

Taney's opinion took the view that the President must obey and enforce the judicial department's interpretation of the law and its orders:

The only power . . . which the president possesses [is] "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself . . . but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority . . . but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.²⁷¹

This is a flat assertion not only of judicial supremacy, but also of presidential duty to obey and enforce judicial decrees—of presidential *subordinacy* to judicial authority. What the judiciary decrees, the President must do. This is fairly stunning, when put so starkly. It went further than any prior judicial assertion of power. As I have written elsewhere, Taney's *Merryman* opinion was "arguably the first genuine assertion of judicial supremacy in the sense of the courts telling the President what he must do."²⁷²

How could Lincoln respond to this, under the circumstances? On the one hand, Taney's position on the binding authority of judgments was essentially the same line Senate-candidate Lincoln had drawn—judicial decrees were binding law for that case, but not literally controlling for public policy beyond the boundaries of that case²⁷³—and that President Lincoln had drawn in his First Inaugural, noting that the "evil effect" of following judgments in specific cases "can better be borne than could the evils of a different practice" but that judgments in individual cases did not bind the policy of government upon vital questions affecting the whole people.²⁷⁴ On the other hand, to accede to Taney's orders would be to concede the principle that what the courts order, the President must implement, which in effect would deny any and all independent presidential interpretive power with respect to the Constitution and open Lincoln up to the prospect of having to obey a "second *Dred Scott*" opinion making slav-

270 See *id.* at 153; Paulsen, *The Merryman Power*, *supra* note 6, at 93.

271 *Merryman*, 17 F. Cas. at 149 (quoting U.S. CONST. art. II, § 3).

272 Paulsen, *The Merryman Power*, *supra* note 6, at 93.

273 See, e.g., *supra* notes 31–35 and accompanying text.

274 Lincoln, First Inaugural, *supra* note 68, at 221.

ery national²⁷⁵ or, as discussed above, having to obey a Supreme Court decision forbidding federal interference with state secession²⁷⁶—Lincoln's nightmare parade of horrors. Taney's opinion had raised the stakes by exposing how easily the line in the sand between judgments and general judicial orders is erased. All it takes is a judicial order, in a specific case, ordering that all judicial opinions on constitutional questions be treated as orders and followed prospectively on all matters of government policy, and the line is gone.²⁷⁷

Lincoln really had no choice. Taney's *Merryman* gauntlet ended up forcing Lincoln to the full logical limits of his stance against judicial supremacy. As between the alternatives of complete presidential subordination to judicial interpretations of the Constitution and the legitimacy of refusing to abide by and enforce even judicial judgments in a particular case, Lincoln chose the latter horn of the dilemma. As was typical of Lincoln's style as President, he avoided casting his refusal in dramatic, in-your-face, confrontational terms. He did not publicly proclaim his defiance of the court's order. But defiance it was: he did not obey Taney's order, nor did his administration seek any sort of appeal to the full Supreme Court.²⁷⁸ Lincoln's principled stance against judicial supremacy as a general proposition, and the costs of retreating from that stance in the face of Taney's order under the circumstances, had ultimately led him to the conclusion that the judiciary may not issue judgments that bind the independent constitutional judgment of elected officials, *even in the particular case*.

Interestingly, the exercise of this presidential power to refuse to execute judicial judgments even in the case rendered—what I have elsewhere dubbed “The *Merryman* Power” and defended at length on originalist, separation-of-powers principles²⁷⁹—came in a case where

275 See *supra* notes 112–25 and accompanying text.

276 See *supra* Part IV.A.

277 As I have argued elsewhere, the judicial-supremacy-as-to-judgments-but-not-otherwise position completely collapses into judicial supremacy as to everything, period. The distinction is a spurious one, whenever the slightest pressure is applied to it. See Paulsen, *The Merryman Power*, *supra* note 6, at 99–103.

278 See Currie, *supra* note 218, at 1134 n.15; see also WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 44–45 (1998) (noting the procedural obstacles and practical prospects of appealing in *Merryman* and concluding that, “[g]iven th[e] makeup of the Court, an appeal of the *Merryman* decision must have appeared to the administration as a risky course of action, to be avoided if possible”).

279 My first tentative foray into this issue was Paulsen, *The Merryman Power*, *supra* note 6, in which I argued merely that the principles of executive branch interpretive autonomy and judicial supremacy are hopelessly inconsistent with each other, when push comes to shove; and that every attempted reconciliation of those principles fails. In subsequent scholarship, I have defended aggressively the position to which Lincoln

the correct resolution of the issue on the merits (Does Congress exclusively possess the writ suspension power or is it shared with the President, who may exercise it in the absence of Congress?) was extremely debatable. Taney possessed a good number of excellent arguments on his side; perhaps, but for the circumstances of crisis, Taney's abstract interpretation was the better one.²⁸⁰ At any rate, the *Merryman* decision certainly was not the complete judicial outrage that *Dred Scott* was. The only outrage, if outrage it be, was the assertion of judicial supremacy and complete presidential subordination to the judiciary's decrees. That was the proposition to which Lincoln could not, and would not, accede. Lincoln's position was not, and could not be, limited to the stance that the President could refuse to implement judicial decisions in cases of "clear" judicial error, or "clear" disregard for the Constitution, or of "atrocious" decisions, in legal or moral terms. His position, as expressed by his (in)action, was that the President was not bound to obey and enforce judicial decrees that he believed were *incorrect*, whenever circumstances suggested complying with the decision would be in some meaningful way harmful to important national interests.

Lincoln's message to Congress of July 4, 1861, addressed, among other things,²⁸¹ the propriety of his refusal to enforce Taney's *Merryman* decision.²⁸² It is interesting that Lincoln confined his discussion to the *merits* of the underlying issue on which the executive and the judicial branches had finally decided to take opposing positions; he did not separately defend the propriety of the executive branch taking, and continuing to take, a position opposed to the judiciary's decrees.²⁸³ Lincoln began by stating the reason for his suspension of the writ, and the charge of illegality:

Soon after the first call for militia, it was considered a duty to authorize the Commanding General, in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has purposely been

was driven reluctantly. See Paulsen, *Irrepressible Myth*, *supra* note 6, at 2724–27; Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 223, 276–84; Paulsen, *Nixon Now*, *supra* note 6, at 1337, 1345–68.

280 See Paulsen, *The Constitution of Necessity*, *supra* note 246, at 1268–72.

281 For a discussion of other themes of the July 4 message, see Kesavan & Paulsen, *supra* note 223, at 305–13.

282 See Lincoln, *Message to Congress*, *supra* note 216, at 251–53.

283 See Paulsen, *The Constitution of Necessity*, *supra* note 246, at 1268–71; Paulsen, *The Merryman Power*, *supra* note 6, at 95.

exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them.²⁸⁴

Having framed the issue, Lincoln proceeded to defend his actions:

Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?²⁸⁵

This was Lincoln's argument from necessity, which I have set forth and defended elsewhere.²⁸⁶ It informs, and helps make more persuasive, Lincoln's argument from text, structure, purpose, logic, and practicality, which follows.

But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that "The privilege of the writ of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together;

284 Lincoln, Message to Congress, *supra* note 216, at 252 (quoting U.S. CONST. art. II, § 3).

285 *Id.* at 252–53.

286 See Paulsen, *The Constitution of Necessity*, *supra* note 246, at 1268–71.

the very assembling of which might be prevented, as was intended in this case, by the rebellion.²⁸⁷

Notice what is missing: there is no direct response to Taney's assertion that Lincoln was bound to enforce Taney's judgment to the contrary. Lincoln's "argument" that the President is not bound by erroneous judicial decisions was almost entirely an argument from silence, implied by his rebuttal of Taney's arguments on the merits and the fact that Lincoln was explaining why he had *not* gone along with Taney's ruling. "No more extended argument is now offered," Lincoln said, closing out the discussion, "as an opinion, at some length, will probably be presented by the Attorney General."²⁸⁸ Lincoln thus left the explicit constitutional argument to his Attorney General, Edward Bates, who published a fascinating (if somewhat rambling) formal legal opinion on July 5, the very next day.²⁸⁹

The crux of Bates's opinion with respect to the judicial supremacy issue was the Constitution's separation of powers. (Bates also reargued the writ suspension power, at greater length but with less persuasive power than Lincoln.) The design of the Constitution, Bates argued, reflected the desire to avoid "unity of power," a "special dread" of the Framers, and of the people.²⁹⁰ Thus, the Constitution deliberately divided the people's "sovereignty" among several branches of government power, making none the superior of the others.²⁹¹ Echoing Madison's *Federalist No. 49*, Bates wrote that "[t]hese departments are co-ordinate and coequal—that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both of them together."²⁹² It followed that to allow "one of the three"—the judiciary—"to determine the extent of its own powers, and also the extent of the powers of the other two," would mean that "that one can control the whole government."²⁹³ (Note also the echoes of Lincoln's First Inaugural with respect to vital questions affecting the "whole,"

287 Lincoln, Message to Congress, *supra* note 216, at 253 (quoting U.S. CONST. art. I, § 9, cl. 2).

288 *Id.*

289 See 10 Op. Att'y Gen. 74 (1861).

290 *Id.* at 76.

291 *Id.*

292 *Id.*

293 *Id.* The argument tracks Madison nearly identically: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." THE FEDERALIST NO. 49, at 261 (James Madison) (George W. Carey & James McClellan eds., 2001). For a complete side-by-side of Bates and Madison, see Paulsen, *The Merryman Power*, *supra* note 6, at 95–97.

and the importance of the people not resigning “the government” into the hands of the Supreme Court.)²⁹⁴ Thus, Bates observed, the Framers designed a system where the branches, by virtue of that independence and coequality, would “keep each other within their proper spheres by their mutual antagonism—that is, by the system of checks and balances, to which our fathers were driven at the beginning by their fear of the unity of power.”²⁹⁵

Bates then drew from these premises, fairly, the conclusion that the judiciary could not boss the President around: “If it be true, as I have assumed, that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other,” it was then not “legally possible for a judge to issue a command to the President to come before him *ad subjiciendum*—that is, to submit implicitly to his judgment” and to be held “in contempt of a superior authority” and fined or imprisoned if he disobeyed.²⁹⁶

The late Chief Justice William H. Rehnquist, in his engaging and prescient book, *All the Laws But One: Civil Liberties in Wartime*, wrote of Bates’s opinion: “It was not a very good opinion.”²⁹⁷ But Rehnquist’s laconic analysis of Bates’s opinion is itself not very good. Bates’s opinion, Rehnquist wrote, “essentially argued that each of the three branches of the federal government established by the Constitution was coequal with and independent of the other two.”²⁹⁸ That is a perplexing way to begin a *critique* of Bates’s argument, for surely there is nothing wrong—nothing at all—with this proposition. Indeed, it is the essence of the idea of separation of powers and fully consistent with James Madison’s explanation of this vital principle in *Federalist No. 49*.²⁹⁹ Rehnquist continued: “The President was thus not subordinate to the judicial branch, and so the latter could nor order him, or his subordinates, to free Merryman.”³⁰⁰ Rehnquist did not try to explain why this conclusion should not follow from the axiom of the coequal constitutional status of the branches. Unless the Constitution specifies a rule making the President subordinate to the orders of the judiciary, either generally or in some specific situation applicable to the case at hand, Bates’s conclusion surely follows logically from

294 See *supra* notes 226–32 and accompanying text.

295 10 Op. Att’y Gen. at 76–77.

296 *Id.* at 85.

297 REHNQUIST, *supra* note 278, at 44.

298 *Id.*

299 See *supra* note 293.

300 REHNQUIST, *supra* note 278, at 44.

correct premises.³⁰¹ Rehnquist's only argument, if one can call it that, is that "[t]his proposition had been refuted by Chief Justice Marshall's opinion in *Marbury v. Madison* more than half a century earlier."³⁰²

That's a whopper, but a familiar one: the canard that Marshall's opinion in *Marbury v. Madison*³⁰³ asserted judicial supremacy has been refuted by constitutional scholars dozens of times, yet the myth endures—constitutional law's equivalent of the Creature from the Black Lagoon.³⁰⁴ *Marbury* does not claim judicial supremacy; and even if it did, the judiciary's assertion of supremacy (which the Court *has* made, but only in modern times³⁰⁵) would not qualify as a refutation of Bates's argument, but only as a self-interested contradiction of it. Ironically, the making of the claim seems almost to validate the correctness of Bates's opinion.

The *Merryman* confrontation was the apex of Lincoln's stance against judicial supremacy. More than anything he said against the prospective binding political authority of *Dred Scott*; more than anything he said in the campaigns of 1858 and 1860; more than anything he said in his First Inaugural; what Lincoln *did* in defying Taney's order in *Merryman* demonstrated the true implications of Lincoln's position on judicial authority. Judicial decisions were not law of the land, binding on national policy, and they were not necessarily binding in the particular case, either. To be sure, one can fairly argue that these were extreme circumstances calling for extreme responses. Lincoln's defiance is arguably the only true instance of presidential assertion and exercise of a claimed presidential power forthrightly to refuse to execute judicial decrees. But principles, and their limits, are often defined, or refined, in the crucible of extreme tests. At any rate, as a historical matter the reality is undeniable: when push came to shove, Lincoln went all-in against the proposition of judicial supremacy in constitutional interpretation. Judicial decisions do not

301 As I have explained and discussed elsewhere, the only plausible candidate for such a specific, trump-everyone interpretive power lies in the powers of juries set forth in the Fifth and Sixth Amendments. See Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 288–92.

302 REHNQUIST, *supra* note 278, at 44.

303 5 U.S. (1 Cranch) 137, 177 (1803).

304 See Paulsen, *Irrepressible Myth*, *supra* note 6, at 2706–24; Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 225–26 n.19, 244–45.

305 See Paulsen, *The Most Dangerous Branch*, *supra* note 6, at 225 n.18 (collecting modern Supreme Court cases making, or repeating, this judicial assertion). William Rehnquist's most notable assertion of this claim came in his opinion for the Court, as Chief Justice, in *United States v. Morrison*, 529 U.S. 598, 616–17 n.7 (2000) (“[E]ver since *Marbury*, this Court has remained the ultimate expositor of the constitutional text.”).

bind the independent constitutional judgment, and action, of other actors in the constitutional system.

After *Merryman*, Lincoln's defiance, as President, of the prospective authority of *Dred Scott* with respect to government policy concerning the status of blacks as citizens and the power of Congress to prohibit slavery in the territories almost became easy cases. The final set of examples of Lincoln's mature position all involve *Dred*-defying acts.

C. *Defying Dred Scott*

It is appropriate that the final pieces of data bearing on Lincoln's stance toward judicial authority involve the case that pushed Lincoln down this path in the first place, *Dred Scott*. Not to put too fine a point on it, once the war came, Lincoln and Congress defied the authority of *Dred Scott* as in any way limiting the power of the government on the points of law the Court decided.

First and most striking is what Congress and Lincoln did with respect to *Dred Scott's* holding that Congress could not prohibit slavery in the territories. Once Lincoln became President and the reality of civil war removed the brakes of political accommodation, they disregarded the decision and passed legislation flying in the face of the Court's holding. Following Lincoln's line denying any authoritative status to the Court's decision as a rule governing political conduct, Congress flatly banned slavery in all federal territories, even though the *Dred Scott* decision clearly purported to prescribe a general constitutional rule that such legislation was an unconstitutional interference with Fifth Amendment (substantive) "due process" rights of slaveholders in their slave property.³⁰⁶

This legislation was passed by Congress and signed into law by President Lincoln in June 1862, a year into the war.³⁰⁷ As Professor David Currie reported, Congress borrowed directly from the Northwest Ordinance for its language prohibiting slavery "immediately, eternally, and without reservation."³⁰⁸ After a more extended debate over prohibiting slavery in the District of Columbia, the prohibition of slavery in the territories was enacted with relatively little discussion. "Strikingly," Currie wrote, "no one so much as mentioned the *Dred Scott* case, which had struck down a provision indistinguishable from

306 See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450–51 (1857).

307 Act of June 19, 1862, ch. 111, 12 Stat. 432.

308 Currie, *supra* note 218, at 1147.

the one just proposed, let alone explained why the decision was wrong."³⁰⁹

Yet the plain fact is that the new ban was unconstitutional if *Dred Scott* was controlling law. The statute was Congress's—and Lincoln's—legislative rejection of the Supreme Court's definitive constitutional interpretation in *Dred Scott*. Indeed, it would not be far off to say that Congress had, by legislation, purported to overrule the Supreme Court's interpretation of the Constitution. Of course, no case was ever brought challenging the act in the courts; matters were rapidly being overtaken by events. The true resolution of these differences took place on the battlefields of the Civil War, not in any court of law.³¹⁰ But it is instructive that Lincoln and Congress believed, not merely in the abstract, but with their actions, that the Supreme Court's decision was not binding upon them in the exercise of their constitutional powers. And they evidently believed it so strongly and confidently that they did not even need to discuss the effect of the Court's decision on their own constitutional judgments. There is no anguished handwringing over the authority of the Supreme Court in constitutional interpretation. There is simply the act of repudiating the Court's ruling.

Less dramatically, but equally defiantly, Lincoln's administration granted patents and visas to black *citizens*—a legal requirement for receiving such privileges—in the teeth of *Dred Scott*'s citizenship holding that blacks could not be United States citizens under the Constitution.³¹¹ Once again, if *Dred Scott* was controlling law, such executive action was unconstitutional. And once again Lincoln's actions thus stand in unmistakable conflict with the assumption that the Supreme Court's interpretations of the Constitution are binding on the President.³¹²

309 *Id.* at 1149–50.

310 See Paulsen, *The Civil War as Constitutional Interpretation*, *supra* note 6, at 691.

311 Letter from J. Thomas, Assistant Secretary of State, to William Marcy, Secretary of State (Nov. 4, 1856), in 5 THE WORKS OF CHARLES SUMNER 497, 497–98 (Boston, Lee & Shepard 1872); Colby, *supra* note 219, at 1053; Easterbrook, *supra* note 134, at 926.

312 Historian Doris Kearns Goodwin collates reports of another *Dred*-defying legal position taken by the Lincoln administration. Well into the war, Attorney General Bates issued a legal opinion addressing the question whether a commercial schooner in the coastal trade lawfully could be captained by a black man. Naval law required that an American flag vessel be commanded by an American citizen, and *Dred Scott* had held that blacks could not be American citizens. Bates concluded that citizenship was governed by place of birth, not color of skin—announcing the rule that eventually would be embodied in the first sentence of the Fourteenth Amendment—notwithstanding the decision in *Dred Scott*. Writes Goodwin of this Bates opinion: “The

The third and final example is dramatic—and famous. Lincoln's Emancipation Proclamation, a military order seizing an enemy resource pursuant to his military authority as Commander in Chief,³¹³ was probably unconstitutional if *Dred Scott* was valid, binding law. The matter is perhaps not entirely free from doubt; one could certainly argue that federal government confiscation of slave property *ordinarily* would have been a violation of the Due Process Clause under *Dred Scott* (and perhaps also an uncompensated taking to boot), but that the circumstances of armed military conflict brought such action within the scope of the war power, at least during the period of the conflict.³¹⁴ Nonetheless, it is difficult to avoid the force of the claim that military emancipation of slaves within states that Lincoln vigorously claimed remained states within the United States of America conflicted rather sharply with *Dred Scott*. If it were true that white citizens in federal territories possessed a constitutional right to own slaves, protected against national legislative interference, it surely was a fortiori true that white citizens possessed a constitutional right to own slaves in *states* whose laws explicitly permitted and protected the institution.

Yet history is plain that, while Lincoln considered questions of his legal authority to issue the Emancipation Proclamation, those questions for him concerned the proper scope of presidential military power—that is, the breadth of the Commander in Chief Clause power—and of the authority that flowed from presidential war power to seize resources in enemy territory.³¹⁵ But nary a word was spoken about the implications of the Supreme Court's decision in *Dred Scott* concerning the constitutional right to slave property, free of federal interference. By the time Lincoln proclaimed emancipation, the Court's decision in *Dred Scott* simply was not regarded as relevant to the question of Lincoln's constitutional authority to make such an order.³¹⁶

Dred Scott decision was wrong; free blacks were citizens of the United States." GOODWIN, *supra* note 174, at 674.

313 Lincoln, Emancipation Proclamation, *supra* note 221, at 424 (invoking the President's authority as military Commander in Chief).

314 Paulsen, *supra* note 220, at 814–23.

315 See ALLEN C. GUEZLO, LINCOLN'S EMANCIPATION PROCLAMATION 190–212 (2004); MCPHERSON, *supra* note 64, at 504; WILSON, *supra* note 48, at 105–42; Paulsen, *supra* note 220, at 823–31.

316 As to Southern slaveowners *not* supporting the rebellion—that is, those who in theory remained loyal to the United States—the Emancipation Proclamation arguably constituted a seizure of citizens' private property for military use, without specific legislative authorization and without compensation. Cf. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585–89 (1952) (invalidating President Truman's

In his First Inaugural, in his defiance of Taney in *Merryman*, and with his complete repudiation of *Dred Scott* through legislation, administrative action, and emancipation, Lincoln carried into action—and carried through to their logical end—his constitutional views that judicial decisions contrary to the Constitution could not bind political authorities in the exercise of their independent constitutional judgment. Lincoln had, in the years from 1857 to 1864, progressed from a theory of judicial precedent that accorded weight, but not controlling authority, to court decisions; to a view that judicial decisions had no binding weight on political actors outside the particular case decided; to a thoroughgoing separation-of-powers perspective that denied absolute authority to any judicial decision, even the judgment in a particular case.

It is impossible to reconcile the dominant modern perspective of judicial supremacy with Lincoln's fully developed constitutional views on judicial authority. This lengthy survey shows an irrepressible conflict between the two. One or the other simply has to be judged wrong. Which is it?

V. CODA

2008 marks both the sesquicentennial of the Lincoln-Douglas debates and the golden anniversary of *Cooper v. Aaron*,³¹⁷ decided in 1958. The world little notes—but should long remember—the ironic affinity of these two constitutional landmarks separated by a century. Surely the lost lesson of Lincoln, first developed at length in his Senate campaign, is the stunning wrongness of the claim of complete judicial supremacy in constitutional interpretation—the equating of the decisions of the Supreme Court with the Constitution itself.

The claim is legally wrong: it is inconsistent both with the limited nature of judicial power generally and with the bedrock conception of separation of powers that forbids any one branch of the national government from controlling the constitutional judgments of the other two. It is inconsistent with democracy—with the right of the people independently to interpret their Constitution through all the avenues of popular, republican government subject to their direct and indirect control, including legislative bodies, executive bodies, judicial bodies, and juries. And it is inconsistent with the reality of willful, monstrous judicial error, most pressingly illustrated by *Dred Scott*. Unless it is

wartime seizure of the domestic steel production industry); *id.* at 631 (Douglas, J., concurring) (emphasizing that steel seizure involved an uncompensated taking of private property).

317 358 U.S. 1 (1958).

assumed that the Supreme Court can do no wrong by the Constitution—an assumption rendered impossible by the reality of *Dred Scott* (and confirmed, repeatedly, throughout the Court's history by other atrocious cases)—judicial supremacy simply cannot be squared with the supremacy of the Constitution. To defer, reflexively, to the Court's decisions, is to acquiesce, more than occasionally, to a betrayal of the Constitution, often with grave moral and human consequences. To accept judicial supremacy would be to have accepted the Court's assertion that the black race is so inferior as to have no rights that the white race is bound to respect, and that blacks justly could be reduced to slavery for their own benefit. To accept judicial supremacy would be to have accepted a second *Dred Scott* decision requiring every state in the Union to have tolerated slavery within its limits. To accept judicial supremacy would be to have accepted judicial declaration of a plenary federal constitutional right to slavery. To accept judicial supremacy would be to have accepted a judicial decision forbidding federal interference with a state's secession from the Union. In short, judicial supremacy, 150 years ago, meant accepting constitutional rights to slavery and secession.

A century, a Civil War, Reconstruction, Jim Crow, and two world wars later, *Cooper* reaffirmed *Brown v. Board of Education's*³¹⁸ rejection of racial segregation, the ugly illegitimate grandchild of the white supremacist thinking that had produced *Dred Scott*. *Cooper's* greatness lay in its unanimous reaffirmation of correct constitutional principle and in its condemnation of resistance to that principle. In that sense, *Cooper* echoed Lincoln. But, ironically, in so doing the Court in *Cooper* overreached and asserted precisely the claim of judicial supremacy that Lincoln rejected a century before. The Court in 1958 echoed Stephen Douglas in 1858, equating its decisions with the Constitution itself and—exactly as Douglas did—condemning resistance to Supreme Court opinions as resistance to the Constitution itself.³¹⁹

318 347 U.S. 483 (1954).

319 *Cooper*, 358 U.S. at 18 (claiming that *Marbury* established the proposition “that the federal judiciary is supreme in the exposition of the law of the Constitution” and that “that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system”). That assertion, or others like it, has become something of a staple of Supreme Court opinions, usually signaling the Court's need to make up in boldness what its opinion may lack in persuasiveness. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”); *United States v. Morrison*, 529 U.S. 598, 616–17 n.7 (2000) (“[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) (“[T]he Court [is] invested with the authority to decide [the people's] constitutional cases and speak

The Court did not (and has not since) recognized the irony that it was claiming for itself, in the context of a good cause, what Douglas and the South had claimed for the Court, in the context of a bad one. The claim of judicial supremacy must be *right*, or *wrong*, irrespective of context. Imagine for example that 1958 had seen, instead of *Brown* as it was actually decided, a reaffirmation of *Plessy* or even a judicial order mandating segregation of the races. Suppose, in this alternative world, *Cooper* declared the Court's decisions interpreting the Constitution to be on par with the Constitution itself and declared resistance to those decisions unlawful. Under the reasoning of the real *Cooper*, that proclamation, too, though wrong on the merits, would have been right in its exposition of judicial authority, and binding on all other actors within the constitutional system. Can this possibly be right? Would modern defenders of judicial supremacy really embrace such a result?

Against the vision of *Cooper* stands the vision of Abraham Lincoln. Lincoln did not disrespect the judicial role. But he had a realistic understanding of the possibility of grave judicial wrongdoing—realism born of the reality of *Dred Scott*. This understanding ultimately drove him to the conclusion that judicial supremacy—the claim that the Court's decisions on constitutional questions bind the other two branches of government and the political and constitutional judgments of the people—was fundamentally inconsistent with constitutional government of the people, by the people, and for the people. Judicial supremacy was, for Lincoln, a peculiar species of despotism. It was a betrayal of the Constitution.

Lincoln's legacy likewise confronts constitutional thought today with a stark choice. The widely accepted, but typically unexamined, notion of judicial supremacy is either right or wrong. If, with Douglas, we affirm that it is right, then there is nothing that *properly* may stand in the way of the Supreme Court's erroneous, and even willfully wrong, interpretations of the Constitution. One might think *Dred Scott* wrong, but to act on that thought, in politics or government, is itself wrong (with, perhaps, the narrow exception of seeking to appoint to the Supreme Court persons who hold one's view of the wrongness of the decision). One cannot accept judicial supremacy

before all others for their constitutional ideals."); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, . . . is a responsibility of this Court as ultimate interpreter of the Constitution."). The claim has not gained persuasiveness by its repetition.

without accepting the duty to accept, enforce, and embrace *Dred Scott* or any other judicial atrocity the Supreme Court might inflict upon the Constitution and upon the nation whose Constitution it is.

But if, with Lincoln, we think this notion of judicial supremacy wrong, then there is nothing wrong with resistance, through all available legal means, to Supreme Court decisions that one in good faith believes improper. The Constitution is not the exclusive province of the Supreme Court. The Court's decisions are not the Constitution. And neither the Supreme Court nor any other authority properly may declare resistance to judicial decisions to be illegitimate. Quite the reverse: the assertion of judicial supremacy is fundamentally incompatible with the American constitutional order.

