

**LINCOLN VERSUS TANEY: LIBERTY,
POWER, AND THE CLASH OF THE
CONSTITUTIONAL TITANS**

*Timothy S. Huebner**

I. TANEY, LINCOLN, AND THE CONSTITUTION.....	619
A. <i>Early Legal Careers</i>	619
B. <i>Taney’s Constitutional Vision</i>	620
C. <i>Lincoln’s Constitutional Vision</i>	626
II. TANEY, LINCOLN, AND THE RIGHTS OF SLAVEHOLDERS: <i>DRED SCOTT V. SANDFORD</i>	631
III. TANEY, LINCOLN, AND THE RIGHTS OF PRO- CONFEDERATES: <i>EX PARTE MERRYMAN</i>	636
IV. EMANCIPATION: THE CONVERGENCE OF LIBERTY AND POWER.....	640
V. ROBERTS, OBAMA, AND THE FUTURE.....	642

* Professor and Chair of the Department of History, Rhodes College. Prof. Huebner is the author of *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890* (1999); *THE TANEY COURT: JUSTICES, RULINGS, AND LEGACY* (2003); and co-editor, with Kermit L. Hall, of *MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY* (2010). I wish to thank Andrew Howie and Heather Holt for their assistance with this essay.

On January 20, 2009, Chief Justice John Roberts administered the oath of office to Barack H. Obama, the forty-fourth President of the United States. Aside from nervously stumbling over the constitutionally prescribed, thirty-five-word oath, the two men probably experienced some awkwardness of a different sort. Their pairing on the steps of the Capitol marked the first time in United States history that a Chief Justice had sworn in a President who voted against his confirmation.¹ To be sure, the two men who stood before a crowd of nearly one million spectators on that day had some things in common. Both were stellar students at Harvard Law School—Roberts (class of 1979) served as managing editor of the law review and Obama (class of 1991) as its president—and after completing law school both experienced extraordinary success.² Fifty-three at the time of the inauguration, Roberts is the second-youngest Chief Justice in American history, while Obama, at forty-seven, is the fourth-youngest to be elected President.³ Despite these similarities, as a U.S. Senator from Illinois in 2005, Obama brought their ideological differences into sharp relief during Roberts' confirmation hearings. While acknowledging Roberts' qualifications and his love for the law, Senator Obama opposed the nomination because, in his words, Roberts "has far more often used his formidable skills on behalf of the strong in opposition to the weak."⁴ Citing in particular Roberts' dismissive attitude toward "efforts to eradicate the remnants of racial discrimination," Obama was one of twenty-two Senate Democrats

¹ Robert Barnes, *A First for Nation and Chief Justice*, WASH. POST, Jan. 20, 2009, at A11. Few U.S. Senators have become President, and even fewer Senators have had the chance to vote on the confirmation of the Chief Justices who swore them into office. Harry S. Truman was sworn in by Chief Justice Harlan Stone. Joint Congressional Committee on Inaugural Ceremonies, Inauguration of the President: Inauguration of President Harry S. Truman, 1945, <http://inaugural.senate.gov/history/chronology/hstruman1945.cfm> (last visited Mar. 4, 2010). Truman was a Senator at the time of Stone's confirmation, but the confirmation was a voice vote, meaning that there is no record of Truman's position on the nominee. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1133 (Kermit L. Hall et al. eds., 2d ed. 2005); *Missouri Picks Winners*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), Oct. 28, 2008, at A3; U.S. Senate, Supreme Court Nominations, present-1789, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Mar. 4, 2010). John F. Kennedy and Lyndon B. Johnson were sworn in by Chief Justice Earl Warren. The confirmation vote for Warren was also conducted by voice vote. U.S. Senate, *supra*.

² Barnes, *supra* note 1, at A11.

³ *Id.*

⁴ *Id.*; Nomination of John Roberts, 151 CONG. REC. S10365, S10366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

to vote against President George W. Bush's first nominee to the Supreme Court.⁵

Despite Obama's clear statement in opposition to Roberts, whatever strain exists in the relationship between the two men pales in comparison to the tension that surely existed almost 150 years before, when Chief Justice Roger B. Taney administered the presidential oath—on the very same Bible—to Abraham Lincoln. Nearly four years to the day after Taney had delivered his opinion in *Dred Scott v. Sandford*, in which he held that slavery was constitutionally protected in federal territories,⁶ on March 4, 1861, President-elect Lincoln rose from his seat on the inaugural platform to take the oath. A previously obscure former Congressman from Illinois, Lincoln had recently gained national fame as the most thoughtful and outspoken critic of the *Dred Scott* opinion. In a series of Senate campaign debates with Stephen Douglas in 1858, Lincoln had sharply criticized the Court's holding, and in 1860 the platform of Lincoln's Republican Party had denounced *Dred Scott* as "a dangerous political heresy."⁷ Now he would take the oath from the author of the pro-slavery ruling. It was a dramatic moment. Taney had reportedly said that, were Senator William Seward of New York—arguably a more outspoken opponent of slavery than Lincoln—to gain the presidency, "he would . . . refuse[] to administer the oath" to him.⁸ Although Lincoln may have been a bit less offensive to Taney's sensibilities, surely the Chief Justice knew that by swearing in the first Republican President, he was in effect witnessing the demise of the Court's supposedly definitive decision on slavery in the territories.⁹ Lincoln's inauguration thus marked a critical

⁵ *The Senate's Vote on Roberts*, N.Y. TIMES, Sept. 30, 2005, at A24. Roberts won confirmation by a vote of 78–22. *Id.* All fifty-five Senate Republicans and exactly half of the chamber's forty-four Democrats voted in favor of Roberts. *Id.* Independent Senator James Jeffords also voted "yes." *Id.*; see Rollcall Vote No. 245 Ex., 151 CONG. REC. S10649–50 (daily ed. Sept. 29, 2005) (providing the rollcall vote for the confirmation of John G. Roberts).

⁶ 60 U.S. 393, 451 (1856).

⁷ Appendix: Party Platforms of 1860, in 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–1968, at 1123, 1126 (Arthur M. Schlesinger, Jr. et al. eds., 1971); Michael Stokes Paulsen, *Lincoln & Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1243, 1245–46 (2008).

⁸ BRIAN MCGINTY, LINCOLN AND THE COURT 19 (2008).

⁹ Seward particularly incurred the wrath of Southerners for his "higher law" speech of 1850, in which he had asserted that there was a higher law regarding the future of slavery in the territories than the U.S. Constitution, and for his 1858 statement that an "irrepressible conflict" existed between the slave and free states. William Henry Seward, in 8 DICTIONARY OF AMERICAN BIOGRAPHY 615, 617 (Dumas Malone ed., 1963). By all accounts, tension between Lincoln

moment in U.S. history; the pro-slavery constitutional order—that Taney had such a hand in creating—confronted an uncertain future.

The meeting that day on the Capitol steps between Taney and Lincoln symbolized a much deeper conflict that can only be understood by delving into the biographies, political affiliations, and constitutional visions of the Chief Justice and the President. Taney's partisan commitment to Jacksonian Democratic politics, his bent toward judicial pragmatism, and his eventual belief that the Constitution protected the rights of slaveholders, all influenced his constitutional thought and decision-making. His opinions in *Dred Scott*, in support of slaveholders' rights, and *Ex parte Merryman*, in defense of the rights of Confederate sympathizers, represent the culmination of the Chief Justice's constitutional jurisprudence. Lincoln's adherence to the principles of the Whig Party, his deep faith in the rule of law, and his abstract belief in the Declaration of Independence defined his constitutional perspective. The evolution of his thinking on the issue of the relationship between slavery and national power, as well as his justification for the suspension of the privilege of the writ of habeas corpus, best exemplified this constitutional vision. Because the perspectives of these two powerful men were so different from each other, the struggle between Taney and Lincoln constituted a veritable clash of the constitutional titans.

I. TANEY, LINCOLN, AND THE CONSTITUTION

A. *Early Legal Careers*

Taney and Lincoln came to the legal profession from very

and Taney was not visible on Inauguration Day. Taney and Lincoln, according to one observer, walked onto the platform "arm in arm," as was the custom at the time. L. E. CHITTENDEN, RECOLLECTIONS OF PRESIDENT LINCOLN AND HIS ADMINISTRATION 87 (1891). After the new President delivered his inaugural address, Taney administered the oath:

The Chief Justice of the United States now came forward. His venerable appearance gave to what might have been a mere matter of form great dignity and impressive significance. He extended an open Bible, upon which Mr. Lincoln laid his left hand, and, uplifting his right arm, he slowly repeated after the Chief Justice the words of the Constitution. "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States. So help me God!"

Id. at 90–91.

different backgrounds. The aristocratic Taney, born in 1777 in Calvert County, Maryland, in the southern part of the state, hailed from a distinguished family who had lived in Maryland for five generations.¹⁰ The second of four sons, as a young man he lacked the opportunity to inherit his father's estate, and in 1792 he went north to school, enrolling at Dickinson College in Carlisle, Pennsylvania.¹¹ After graduating from Dickinson in 1796, Taney moved to Annapolis to study the law with the eminent "Jeremiah Townley Chase, one of the three judges of the Maryland General Court."¹² In 1799, Taney gained admission to the bar, and after a brief term in the Maryland House of Delegates, he moved to Frederick, Maryland in 1801, located about forty-five miles northwest of Baltimore near the Pennsylvania border.¹³ There, he earned the respect of the community and soon attained a reputation as one of the best lawyers in the western part of the state.¹⁴ In 1809, he began arguing cases before the Maryland Court of Appeals, the state's highest court, and in 1816 he won election to the state senate, where he served for five years.¹⁵ After practicing law in Frederick for more than two decades, Taney moved to Baltimore in 1823 in order to advance his career, and he soon began arguing cases before the United States Supreme Court.¹⁶ By 1827, when he won appointment to the position of state Attorney General, Taney stood at the top of the legal profession in his home state.¹⁷

Lincoln took a different path to the law. Born in 1809 in the wilds of central Kentucky, the son of illiterate parents, the young Lincoln moved with his family from one rough patch of land to the next, first to southern Indiana and then Illinois. Lincoln hated the laborious life of a frontier farmer and sought every chance he could to gain an education. Getting a hold of whatever books were available, he educated himself, never attended college, and won friends easily with his talent for talking and story-telling. Unlike most other lawyer-politicians of the day, Lincoln ran for political office before ever beginning his study of

¹⁰ CARL BRENT SWISHER, ROGER B. TANEY 1, 3, 9 (Archon Books 1961) (1935).

¹¹ *Id.* at 7, 9, 15.

¹² *Id.* at 24–25.

¹³ *See id.* at 28, 31–32; *see also* WALKER LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 40, 42 (1965).

¹⁴ LEWIS, *supra* note 13, at 42.

¹⁵ *Id.*; SWISHER, *supra* note 10, at 82.

¹⁶ *See* JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 12 (2006).

¹⁷ *Id.* at 13.

the law. Elected to the Illinois Legislature in 1834, he started his legal education that same year by reading law books on his own, rather than by studying with another attorney.¹⁸ Although exceptional in this regard, Lincoln never questioned the soundness of this approach. “[I]t is but a small matter whether you read *with* any body or not,” he wrote some years later to the young Isham Reavis, who had inquired whether he could study law with Lincoln.¹⁹ “I did not read with any one,” Lincoln noted proudly.²⁰ In 1836, Lincoln earned admission to the bar and he built his practice while he served in the state legislature.²¹

B. Taney’s Constitutional Vision

Despite a difference in their ages of twenty-three years, the 1830s proved the crucial decade in shaping the constitutional and political beliefs of both Taney and Lincoln. Although, like many aristocrats of the time, Taney had begun his political career in the early nineteenth-century as a member of the Federalist Party, factionalism led to the eventual fading of the party in Maryland, and by the mid-1820s Taney sought out new political connections.²² In the four-way presidential campaign of 1824, the Marylander supported Andrew Jackson of Tennessee, nicknamed “Old Hickory.”²³ “He is honest, he is independent, is not brought forward by any particular class of politicians, or any sectional interest,” Taney wrote to a friend.²⁴ “He is not one of the [Cabinet] Secretaries. He is taken up spontaneously by the people, and if he is elected will owe obligations to no particular persons.”²⁵ Although Jackson lost in 1824, Taney’s hitching of his political fortunes to those of Jackson paid off four years later when the Tennessean won election to the presidency.²⁶ A few years later, when a scandal led to the re-shuffling of Jackson’s Cabinet, Taney accepted his first appointment to a position in the federal government.²⁷ He served first as U.S. Attorney General

¹⁸ See MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 31 (2006); George Anastaplo, *Abraham Lincoln and the American Regime: Explorations*, 35 VAL. U. L. REV. 39, 126 (2000).

¹⁹ STEINER, *supra* note 18, at 53.

²⁰ *Id.*

²¹ *Id.* at 29, 37.

²² SWISHER, *supra* note 10, at 118, 119–20, 121.

²³ *Id.* at 121, 122.

²⁴ *Id.* at 121.

²⁵ *Id.*

²⁶ *Id.* at 122–23.

²⁷ *Id.* at 140–41.

(1831–1833) and subsequently as Secretary of the Treasury (1833–1834).²⁸ In the latter role, Taney carried out the extremely controversial task of withdrawing the federal government's deposits from the Second Bank of the United States in 1833.²⁹ While Jackson had already vetoed a bill that would have re-chartered the Bank, Taney's action dealt the final death blow to the Bank and won him no friends among Jackson's Whig political opponents.³⁰

Taney's willingness to assist Old Hickory in killing the Bank represented a sincere expression of Taney's political ideology. Like other Jacksonian Democrats, Taney believed that power and liberty were at odds with each other and that concentrated power—whether political or economic—posed a grave threat to individual liberty. Jacksonian Democrats thus opposed attempts by the national government to regulate, coerce, or control, fearing that such efforts would restrict the rights of individuals.³¹ Only strong states, they reasoned, building on the philosophical and political legacy of Thomas Jefferson, could stand as bulwarks of liberty in the face of national tyranny. Democrats also detected a whiff of aristocratic privilege in such coercive policies. Nationally funded internal improvements, national banks, and high federal tariffs, as well as temperance laws enacted at the state and local level, all incurred the wrath of Democratic politicians, for such measures seemed to destroy individual liberty at the same time that they promoted the economic interests of the elite.³² “If we can not at once . . . make our Government what it ought to be,” Taney eloquently stated in the famous Bank Veto Message that he penned for President Jackson, continuing on to say:

we can at least take stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code

²⁸ *Id.* at 140–41, 144.

²⁹ HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 155 (2006). Two previous secretaries had lost their jobs for their unwillingness to commit the deed. *Id.* at 154–55.

³⁰ See SWISHER, *supra* note 10, at 193–94, 239, 258. For more information on the Bank War, see ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR* 44 (1967) and WATSON, *supra* note 29, at 132–71.

³¹ See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 501 (2007).

³² See WATSON, *supra* note 29, at 97–98; see also HOWE, *supra* note 31, at 501; SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 455 (2005).

of laws and system of political economy.³³ By the 1830s, Taney, the politician, stood squarely against concentrated power and privilege.³⁴

As Chief Justice, Taney somewhat moderated his Jacksonian commitments. Appointed by Jackson in 1836,³⁵ much to the outrage of political opponents who feared that he would do no more than carry out the President's partisan agenda, the new Chief Justice soon proved his critics wrong. Taney emerged as a thoughtful jurist, who took the constitutional text, legal precedent, and social consequences carefully into account when deciding cases.³⁶ Over the next two decades, Taney acted as a skilled legal craftsman who helped resolve a number of the most pressing constitutional questions confronting the country. In doing so, Taney's jurisprudence displayed more prudence than ideological purity.

This "nondoctrinaire" approach to decision-making proved especially evident in three important areas of constitutional interpretation—contracts, commerce, and admiralty jurisdiction.³⁷ On the matter of contracts, Taney delivered the decision in *Charles River Bridge v. Warren Bridge*, in which he resolved the thorny question of whether a corporation charter issued by a state contained an implied monopoly.³⁸ Taney rejected the notion of an implied monopoly and held in favor of

³³ Andrew Jackson, Veto Message (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1153 (James D. Richardson ed., 1897) [hereinafter A COMPILATION OF MESSAGES].

³⁴ See SWISHER, *supra* note 10, at 228. Such a polarizing figure was Taney that when Jackson initially appointed him to an associate justiceship in 1835, the Senate killed the nomination by indefinitely postponing it and even tried to reduce the Court's size to six in order to eliminate the vacancy altogether. Jackson nominated him again for the Court in 1835, this time to the Chief Justice position to replace the deceased John Marshall. E. W. Smalley, *The Supreme Court of the United States*, 25 CENTURY MAG. 163, 178 (1882).

³⁵ See Smalley, *supra* note 34, at 178.

³⁶ To be sure, some of his opinions conformed to Jacksonian principles, but the new Chief Justice was clearly not a "political judge" in the worst sense of the word. He did not seek to impose a specific agenda in cases regardless of the facts and the law. Instead, he showed himself to be political in the sense that he displayed an understanding of the larger circumstances surrounding legal issues, as well as an ability to craft his legal decisions to resolve social and political tensions. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 1, 30 (1977). He was, in Morton Horwitz's classic formation, "an instrumentalist," who possessed an "awareness that the impact of a decision extended far beyond the case before" him. *Id.* at 2.

³⁷ R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 116, 117 (2d ed. 2006).

³⁸ 36 U.S. 420, 441 (1837).

the new (and toll-free) Warren Bridge, which threatened the business of the established (and toll-operated) Charles River Bridge.³⁹ The opinion thus exhibited Jacksonian opposition to monopoly power. Taney's decisions on the commerce power were more pragmatic. As the nation's economy expanded, Taney and his judicial colleagues struggled to define the specific parameters of national and state regulatory authority.⁴⁰ Taney believed that states possessed a concurrent power to regulate commerce—even if that commerce passed beyond a state's borders—provided that the regulation did not conflict with existing federal law.⁴¹ After struggling in a series of decisions to settle the law in this area, Taney and his fellow justices eventually adopted a compromise. In *Cooley v. Board of Wardens*, the Court held that areas requiring national uniformity would be the exclusive domain of Congress, while other matters of commercial regulation would be the purview of states.⁴²

Finally, Taney provided a nationalistic solution to the question of the appropriate admiralty jurisdiction of the federal courts. For many years, the Court operated under a precedent that restricted federal jurisdiction to those waters within the ebb and flow of the tide, but economic growth and technological change necessitated legal reform.⁴³ With increasing numbers of cases involving steamboats burdening state courts, Congress extended admiralty jurisdiction in 1845 to federally licensed vessels employed in interstate commerce on the Great Lakes and connecting waterways.⁴⁴ In *Genesee Chief v. Fitzhugh*, Taney upheld the 1845 statute, overturned precedent, and established a broad new definition of federal admiralty jurisdiction.⁴⁵ All public navigable waters, Taney held, came within the admiralty and maritime jurisdiction of the federal courts.⁴⁶ Thus, Taney proved Jacksonian in some decisions, more nationalistic in others, and for the most part steered a moderate course when it came to handling the major constitutional questions of his day. All of these decisions reflected Taney's sensitivity to political realities

³⁹ *Id.* at 477.

⁴⁰ TIMOTHY S. HUEBNER, *THE TANEY COURT: JUSTICES, RULINGS, AND LEGACY* 38 (2003).

⁴¹ *Id.*

⁴² 53 U.S. 299, 319 (1852).

⁴³ *See In re Steam-Boat Thomas Jefferson*, 23 U.S. 428, 429 (1825) (restricting admiralty jurisdiction to the ebb and flow of the tide).

⁴⁴ *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 451 (1851).

⁴⁵ *Id.* at 451, 457.

⁴⁶ *Id.* at 457.

and changing social conditions. In each instance, the Chief Justice sought to solve a pressing social problem that had become a constitutional problem.

On the slavery issue, Taney eventually came to embrace the position of most Jacksonian Democrats—that slaveholding constituted a constitutionally protected right. In Jacksonian thought, this notion stemmed from two main sources. First, slavery existed under state law and held a relatively insignificant place in federal law and the Constitution.⁴⁷ For this reason, southern Democrats in particular emphasized state autonomy and opposed federal control over the institution. Second, where the Constitution did mention slavery, they argued, it offered protection to slaveholders in the form of the Fugitive Slave Clause, which stated that fugitive slaves were to be “delivered up” to their owners.⁴⁸ Taney was slow to arrive at this pro-slavery position. In fact, early in his career he publicly expressed anti-slavery principles and actually liberated his own slaves.⁴⁹ But, as he joined the Jackson Administration during the 1830s, his views gradually evolved, and sometime during the 1840s Taney became an adherent of this “slaveholders’ rights” argument.⁵⁰

As politics became increasingly sectionalized, Taney emerged

⁴⁷ See HUEBNER, *supra* note 40, at 39.

⁴⁸ See *id.* at 40; see also U.S. CONST. art. IV, § 2, cl. 3.

⁴⁹ HUEBNER, *supra* note 40, at 34.

⁵⁰ Taney expressed these early anti-slavery views most forcefully in his speech in defense of Jacob Gruber, a Methodist abolitionist minister from Pennsylvania. Slaveholders in Maryland brought charges against Gruber for disturbing the peace and inciting a rebellion after he preached a controversial sermon in which he criticized slavery and slaveholders. In the course of successfully defending Gruber, Taney uttered the following words:

A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet while it continues, it is a blot on our national character, and every real lover of freedom, confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means, by which this [necessity] may be best attained. And until it shall be accomplished: until the time shall come when we can point without a blush, to the language held in the [D]eclaration of [I]ndependence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.

DAVID MARTIN, TRIAL OF THE REV. JACOB GRUBER 43 (1819). For more on Taney’s changing views on slavery, see Timothy S. Huebner, *Roger B. Taney and the Slavery Issue: Looking Beyond—and Before—Dred Scott*, J. AM. HIST. (forthcoming 2010).

as one of the most pro-slavery members of a moderately pro-slavery Supreme Court. “In *Groves v. Slaughter*, a case involving the sale of slaves in Mississippi,” Taney went beyond the scope of the question at hand—and beyond the decision of his colleagues—and argued that power to regulate interstate slave trading lay exclusively with the states.⁵¹ In *Prigg v. Pennsylvania*, Taney concurred with the majority opinion invalidating Pennsylvania’s personal liberty law as a violation of both the Constitution and the Federal Fugitive Slave Law of 1793.⁵² “The Pennsylvania statute required slave catchers to obtain a proper writ from a state judge before removing any African Americans from the state.”⁵³ In the majority opinion, Justice Joseph Story, in the majority opinion, struck down the law, holding that regulation of the slaveholder’s right of recovery lay exclusively with Congress.⁵⁴ Taney, in a concurrence, rejected Story’s reasoning. The Chief Justice “insisted that the Constitution prohibited states only from *interfering* with a slaveholder’s right to recover his property, not from *supporting* or *enforcing* the rights of slaveholders.”⁵⁵ He concluded, that as long as states did not threaten the constitutional guarantees of slaveholders, they could regulate slavery.⁵⁶ In *Strader v. Graham*, Taney again argued for state power to protect slavery, this time by dismissing a suit for damages involving a group of slaves who had been taken briefly into Ohio and later fled from Kentucky into Canada.⁵⁷ When the owner of the slaves sued a group of men who had allegedly aided their escape, defense counsel argued that the Northwest Ordinance, which had banned slavery in the Old Northwest in 1787, freed the slaves upon their stepping foot on Ohio soil.⁵⁸ Writing for a unanimous Court, Taney dismissed the case for lack of jurisdiction by claiming that the laws of Kentucky superseded the Northwest Ordinance.⁵⁹ Although none of these Supreme Court decisions proved particularly controversial, in each instance Taney preserved slaveholders’ rights by making sure

⁵¹ HUEBNER, *supra* note 40, at 39; see *Groves v. Slaughterhouse*, 40 U.S. 449, 508–09 (1841).

⁵² 41 U.S. 539, 626–27 (1842) (Taney, C.J., concurring).

⁵³ HUEBNER, *supra* note 40, at 39; see *Prigg*, 41 U.S. at 550–53 (majority opinion).

⁵⁴ *Prigg*, 41 U.S. at 625.

⁵⁵ HUEBNER, *supra* note 40, at 39; see *Prigg*, 41 U.S. at 627 (Taney, C.J., concurring).

⁵⁶ *Prigg*, 41 U.S. at 633.

⁵⁷ 51 U.S. 82, 97 (1850).

⁵⁸ *Id.* at 93–94.

⁵⁹ *Id.* at 96–97.

that states maintained control of slavery.⁶⁰

By the late 1850s, Taney's constitutional vision consisted of Jacksonian political principles rooted in his partisan past, a dose of moderate pragmatism born of his experience as Chief Justice, and a growing commitment to the rights of slaveholders shaped by the widening sectional rift in national politics. In the years to come—the pivotal era of *Dred Scott* and the Civil War—all of these elements of his thinking would prove significant.

C. Lincoln's Constitutional Vision

Lincoln developed a very different vision from that of Taney. Lincoln's beliefs represented those of the Whig Party of the 1830s, which had coalesced around opposition to Jackson and his policies. In his very first political campaign—an unsuccessful run for the state legislature in 1832—Lincoln articulated his commitment to the Whig agenda, particularly Congressman Henry Clay's "American System."⁶¹ "My politics are short and sweet, like the old woman's dance," Lincoln stated.⁶² "I am in favor of a national bank. I am in favor of the internal improvement system and a high protective tariff. These are my sentiments and political principles,"⁶³ he continued.

In contrast to Jacksonians, Whigs stressed the need for a national program of economic development and favored the exercise of government power to assist in the process of nationwide economic integration. Eschewing class-based rhetoric, Whigs emphasized the compatibility of all classes and interests, for they believed that the so-called "producing classes" included lawyers, bankers, and merchants as well as laborers, artisans, and farmers.⁶⁴ Not inclined to view the social order in

⁶⁰ For other discussions of Taney's preservation of slaveholders' rights, see HUEBNER, *supra* note 40, at 155–64; EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825–1861* (2009); NEWMYER, *supra* note 37, at 118–31; Carl B. Swisher, *The Taney Period 1836–64*, in 5 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 528–91 (1974); and Paul Finkelman, "Hooted Down the Page of History": *Reconsidering the Greatness of Chief Justice Taney*, 1994 *J. SUP. CT. HIST.* 83, 89–98 (1994).

⁶¹ See DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 123–49 (1979) (providing a detailed chapter on Clay as a Whig and advocate of the American System).

⁶² Abner Y. Ellis, *A Political Speech in 1832*, in *RECOLLECTED WORDS OF ABRAHAM LINCOLN* 150, 150 (Don E. Fehrenbacher & Virginia Fehrenbacher eds., 1996).

⁶³ *Id.*

⁶⁴ WATSON, *supra* note 29, at 244.

stark, oppositional terms, in other words, Whigs insisted that all rose on their own merits and that anyone in America could experience upward mobility.⁶⁵ Perhaps because of his humble origins and his own rapid rise, Lincoln believed that every man could climb the ladder to success.

Consistent with the ideals of Whigs, Lincoln also expressed a deep respect for order and the rule of law.⁶⁶ In one of his earliest orations, the so-called “Lyceum Speech” of 1838,⁶⁷ Lincoln articulated a theme that he would reiterate throughout his political career:

Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primmers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And in short, let it become the *political religion* of the nation.⁶⁸

Disrespect for law, Lincoln believed, was greatly to be feared, for it manifested itself in outbreaks of social chaos and mob violence.⁶⁹ Lincoln knew the dangers of crowds when stirred to action, for only months before his speech, the murder of an abolitionist minister and editor had occurred in nearby Alton, Illinois. After having already destroyed three times the printing press of Elijah Lovejoy, in 1837 a mob in Alton murdered the outspoken opponent of slavery.⁷⁰ Although Lincoln neglected to mention Lovejoy’s death in the Lyceum speech—he referred instead to other recent mob atrocities in Mississippi and St. Louis—Lincoln viewed the excess of passions as a grave threat to the Republic.⁷¹ Only if reason and rationality prevailed in politics and policy-making could the young nation survive. “Reason, cold, calculating, unimpassioned reason,” Lincoln urged, “must furnish all the materials for our future support and defence [sic].”⁷² For

⁶⁵ *Id.*; see HOWE, *supra* note 61, at 96–122.

⁶⁶ HOWE, *supra* note 61, at 34 (noting “[t]he American Whig’s dedication to order”).

⁶⁷ Address to the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in THE PORTABLE ABRAHAM LINCOLN 17, 17 (Andrew Delbanco ed., 1992).

⁶⁸ *Id.* at 22.

⁶⁹ See *id.* at 18–19.

⁷⁰ See MERTON L. DILLON, ELIJAH P. LOVEJOY, ABOLITIONIST EDITOR 169 (1961); PAUL SIMON, FREEDOM’S CHAMPION: ELIJAH LOVEJOY 58–59, 63, 118 (1994).

⁷¹ Address to the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), *supra* note 67, at 18–21.

⁷² *Id.* at 26.

Lincoln, reason and reverence for the law went hand in hand.

Commitment to the principles of the Declaration of Independence constituted a final, and increasingly important, component of Lincoln's political and constitutional beliefs. Lincoln served only a single term in the U.S. House of Representatives, during the 1840s, after which he returned home to Springfield to build his law practice.⁷³ But the passage of the Kansas-Nebraska Act in 1854 caused Lincoln to turn his attention again toward the national stage.⁷⁴ As he did so, he repeatedly cited the Declaration as foundational to his thinking about slavery, freedom, and the meaning of America.⁷⁵

Lincoln frequently referred to the Declaration of Independence both in his public speeches and his private correspondence. In one of his most important addresses, delivered at Peoria, Illinois on October 16, 1854, Lincoln insisted that the Declaration stood as the moral standard against which the nation needed to be measured.⁷⁶ Arguing that the founding generation held anti-slavery beliefs, he concluded that the "unmistakable spirit of that age towards slavery, was hostility to the principle, and toleration, only by necessity."⁷⁷ But since the 1820s, he argued, something had gone terribly wrong.⁷⁸ The nation had diverged from the spirit of its founding and begun to accept southern arguments that slaveholding constituted a basic right.⁷⁹ Lincoln offered this summary of the nation's history in this regard: "Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for SOME men to enslave OTHERS is a 'sacred right of self-government.'"⁸⁰

Lincoln expressed these beliefs even more strongly in private. In an 1855 letter to his dear friend Joshua Speed, for example, Lincoln explained his opposition to the extension of slavery as well as to Know-Nothingism, a political movement during the 1850s that opposed Catholic immigrants.⁸¹ Lincoln wrote:

⁷³ LEWIS E. LEHRMAN, *LINCOLN AT PEORIA: THE TURNING POINT* 344 (2008) (providing a timeline of milestones in the life of Abraham Lincoln, including his term as a Representative).

⁷⁴ *See id.* at 77, 99.

⁷⁵ *Id.* at 101, 103–04.

⁷⁶ *See* Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), *in* THE PORTABLE ABRAHAM LINCOLN, *supra* note 67, at 41, 63–64.

⁷⁷ *Id.* at 73–74 (emphasis omitted).

⁷⁸ *Id.*

⁷⁹ *Id.* at 74.

⁸⁰ *Id.*

⁸¹ *See* Letter to Joshua F. Speed (Aug. 24, 1855), *in* THE PORTABLE ABRAHAM

Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that “*all men are created equal*.” We now practically read it “all men are created equal, *except negroes*.” When the Know-Nothings get control, it will read “all men are created equal, *except negroes, and foreigners, and catholics*.” When it comes to this I should prefer emigrating to some country where they make no pretense of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy [sic].⁸²

According to Lincoln, the nation needed to return to the basic principles that all people were entitled to “life, liberty, and the pursuit of happiness,” as articulated in the Declaration.⁸³

All of these ideas coalesced in Lincoln’s thinking during the late 1850s, when the demise of the Whig Party prompted him to join the newly-formed Republican Party. A loose coalition of anti-slavery, former Whig, and anti-Jacksonian elements in American politics, the Republicans emphasized an ideology of free labor that upheld the dignity of individual work and stressed the economic opportunities associated with individual ownership and upward mobility.⁸⁴ Viewing the North as the embodiment of these principles and the South as the antithesis of these ideals, Republicans saw the West as the battleground over the future of America.⁸⁵ Republicans hoped to stop the spread of slavery into the new federal territories as a way of ensuring that a free labor way of life took root in the West.⁸⁶

Lincoln emerged as an important voice within Republican ranks. In 1858, he gained national attention in his debates with

LINCOLN, *supra* note 67, at 84, 88.

⁸² *Id.* at 88.

⁸³ Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), *supra* note 76, at 63.

⁸⁴ ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11 (1970); Eric Foner, *The Ideology of the Republican Party*, in THE BIRTH OF THE GRAND OLD PARTY: THE REPUBLICANS’ FIRST GENERATION 8, 8–9 (Robert F. Engs & Randall M. Miller eds., 2002).

⁸⁵ DAVID M. POTTER, THE IMPENDING CRISIS, 1846–1861, at 33 (Don E. Fehrenbacher ed., 1976).

⁸⁶ *Id.*; see EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 1 (1967); JONATHAN H. EARLE, JACKSONIAN ANTISLAVERY & THE POLITICS OF FREE SOIL, 1824–1854 (2004) (providing multiple chapters on sectional politics and the question of slavery in the territories); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY 258 (Ward M. McAfee ed., 2001); MICHAEL F. HOLT, THE FATE OF THEIR COUNTRY: POLITICIANS, SLAVERY EXTENSION, AND THE COMING OF THE CIVIL WAR 5 (2004); ERIC H. WALTHER, THE SHATTERING OF THE UNION: AMERICA IN THE 1850s, at xix (2004).

Senator Stephen Douglas.⁸⁷ In this series of exchanges across the State of Illinois, Lincoln repeatedly emphasized free labor themes—the idea of lifting unnecessary burdens from people’s shoulders and allowing them to reap the fruits of their own toil.⁸⁸ The Declaration of Independence, moreover, figured prominently in his critique of slavery and southern society. “[T]here is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence—the right to life, liberty, and the pursuit of happiness,” Lincoln proclaimed.⁸⁹ “I agree with Judge Douglas [the negro] is not my equal in many respects . . . [b]ut in the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.*”⁹⁰ A few years after the great debates, as the nominee of the Republican Party, Lincoln defeated Douglas and two other candidates to win the presidency in 1860.⁹¹ By that time, Lincoln held a nationalistic outlook rooted in his Whig background, a commitment to the rule of law learned from his own experience as a lawyer, and a faith in the Declaration of Independence that put him at odds with the spread of slavery.

II. TANEY, LINCOLN, AND THE RIGHTS OF SLAVEHOLDERS: *DRED SCOTT V. SANDFORD*

As President, Lincoln was forced to confront Taney’s decision in *Dred Scott v. Sandford*.⁹² Scott, a Missouri slave, had accompanied his owner, an Army surgeon named John Emerson, to Illinois and Wisconsin Territory during the 1830s.⁹³ Several years later, after the death of Emerson, Scott initiated a lawsuit

⁸⁷ THE POLITICAL LINCOLN: AN ENCYCLOPEDIA 433 (Paul Finkelman & Martin J. Hershock eds., 2009) [hereinafter THE POLITICAL LINCOLN].

⁸⁸ *Id.* at 276.

⁸⁹ First Lincoln-Douglas Debate, Ottawa, Illinois (Aug. 21, 1858), in THE PORTABLE ABRAHAM LINCOLN, *supra* note 67, at 97, 115.

⁹⁰ *Id.*

⁹¹ THE POLITICAL LINCOLN, *supra* note 87, at 115–16.

⁹² 60 U.S. 393 (1856). The literature on *Dred Scott* is, of course, voluminous, but one should especially see AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857 (2006); WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT’S STRUGGLE FOR FREEDOM (1979); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS (1997); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); and EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY (2007).

⁹³ *Dred Scott*, 60 U.S. at 431, 493.

with the aid of the sons of his former owners, claiming that, by virtue of his residence in free territory, he had gained his freedom.⁹⁴ By a vote of 7–2, the justices denied Scott’s claim for freedom.⁹⁵ Taney led the way. In a lengthy opinion, Taney revealed his deep devotion to slavery and the values of southern society. First, he held that African Americans, whether slave or free, had not been included in the political community at the time of the founding; therefore, he reasoned, neither they nor their descendants were citizens of a state within the meaning of the Constitution.⁹⁶ Because Scott could not be a citizen, he had no right to sue.⁹⁷ According to Taney, African Americans were “so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”⁹⁸ Shocking as it is to modern ears, these words, as Mark Graber shows, remained well within the antebellum constitutional mainstream and in keeping with the Supreme Court’s other pronouncements on slavery.⁹⁹ This aspect of the Court’s decision, in short, drew little criticism.

More significant within the context of the political and constitutional debate of the time was Taney’s other holding: that Congress had no power to prohibit slavery in federal territories.¹⁰⁰ After disagreements among the Justices broke apart an initial consensus in favor of a narrow ruling, Taney’s pragmatic side emerged and he chose to address this larger issue. The intensity of the national political debate over slavery—as well as a real or perceived pressure to “resolve” the question, once and for all—surely contributed to this fateful decision. According to Taney, Scott’s sojourn in Wisconsin Territory did not make him a free man, because Congress lacked the power to exclude slavery from the territories.¹⁰¹ Taney narrowly interpreted the Constitution’s Territories Clause by arguing that it applied only to territories at the time of the founding.¹⁰² In doing so, Taney limited congressional power over more recent territorial acquisitions such as the Louisiana Purchase and the lands gained in the Mexican-American War.

⁹⁴ MALTZ, *supra* note 92, at 64.

⁹⁵ *Dred Scott*, 60 U.S. at 455.

⁹⁶ *Id.* at 406.

⁹⁷ *Id.*

⁹⁸ *Id.* at 407.

⁹⁹ GRABER, *supra* note 92, at 28–29.

¹⁰⁰ *Dred Scott*, 60 U.S. at 450.

¹⁰¹ *Id.* at 452.

¹⁰² *Id.* at 432.

Most important, the Chief Justice held that slaveholding in the territories was a constitutional right.¹⁰³ In order to make this point, Taney claimed that the Fifth Amendment's Due Process Clause prohibited Congress from interfering with slavery in the territories, because to do so would violate the property rights of the slaveholders who settled there.¹⁰⁴ An act of Congress that attempted to restrict this right, he asserted, "could hardly be dignified with the name of due process of law."¹⁰⁵ Slaves, he contended, were no different than any other form of property, and the rights of such property holders required constitutional protection.¹⁰⁶ Taney also relied upon the Slave Trade Clause and the Fugitive Slave Clause to make this point. Based on the former, Taney argued, "[t]he right to traffic in [a slave] like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years."¹⁰⁷ As for the latter, Taney insisted that the right of recapturing fugitives also showed that the Constitution protected the rights of slaveholders.¹⁰⁸ "[T]he Government in express terms is pledged to protect [slave property] in all future time, if the slave escapes from his owner," Taney wrote, "[a]nd no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description."¹⁰⁹ According to Taney, Congress could do nothing to interfere with the rights of slaveholders in federal territories.¹¹⁰ The key line of the opinion succinctly captured Taney's view of slavery: "[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution."¹¹¹

The major "rights" question presented by *Dred Scott*, in other words, was not whether African Americans—slave or free—possessed the rights of citizenship under the U.S. Constitution; rather, "rights," in the context of the heated debates of the 1850s, meant the rights of *slaveholders*. Those were the rights that

¹⁰³ *Id.* at 451.

¹⁰⁴ *Id.* at 450.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 451.

¹⁰⁷ *Id.* Taney conveniently ignored the fact that Congress had ended the slave trade in 1808. *See* Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426, 426 (prohibiting the importation of slaves into the United States, effective as of January 1, 1808).

¹⁰⁸ *Dred Scott*, 60 U.S. at 451–52.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 450.

¹¹¹ *Id.* at 451.

South Carolina Senator John C. Calhoun had championed during the late 1840s and that Southern extremists such as Alabama political leader William Lowndes Yancey had taken up during the late 1850s.¹¹² Strikingly absent from the mainstream national debate over slavery, in fact, was a discussion of the rights of African Americans.¹¹³ Abolitionists and anti-slavery activists seemed perfectly content to debate the constitutionality and morality of slavery, but few argued for absolute racial equality under the Constitution or the law. Taney's decision in *Dred Scott* constituted a ringing endorsement, from the highest Court in the land, of the view that the Constitution specifically protected the rights of slaveholders.

Lincoln struggled to respond to *Dred Scott*. As a candidate for the U.S. Senate in Illinois, Lincoln expressed no opposition to Taney's holding regarding black citizenship. In fact, Lincoln "made clear that he 'never ha[d] complained *especially* of the *Dred Scott* decision because it held that a negro could not be a citizen."¹¹⁴ When it came to the rights of African Americans, in his debates with Douglas, Lincoln repeatedly referred only to the basic right—which he believed lay in the Declaration of Independence—that a person should not be owned by another person.¹¹⁵ At the same time, Lincoln vigorously challenged Taney's holding that Congress could not prohibit slavery in the territories and that slavery "was distinctly and expressly affirmed in the Constitution."¹¹⁶ In his famous Cooper Union address of 1860, where the ambitious frontier lawyer caught the attention of

¹¹² See JOHN NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION: A BIOGRAPHY 310–11, 315, 336–37 (1988); ERIC H. WALTHER, WILLIAM LOWNDES YANCEY AND THE COMING OF THE CIVIL WAR 187–89 (2006).

¹¹³ Disagreements—even among Republicans—on that issue would divide the nation during the Reconstruction period. See MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 210–16 (1974).

¹¹⁴ GRABER, *supra* note 92, at 32 (quoting Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois (Oct. 15, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 283, 298–99 (Roy. P. Basler et al. eds., 1953) [hereinafter COLLECTED WORKS]). Lincoln expressly stated his opposition to black citizenship in his fourth debate with Douglas at Charleston, Illinois, September 18, 1858. Lincoln-Douglas Debates: Fourth Joint Debate (Sept. 18, 1858), in THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 50, 52 (Orville Vernon Burton ed., 2009) [hereinafter THE ESSENTIAL LINCOLN].

¹¹⁵ Lincoln-Douglas Debates: Seventh and Last Debate (Oct. 15, 1858), in THE ESSENTIAL LINCOLN, *supra* note 114, at 55, 55–56.

¹¹⁶ *Dred Scott*, 60 U.S. at 450; Address at Cooper Institute, New York City (Feb. 27, 1860), in THE PORTABLE ABRAHAM LINCOLN, *supra* note 67, at 168, 182–83.

the eastern establishment and ended up securing the nomination for President, Lincoln set out to show that the Founders had not specifically attempted to protect slave property.¹¹⁷ But in taking issue with Taney on this point, Lincoln never went so far as to advocate anything remotely resembling abolition in the southern states and instead sought only to prohibit the spread of slavery into the territories. Lincoln favored limiting the rights of slaveholders by putting slavery, in his words, “in the course of ultimate extinction.”¹¹⁸

Lincoln’s grappling with *Dred Scott* reflected the tensions inherent within his constitutional beliefs. On the one hand, he repeatedly stated his devotion to the ideals of the Declaration of Independence, particularly the notion that the Declaration’s claim that “all men are created equal” meant that none should be enslaved.¹¹⁹ Just two weeks before his inauguration, in a speech delivered at Independence Hall in Philadelphia, Lincoln went so far as to state, “I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.”¹²⁰ On the other hand, Lincoln’s simultaneous commitment to order and the rule of law meant that he never felt comfortable with abolitionism and in general disavowed radical change. Whether based on belief in order or his reading of the constitutional text, Lincoln thus recognized at least some rights of slaveholders.

This tension was most evident in his Inaugural Address of March 1861. With the author of the *Dred Scott* decision seated nearby, Lincoln implicitly acknowledged that masters did possess the right to own slave property.¹²¹ He first reiterated what he had said in previous speeches: “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”¹²² Lincoln, moreover, quoted the language of the Republican Party platform on which he was

¹¹⁷ Address at Cooper Institute, New York City (Feb. 27, 1860), *supra* note 116, at 183; THE POLITICAL LINCOLN, *supra* note 87, at 185.

¹¹⁸ Lincoln-Douglas Debates: Seventh and Last Debate (Oct. 15, 1858), *supra* note 115, at 57.

¹¹⁹ Chicago, Illinois (July 10, 1858), *in* THE ESSENTIAL LINCOLN, *supra* note 114, at 44, 46–47.

¹²⁰ Speech at Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), *in* THE ESSENTIAL LINCOLN, *supra* note 114, at 98, 99.

¹²¹ First Inaugural Address (Mar. 4, 1861), *in* THE PORTABLE ABRAHAM LINCOLN, *supra* note 67, at 195, 200.

¹²² *Id.* at 195 (internal quotation marks omitted).

nominated. This statement of party principles affirmed “the right of each State to order and control its own domestic institutions.”¹²³

On the question of the return of fugitive slaves, Lincoln proved just as direct. Quoting the language of the Constitution’s Fugitive Slave Clause, Lincoln affirmed that the clause intended to provide “for the reclaiming of what we call fugitive slaves; and the intention of the law-giver is the law.”¹²⁴ Attempting to assuage southern fears that his inauguration as President would mean the abolition of slavery, Lincoln emphasized the areas of common agreement between Northerners and Southerners. The safety and security of slavery where it already existed, as well as the right of slaveholders to reclaim fugitive slaves, according to Lincoln, were propositions to which all could agree.¹²⁵ In his Inaugural Address, the new President narrowed the source of sectional division to a single issue—the extension of slavery into the territories. “One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong*, and ought not to be extended,” he stated, continuing with, “This is the only substantial dispute.”¹²⁶ In other words, Lincoln encapsulated the sectional conflict neither in terms of black rights, the existence of slavery in the South, nor even the enforcement of the Fugitive Slave Law. These seemed, to Lincoln at least, settled constitutional issues. Rather, the essence of the sectional conflict lay in the debate over the rights of slaveholders to take slaves into new territories.

Thus, the conflict between Lincoln and Taney over slavery boiled down to the rights of slaveholders. To Taney, slaveholders possessed a basic right guaranteed in the Constitution itself. To Lincoln, who wanted to put slavery “in the course of ultimate extinction,”¹²⁷ slavery’s spread needed to be arrested and slaveholders’ rights limited. In early 1861, this was as far as Lincoln would go—and as far as he thought he *could* go. Although he believed slavery to be wrong, Lincoln also felt he was constrained by law and the Constitution. Lincoln believed that the Declaration of Independence affirmed the natural right of freedom for all human beings, but he implicitly acknowledged

¹²³ *Id.*

¹²⁴ *Id.* at 196.

¹²⁵ *Id.* at 195–96.

¹²⁶ *Id.* at 201.

¹²⁷ Lincoln-Douglas Debates: Seventh and Last Debate (Oct. 15, 1858), *supra* note 115, at 57.

that the Constitution granted at least some rights to slaveholders.

III. TANEY, LINCOLN, AND THE RIGHTS OF PRO-CONFEDERATES:
EX PARTE MERRYMAN

Aside from slavery and the *Dred Scott* decision, the other major dispute that brought Taney's and Lincoln's distinct constitutional visions into conflict was Taney's wartime opinion in *Ex Parte Merryman*.¹²⁸ The Civil War began on April 12, just weeks after the inauguration, when Confederate forces bombarded Fort Sumter in South Carolina. By June, eleven slaveholding states had seceded from the Union, including Virginia. These states claimed to have formed a new nation, the Confederate States of America.¹²⁹ Because Maryland lay to the north of Washington, D.C. and Virginia to the south, Lincoln and Union military leaders had no choice but to secure Maryland, in order to keep the nation's capital from being surrounded by enemy territory. Within days of Sumter, pro-secessionists raised a Confederate flag on Federal Hill in Baltimore, a gesture that prompted anger among the city's Unionists.¹³⁰ When Union troops from Massachusetts detrained in the city on their way to Washington, a riot ensued.¹³¹ A mob of pro-Confederate civilians threw bricks and stones at the Union forces.¹³² Despite what one witness described as "the extraordinary coolness and forbearance of the troops," the Union troops eventually fired upon their attackers.¹³³ Four soldiers and at least twelve civilians died in the April 19 fracas, arguably the first bloodshed of the War.¹³⁴ Because Baltimore possessed the railroad line nearest to Washington, the disturbance cut off the Union capital from the rest of the North, and for several days in April, Lincoln and other officials feared an imminent Confederate invasion before more federal troops finally arrived. Tensions between pro-Union and pro-Confederate

¹²⁸ 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). Accounts of this case include DANIEL FARBER, *LINCOLN'S CONSTITUTION* 157–63 (2003); MCGINTY, *supra* note 8, at 65–91; SIMON, *supra* note 16, at 177–98; and Swisher, *supra* note 60, at 844–54.

¹²⁹ *See id.* at 160.

¹³⁰ Frederic Emory, *The Baltimore Riots*, in *THE ANNALS OF THE WAR* 775, 776 (1879).

¹³¹ *See id.* at 781–84.

¹³² *Id.* at 782.

¹³³ *Id.* at 785.

¹³⁴ *Id.*

elements in Maryland continued to simmer, and with Congress out of session, Lincoln acted. In a bold move intended to prevent sabotage, on April 27, 1861, the President suspended the privilege of the writ of habeas corpus in the critical corridor between Philadelphia and Washington.¹³⁵ This allowed Union troops to arrest and jail Confederate sympathizers without trial. The subsequent arrest of John Merryman, a wealthy landowner and secessionist accused of burning bridges and destroying telegraph wires in Maryland, prompted a challenge to Lincoln's order.¹³⁶

Despite overt sympathy for the Confederate cause, Chief Justice Taney remained on the bench after the outbreak of war, and he eagerly took Merryman's case in his capacity as federal circuit judge for Maryland. Seeking to maximize the authority—and the impact—of his opinion, Taney wrote at the top of the page, “Before the Chief Justice of the Supreme Court of the United States at Chambers.”¹³⁷ Only Congress had the power to suspend the writ of habeas corpus, he argued, and any person arrested by a military officer should be turned over to civil authorities, rather than be subject to military trial.¹³⁸ Taney sharply criticized the President's action as an unconstitutional exercise of presidential power and as a dangerous threat to individual liberty.¹³⁹ Taney stated:

[The President] is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the [C]onstitution expressly provides that no person “shall be deprived of life, liberty, or property without due process of law,”—that is, judicial process.¹⁴⁰

In the course of his opinion, Taney viewed the matter as much one of individual rights—the rights of the Confederate

¹³⁵ See Abraham Lincoln, Letter to the Commanding General of the Army of the United States (Apr. 27, 1861), in 7 A COMPILATION OF MESSAGES, *supra* note 33, at 3219, 3219.

¹³⁶ Two days after the suspension of the writ, the Maryland Legislature convened and rejected secession, a fact that greatly soothed nerves in Washington. According to James Simon, “Merryman was seized in his bedroom at 2:00 a.m. on May 25 and imprisoned at Fort McHenry in Baltimore Harbor that morning.” SIMON, *supra* note 16, at 186.

¹³⁷ Swisher, *supra* note 60, at 848.

¹³⁸ See *Ex Parte Merryman*, 17 F. Cas. 144, 148–49 (C.C.D. Md. 1861) (No. 9,487); see also MCGINTY, *supra* note 8, at 75.

¹³⁹ See *Ex Parte Merryman*, 17 F. Cas. at 149–50; SIMON, *supra* note 16, at 282.

¹⁴⁰ *Ex Parte Merryman*, 17 F. Cas. at 149.

sympathizer, Merryman—as one of executive power. Taney mentioned the Constitution's Fifth Amendment four times, nearly as often as he did the portion of the constitutional text that specifically dealt with the suspension of the writ of habeas corpus, Article I, Section 9.¹⁴¹ Confident of the soundness of the decision, Taney boldly sent a copy of his opinion to Lincoln, arguing that the Chief Executive needed to “take care that the laws be faithfully executed.”¹⁴²

Taney, in essence, viewed the suspension of the writ as a rights issue—an issue of liberty—much in the same way that he framed the right of slaveholders to take their slave property into the territories. Indeed, the connection between *Dred Scott* and *Merryman* was that, in both instances, Taney relied on the Fifth Amendment to protect individual rights from the supposedly oppressive acts of the central government. Thus, Taney's old Jacksonian political heritage—the hostility to concentrated power—remained an important component of his thinking, for both decisions contained the rhetoric of protecting liberty from national power. Taney's opinions in *Dred Scott* and *Merryman* stand out as some of the first instances in which the Court seriously addressed and advocated the guarantees of the Bill of Rights. From a modern perspective, of course, the notion of slaveholders possessing the right to own other human beings is both ludicrous and repulsive. But viewed in the context of nineteenth century constitutional thought, Taney's decisions in the two cases were of a piece. The Chief Justice saw protecting the rights of slaveholders from hostile congressional legislation as just as important as protecting the rights of Confederate sympathizers from unlawful arrest and detention.

Lincoln framed the habeas corpus issue in a different way—as a matter of national survival. Suspending the writ, the President believed, was essential to preserving the integrity of the Union. Here Lincoln's nationalism, dating back to his days as a Whig, shone through. In his Inaugural Address, Lincoln had claimed that “the Union of these States is perpetual.”¹⁴³ Believing that the Constitution's claim to create “a more perfect Union” implied that a union had existed before the Constitutional Convention of 1787, Lincoln concluded that “[t]he Union is much older than the Constitution” and dated back to the first common efforts among

¹⁴¹ *Id.* at 149–52.

¹⁴² *Id.* at 153 (internal quotation marks omitted).

¹⁴³ First Inaugural Address (Mar. 4, 1861), *supra* note 121, at 197.

the colonies.¹⁴⁴ Describing secession as “the essence of anarchy,” Lincoln held that only through maintaining integrity of the Union could the American experiment survive.¹⁴⁵ When Taney issued his order to release Merryman, Lincoln ignored it, for he believed that preserving the Republic required drastic steps. A few months after Taney’s *Merryman* decision, in an address to Congress on July 4, Lincoln responded to Taney’s criticism by posing what would become one of the most famous rhetorical questions in American history: “[A]re all the laws, *but one*, [habeas corpus] to go unexecuted, and the government itself go to pieces, lest that one be violated?”¹⁴⁶ Lincoln clearly believed that his suspension of the writ served the larger purpose of preserving the Constitution and the Union. Congress apparently agreed, for it subsequently approved of Lincoln’s action.

In the same address to Congress, Lincoln described the Union cause in a way that revealed his evolving constitutional perspective. The War, the President confidently asserted, was worth fighting and the Union cause just:

On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.¹⁴⁷

Lincoln’s devotion to the ideals of the Declaration of Independence and his linking of those ideals to the government of the United States made him increasingly willing to use national power. Suspending the privilege of the writ of habeas corpus stood out as the first important example of this fact.

IV. EMANCIPATION: THE CONVERGENCE OF LIBERTY AND POWER

Lincoln’s dual commitment to the Declaration of Independence and national power eventually manifested itself in his emancipation policy. As evident in his Inaugural Address, Lincoln initially believed that the Constitution limited his options when it came to emancipating slaves. Only when four preconditions had been met, as Paul Finkelman describes, did

¹⁴⁴ *Id.* at 198 (emphasis omitted).

¹⁴⁵ *Id.* at 200.

¹⁴⁶ Message to Congress in Special Session (July 4, 1861), in *THE PORTABLE ABRAHAM LINCOLN*, *supra* note 67, at 209, 216.

¹⁴⁷ *Id.* at 222–23.

Lincoln believe that he could move forward on a plan of emancipation.¹⁴⁸ First, as a careful lawyer deeply devoted to the rule of law, “Lincoln needed a constitutional . . . framework” to justify the act of seizing property from southern slaveholders.¹⁴⁹ Early in the War, when three slaves owned by a Confederate Colonel escaped to the Union-held Fortress Monroe in Virginia, the Union commander there refused to return them under the Federal Fugitive Slave Law.¹⁵⁰

General Benjamin Butler instead insisted that, unless the Confederate Colonel swore allegiance to the United States, his escaped slaves would be held as “contrabands of war.”¹⁵¹ Butler’s announcement thus originated a new policy toward slaves in the Confederacy that eventually culminated in the Emancipation Proclamation. In other words, the seizure of enemy property under the laws of war provided Lincoln the legal and constitutional framework that he needed.

Second, as a skillful politician who had succeeded in rising from extremely humble origins to become the third-youngest man elected to the presidency at the time, Lincoln understood the politics of emancipation.¹⁵² Without question, he would need to secure the loyalty of the slaveholding border states and probably exclude these states from any plan of emancipation in order to keep them loyal. He would also have to win over the northern public on the issue. Finally, in order for emancipation not to appear to be a desperate, last-ditch effort by the Union, Lincoln knew that military success also needed to precede any announcement pertaining to the liberation of slaves.¹⁵³ Thus, although he had been planning to issue an emancipation proclamation since summer, the President waited until after the Union victory at Antietam on September 17, 1862 before making his plans public.¹⁵⁴

¹⁴⁸ Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 359 (2009) (“For Lincoln, emancipation required the convergence of four preconditions involving legal and constitutional theory, popular support, and military success.”).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 364–65.

¹⁵¹ *Id.*

¹⁵² See Etling Morison, *Election of 1860*, in 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–1968, *supra* note 7, at 1097, 1100; Gerald Prokopowicz, *Honest Abe Q&A*, FT. WAYNE J. GAZETTE, Dec. 16, 2007, at 13A.

¹⁵³ Finkelman, *supra* note 148, at 360–61.

¹⁵⁴ *Id.* at 361–62; see JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 83 (1991); Charles P. Lord, *Stonewalling the Malls: Just Compensation and Battlefield Protection*, 77 VA. L. REV. 1637, 1644

Once all of these conditions had been met, Lincoln announced the terms of the Emancipation Proclamation on September 22, 1862, one hundred days before the Proclamation would actually go into effect on January 1, 1863.¹⁵⁵ Lincoln issued the Proclamation on his authority as “President of the United States of America and Commander-in-Chief of the Army and Navy.”¹⁵⁶ Lincoln had found a way to emancipate slaves within the confines of the Constitution. Eventually, as the political support for emancipation remained, and as Union military victories continued, Lincoln proposed, and Congress passed, an abolition amendment to the Constitution. The Thirteenth Amendment, passed by both houses of Congress in January, 1865, just months before Lincoln’s death, forever ended slavery in the United States.¹⁵⁷ The states ratified it later that year.¹⁵⁸

The first constitutional amendment to include an enforcement clause, the Thirteenth Amendment also demonstrated the changing relationship between liberty and power in the early Republic. At the time of the founding, the Framers of the Constitution had imagined the new national government as the greatest threat to liberty. In drafting the Bill of Rights, the Framers clearly feared that Congress posed a threat: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press,” reads the First Amendment.¹⁵⁹ But by 1865, the relationship between liberty and power had undergone a significant transformation.¹⁶⁰ Taney and Jacksonian Democrats in some ways represented the older constitutional tradition—one that feared national power concentrated in the Congress or the Executive. His attempts to preserve the rights of slaveholders and Confederate sympathizers showed as much. Lincoln and the Republican Party in wartime, in contrast, demonstrated that linking nationalistic ideals with those of the Declaration of Independence—within the boundaries of the Constitution—could

n.38 (1991).

¹⁵⁵ Finkelman, *supra* note 148, at 385. On the legal framework for emancipation, see BURRUS M. CARNAHAN, *ACT OF JUSTICE: LINCOLN’S EMANCIPATION PROCLAMATION AND THE LAW OF WAR* 117–32 (2007), providing a detailed chapter analyzing the Emancipation Proclamation.

¹⁵⁶ Preliminary Emancipation Proclamation (Sept. 22, 1862), in 5 *COLLECTED WORKS*, *supra* note 114, at 433, 433.

¹⁵⁷ Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. *TOL. L. REV.* 855, 880 (2007); see U.S. CONST. amend XIII.

¹⁵⁸ VanderVelde, *supra* note 157, at 880; see U.S. CONST. amend XIII.

¹⁵⁹ U.S. CONST. amend. I.

¹⁶⁰ See MCPHERSON, *supra* note 154, at 133.

produce revolutionary change. Both the Emancipation Proclamation and the Thirteenth Amendment embodied Lincoln's attempt to combine the principles of liberty with the power of the national government.

V. ROBERTS, OBAMA, AND THE FUTURE

The nation will probably never again witness the sorts of deep divisions that led to a civil war or the revolutionary changes that came about in the aftermath of that conflict. Nevertheless, preliminary indications are that Chief Justice Roberts and President Obama may very well clash on a number of important national issues in the near future. The Roberts Court recently overturned part of the Bipartisan Campaign Reform Act of 2002, more commonly known as the McCain-Feingold legislation.¹⁶¹ In response, in his State of the Union address, President Obama admonished the Court by saying, "I don't think American elections should be bankrolled by America's most powerful interests or, worse, by foreign entities."¹⁶² In remarks to law students at the University of Alabama, Chief Justice Roberts shot back.¹⁶³ He described as "very troubling" the President's willingness to criticize the Court in the State of the Union.¹⁶⁴ Other simmering issues might ultimately bring out the differences in their constitutional philosophies. The Voting Rights Act of 1965, proposed climate change legislation, and comprehensive health reform legislation might all end up before the U.S. Supreme Court in the coming years. In the recently decided *Northwest Austin Municipal Utility* case, members of the Roberts Court expressed doubts about whether provisions of the Voting Rights Act can withstand constitutional scrutiny.¹⁶⁵ Moreover, legal experts and opponents of proposed climate change and health care reform legislation have mentioned the possibility of constitutional challenges, based on the Takings

¹⁶¹ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2009) (declaring portions of the McCain-Feingold legislation unconstitutional); see Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1.

¹⁶² 156 CONG. REC. S266 (daily ed. Jan. 27, 2010) (statement of President Obama).

¹⁶³ Robert Barnes & Anne E. Kornblut, *It's Obama vs. the Supreme Court, Round 2*, WASH. POST, Mar. 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030903040.html>.

¹⁶⁴ *Id.*

¹⁶⁵ *Nw. Austin Mun. Util. v. Holder*, 129 S. Ct. 2504, 2516-17 (2009).

Clause of the Fifth Amendment or the doctrine of liberty to contract.

Perhaps too little time has passed for us to assess the constitutional visions of Roberts and Obama. Roberts will mark his fifth anniversary as Chief Justice this fall, while Obama has just completed his first year in office. In many cases, Roberts has pursued a degree of judicial modesty, in which he has attempted to find common ground among the justices on narrow legal questions while allowing the Court's most conservative members to issue vigorous dissents on larger constitutional questions. For his part, Obama's emphasis on "empathy" in nominating Justice Sonia Sotomayor, his pointed criticism of Roberts at his confirmation, and his stress on how law affects "the daily realities of people's lives," indicate that—were Roberts and his colleagues to overturn other significant legislation in the near future—Obama would most likely push back when the issue involves the lives of the poor and oppressed.¹⁶⁶

Surely, the nation will never again face a crisis as calamitous as when the Civil War constitutional titans, Taney and Lincoln, held their respective positions. Nevertheless, the constitutional visions of Chief Justice John Roberts and President Barack Obama—however unformed or unclear they may be at this point—will likely affect the United States for many years to come.

¹⁶⁶ 151 CONG. REC. S10365–66 (daily ed. Sept. 22, 2005) (statement of Sen. Obama); Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court Seat*, N.Y. TIMES, May 27, 2009, at A1; Adam Nagourney & Jeff Zeleny, *Washington Prepares for Fight Over Any Nominee*, N.Y. TIMES, May 2, 2009, at A10.