

## “I Shall Not Forget or Entirely Forsake Politics on the Bench”: Abraham Lincoln, *Dred Scott*, and the Political Culture of the Judiciary in the 1850s

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### Recommended Citation

Rachel A. Shelden, “*I Shall Not Forget or Entirely Forsake Politics on the Bench*”: Abraham Lincoln, *Dred Scott*, and the Political Culture of the Judiciary in the 1850s, 83 Md. L. Rev. 217 ()

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol83/iss1/8>

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**“I SHALL NOT FORGET OR ENTIRELY FORSAKE POLITICS ON  
THE BENCH”: ABRAHAM LINCOLN, *DRED SCOTT*, AND THE  
POLITICAL CULTURE OF THE JUDICIARY IN THE 1850S**

RACHEL A. SHELDEN\*

In his first debate with Stephen Douglas at Ottawa on August 21, 1858,<sup>1</sup> Abraham Lincoln repeated a theory that he had been touting for nearly two months, since his famed “House Divided” speech in June.<sup>2</sup> According to the Illinois Republican, there had been a conspiracy among four “workmen” of the Democratic Party to nationalize slavery in the United States, which had culminated in *Dred Scott v. Sanford*.<sup>3</sup> First in the conspiracy was Senator Douglas, whose Kansas-Nebraska Act in 1854 upended a thirty-year ban on slavery in the U.S. territories above the 36° 30’ latitude in favor of “popular sovereignty”—letting the people of a territory decide.<sup>4</sup> Next came former-president Franklin Pierce, who encouraged acceptance of the Kansas-Nebraska legislation and any potential consequences, including the violence that exploded in Kansas between pro- and anti-slavery settlers.<sup>5</sup> Third in the plot: newly-elected President James Buchanan, who pressed his inaugural audience in March 1857 to accept any decision on slavery in the territories that the Supreme Court might make.<sup>6</sup> And finally, with all of these pieces set in place, Chief Justice Taney delivered his opinion in *Dred Scott* just two days after Buchanan’s inaugural address, declaring that Congress had no power to legislate on slavery in the territories.<sup>7</sup> Clearly, Lincoln argued, all these men knew in advance what the result would be in *Dred Scott*; after all, when asked by a Senate colleague if it was constitutional for the people of a

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1. First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 20 (Roy P. Basler ed., 1953) (Mr. Lincoln’s reply).

2. Abraham Lincoln, “A House Divided”: Speech at Springfield, Illinois (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461–62 (Roy P. Basler ed., 1953).

3. 60 U.S. (19 How.) 393 (1857).

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

5. Franklin Pierce, Fourth Annual Message (Dec. 2, 1856), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2930 (James D. Richardson ed., 1897).

6. James Buchanan, Inaugural Address (Mar. 4, 1857), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 5, at 3206.

7. See *Dred Scott*, 60 U.S. at 393.

territory to ban slavery from their borders, Douglas answered that “it was a judicial question.”<sup>8</sup> Thus, Lincoln concluded, “we find it impossible to not believe that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common *plan* or *draft* drawn up before the first lick was struck.”<sup>9</sup>

Read in a modern context, Lincoln’s charge appears quite serious—at least as it relates to the Chief Justice. Despite the recent firestorm over questions of ethical misconduct, even current members of the Court acknowledge that Justices should not coordinate with the other branches, and should keep their deliberations private, especially from interested parties.<sup>10</sup> There is a substantial difference between current Justices’ response to criticism of their recusal practices and financial disclosures on the one hand, and to leaking or discussing judicial matters with third parties on the other. In the first case they deny behaving unethically;<sup>11</sup> in the second they deny the behavior has occurred.<sup>12</sup>

Accusations that a Justice discussed a pending case make front page news today. Proof of such conduct would likely be a full-blown scandal. Yet there was little public reaction in 1858 to Lincoln’s charge of a conspiracy among all three branches of government. Illinois papers printed the “House Divided” speech, but without much commentary, and over the course of the remaining debates, the two Senate candidates referred to it infrequently.<sup>13</sup>

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8. CONG. GLOBE, 34th Cong., 1st Sess. app. at 797 (1856) (statement of Sen. Stephen Douglas).

9. Lincoln, *supra* note 2, at 466.

10. See CODE OF CONDUCT FOR U.S. JUDGES Canon 5 (JUD. CONF. 2019). Supreme Court Justices are not technically bound by this code of conduct, but the members of the Court publicly proclaimed that they served as “guidance to the federal judiciary.” See Letter from Chief Justice John Roberts to Senator Richard J. Durbin (Apr. 25, 2023), <https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf>.

11. See, e.g., Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda>.

12. See, for example, the Justices’ reaction to leaks relating to *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). See also Josh Gerstein, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>; Jodi Kantor & Joe Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html>; Robert Barnes & Ann E. Marimow, *Justice Alito Denies Disclosing 2014 Hobby Lobby Opinion in Advance*, WASH. POST (Nov. 19, 2022), <https://www.washingtonpost.com/politics/2022/11/19/alito-hobby-lobby-supreme-court-nyt/>.

13. See, e.g., *Speech of Mr. Lincoln*, ILL. STATE J., July 20, 1858, at 2; *Douglas and Lincoln at Springfield*, CHI. PRESS & TRIBUNE, July 20, 1858, at 2; *Speech of Hon. Abraham Lincoln*, PANTAGRAPH (Bloomington, IL), July 22, 1858, at 1; *Speech of Mr. Lincoln at the State House Saturday Evening, July 17<sup>th</sup>, 1858*, ALTON DAILY COURIER, July 23, 1858, at 2.

Lincoln eventually dropped the theory on the campaign trail entirely. It might be tempting to read such inattention as evidence of the charge's absurdity. But Lincoln scholars generally agree that the Illinois Republican "genuinely believed" a plot of sorts had taken place.<sup>14</sup> Nor was Lincoln the first person to suggest such a conspiracy; antislavery men in and out of Congress had been making similar accusations of coordination among members of the three branches quite effectively since the *Dred Scott* opinion was released.<sup>15</sup> Widespread Northern anxiety about a broader "slave power conspiracy" also made this charge plausible—Republicans had been warning of this kind of plot since the party's inception.<sup>16</sup> In other words, there was nothing new or particularly shocking about the idea of Justices participating in pro-slavery politics; Lincoln's charge was ineffective precisely because it was so commonplace.

Buried in the broader story of Lincoln's political rise, this little episode reveals a great deal about the relationship between judges and politics in the mid-nineteenth century. The sheer ordinariness of Lincoln's accusation—and the lack of public outrage in response—illustrates how boundaries of judicial conduct were understood differently at the time. Rather than relegated to their own separate judicial sphere, judges were key players in nineteenth-century politics; they served as partisan presidential electors, advised political candidates (or were candidates themselves), and collaborated on legislation. Judges' courtrooms also served as key political spaces: During judicial terms, grand juries pressed political leaders for their views on important issues, lawyers with business before the courts delivered campaign speeches, and partisans protested opponents at the courthouse.<sup>17</sup> This integrated relationship between courts and politics meant that Americans typically

14. DAVID HERBERT DONALD, *LINCOLN* 208 (1995). Historians expressing similar sentiments include ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 101 (2010); DON E. FEHRENBACHER, *PRELUDE TO GREATNESS: LINCOLN IN THE 1850S*, at 80 (1962); RICHARD J. CARWARDINE, *LINCOLN* 73 (2003); JOHN BURT, *LINCOLN'S TRAGIC PRAGMATISM: LINCOLN, DOUGLAS, AND MORAL CONFLICT* 133 (2013); DAVID ZAREFSKY, *LINCOLN, DOUGLAS, AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE* 103 (1990).

15. *The Conspiracy Against Freedom*, ALBANY EVENING J., Mar. 11, 1857; *The Slavery Question—The Decision of the Supreme Court*, CHI. TRIBUNE, Mar. 12, 1857, at 2; CONG. GLOBE, 35th Cong., 1st Sess., 612–15 (1858) (speech of Sen. William Pitt Fessenden); CONG. GLOBE, 35th Cong., 1st Sess., 939–43 (1858) (speech of Sen. William Seward); MICHAEL MORRISON, *SLAVERY AND THE AMERICAN WEST: THE ECLIPSE OF MANIFEST DESTINY AND THE COMING OF THE CIVIL WAR* 190 (1997); 1 MICHAEL BURLINGAME, *ABRAHAM LINCOLN: A LIFE* 464 (2008); FEHRENBACHER, *supra* note 14, at 93.

16. Republicans throughout the North used the phrase "slave power" to describe the overwhelming power of enslavers in the federal government. The slave power conspiracy connoted an effort to subject Northerners to the will of enslavers, including spreading the institution of slavery beyond Southern borders. On the slave power conspiracy see, among others, MORRISON, *supra* note 15; LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860* (2000).

17. See *infra* notes 38–69 and accompanying text.

measured judges' conduct against the broader *political* culture—the unspoken and underlying (though evolving) beliefs, attitudes, norms, and available mechanisms that guided politics in that era.<sup>18</sup>

In a world where judges held political views and engaged in political debate, Lincoln's conspiracy charge was about Taney's politics, not judicial propriety. The Illinois Republican used the conspiracy to paint Douglas as an extremist who endorsed the spread of slavery not only to the territories, but potentially to the free states as well.<sup>19</sup> Lincoln's charge failed not because the conspiracy was outlandish, but because Douglas could easily refute the accusation of his ideological extremism.<sup>20</sup>

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If Lincoln's charge was really about political ideology, the relative ambivalence toward Taney's role raises questions about the boundaries of nineteenth-century judicial propriety. Was any political behavior permissible for a judge? There is a limited literature on the history of judicial ethics, concerned primarily with its implications for current norms.<sup>21</sup> But scholars who have examined nineteenth-century propriety typically argue that the judges of that era were more concerned with "actual impartiality" than public perception of their actions.<sup>22</sup> Judges cultivated a reputation for impartiality—and thereby preserved the legitimacy of the Court—by their ability to set aside personal and political preferences in making judicial decisions.<sup>23</sup>

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18. On the concept of political culture, see DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* (1979); Glen Gendzel, *Political Culture: Genealogy of a Concept*, 28 J. INTERDISC. HIST. 225 (1997); MARK E. NEELY, JR., *THE BOUNDARIES OF AMERICAN POLITICAL CULTURE IN THE CIVIL WAR ERA* (2005); RACHEL A. SHELDEN, *WASHINGTON BROTHERHOOD: POLITICS, SOCIAL LIFE, AND THE COMING OF THE CIVIL WAR* (2013).

19. Lincoln argued that a case then pending before the New York Court of Appeals, *Lemmon v. People*, 20 N.Y. 562 (1860), offered the Court an opportunity for a "second Dred Scott," that would bar even the free states from outlawing slavery. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 444 (1978).

20. See *infra* notes 82–86 and accompanying text.

21. On judicial ethics before 1900, see Bruce Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497 (2008); Andrew J. Lievens & Averm Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271 (2007); M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, 131 YALE L.J.F. 190 (2021); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995).

22. Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"*, 99 KY. L.J. 259 (2010).

23. See *supra* notes 21–22.

Maintaining public friendships with politicians was acceptable, as long as judges did not mix their judicial business with politics.<sup>24</sup>

Under the rubric of preserving impartiality and legitimacy, Lincoln's charge should have been explosive; Taney clearly would have violated ethical norms by speaking to Douglas, Pierce, and Buchanan about the *Dred Scott* decision ahead of time. And in hindsight, the case against the Chief Justice (and the Court more broadly) looks even clearer. Historians have unearthed evidence that Buchanan had been in frequent communication with Associate Justice John Catron about *Dred Scott* since at least the beginning of February 1857 and that, later that month, Associate Justice Robert Grier (who purported to speak for Taney and Associate Justice James Wayne) informed the incoming President what the Court would decide.<sup>25</sup> Buchanan knew exactly what he could expect in the *Dred Scott* decision at his inauguration.<sup>26</sup> A few congressmen, including future Confederate Vice President Alexander Stephens also claimed to have influenced the Justices, noting this activity in personal letters only available to historians many years later.<sup>27</sup>

Most scholars have read this behavior by the Court during the *Dred Scott* deliberations as exceptional, echoing Paul Finkelman's contention that the correspondence of members of the Court with Buchanan was "an unpardonable breach of judicial ethics today and was surely questionable then."<sup>28</sup> The extrajudicial conversations only add to the lore surrounding the case. Despite the efforts of some scholars to downplay its exceptionalism and importance, popular and even scholarly accounts continue to portray Taney's opinion as a turning point or key departure from the Court's casework.<sup>29</sup>

24. *Id.*

25. Letters from Justice John Catron to President James Buchanan (Feb. 6, 10, 19, 1857) (on file with the Library of Congress, Carl Brent Swisher Collection); Philip Auchampaugh, *James Buchanan, the Court and the Dred Scott Case*, 9 TENN. HIST. MAG. 231, 238 (1926) (quoting Letter from Justice John Catron to President James Buchanan (Feb. 23, 1857)); Letter from Justice Robert Grier to President James Buchanan (Feb. 23, 1857), in JAMES BUCHANAN, THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE 106 n.1 (John Bassett Moore ed., 1960).

26. See Buchanan, *supra* note 6.

27. RICHARD MALCOLM JOHNSON & WILLIAM HAND BROWNE, LIFE OF ALEXANDER STEPHENS 316 (1883) (quoting Letter from Alexander Stephens to Linton Stephens (Dec. 15, 1856)).

28. Paul Finkelman, *James Buchanan, Dred Scott, and the Whisper of Conspiracy*, in JAMES BUCHANAN AND THE COMING OF THE CIVIL WAR 38 (John W. Quist & Michael J. Birkner eds., 2013).

29. These views are so commonplace that a citation to them is basically fruitless. For a sampling of scholarship making these claims, see, among many other examples, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 25–27, 34 (2014); DANIEL FARBER, LINCOLN'S CONSTITUTION 10 (2003); ALLEN C. GUELZO, FATEFUL LIGHTNING: A NEW HISTORY OF THE CIVIL WAR AND RECONSTRUCTION (2012); GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–

Among other contentions, *Dred Scott* is often described as the critical spark that caused the Civil War; the first use of judicial review since *Marbury v. Madison*;<sup>30</sup> the origin of substantive due process; and the benchmark for cases that have been wrongly decided.<sup>31</sup> Describing the Buchanan correspondence as unethical undoubtedly helps to sell the point that the case was not just unusual but indefensible.

Yet, the believability of Lincoln's conspiracy charge in 1858 actually suggests something quite different about judicial propriety. Lincoln himself noted that members of the Supreme Court would naturally tend toward their political predilections, and that a Republican Court could undo the damage of *Dred Scott*.<sup>32</sup> This was a point not only about political gamesmanship, but a reflection of the Justices' place in American governance. Members of the Supreme Court were not simply umpires of constitutional meaning; in fact, as Lincoln pointed out in the debates, their authority over constitutional questions was deeply contested.<sup>33</sup> Instead, the Justices were players in the political arena both as judges and as partisans. The charge against Taney cannot be isolated from the broader context in which Americans viewed their political world.<sup>34</sup>

Understanding judicial propriety, then, requires looking beyond the confines of the courtroom and the Court's decisions. In that broader realm, nineteenth-century sources illustrate that judges were not oblivious to concerns about propriety. The Justices' letters and other writings were actually littered with anxiety about proper conduct.<sup>35</sup> Moreover, judges'

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1830s, at 221–23 (2019); KENNETH M. STAMPP, *AMERICA IN 1857: A NATION ON THE BRINK* (1990).

30. 5 U.S. (1 Cranch) 137 (1803).

31. See *supra* note 29. For the limited work downplaying the case's exceptionalism and importance, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

32. DAVID M. SILVER, *LINCOLN'S SUPREME COURT* 2 (1956).

33. On Lincoln and judicial supremacy, see Abraham Lincoln, Speech at Springfield, Illinois, (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 2, at 399; Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 IND. L. REV. 141 (2016). On contested constitutional authority in the 1850s, see H. ROBERT BAKER, *THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR* (2006). On contested constitutional authority more broadly, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

34. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969). Several historians have made this point about the founding era. See, e.g., Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321 (2021); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011).

35. See, e.g., Letter from Chief Justice Roger B. Taney to Representative George W. Hughes (Aug. 22, 1860), in SAMUEL TYLER, *MEMOIR OF ROGER BROOKE TANEY*, LL.D. 407 (1874); Letter

concerns were not limited to the courts; typically, these men fretted about acceptable *political* behavior, not simply for a judge but for any officeholder. For example, was it appropriate for federal officials to campaign for themselves in presidential races? This was a question not only for the Justices who ran for office, but also cabinet members and sitting vice presidents.<sup>36</sup> Similarly, it was not only Justices who referenced concepts of “independence” and “impartiality” in evaluating political conduct—congressmen, presidents, and other public men referred to such qualities ad nauseum in speeches, letters, and broadsides. Independence and impartiality could be demonstrated in a variety of ways, including writing pseudonymously—letting a good political argument stand for itself. Such writings did not reflect a concern about impropriety specific to the judiciary; judges were not the only ones who used pen names when they wrote for newspapers.<sup>37</sup> In other words, judges evaluated their own conduct in the context of broader political norms.

Lincoln and Douglas had significant experience with these broader political norms. Both men had been arguing cases in the Illinois state circuit and supreme courts for two decades when they held their great debates. Douglas had even served a short stint as a judge on the Illinois Supreme Court in the early 1840s—the reason why he was almost universally called “Judge Douglas.”<sup>38</sup> Lincoln was also a regular practitioner in the lower federal courts and both he and Douglas were admitted to practice before the U.S. Supreme Court (though Douglas never tried a case in Washington and Lincoln did only once).<sup>39</sup>

The debaters’ audience was similarly well-informed. About half of the members of the state legislature in January 1859, who would choose the next U.S. Senator from Illinois, listed their profession as attorney and would have

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from Justice John McLean to Duff Green (Sept. 16, 1829) (on file with the Library of Congress, John McLean Papers); Letter from Justice John Catron to President James K. Polk (July 23, 1844), in 7 CORRESPONDENCE OF JAMES K. POLK 383 (Wayne Cutler, ed., 1989).

36. On presidential campaigns of Supreme Court justices, see Rachel A. Shelden, *Anatomy of a Presidential Campaign from the Supreme Court Bench: John McLean, Levi Woodbury, and the Election of 1848*, 47 J. SUP. CT. HIST. 241 (2022).

37. On political independence, impartiality, and pseudonyms, see, among others, MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 22 (2003); Eran Shalev, *Ancient Masks, American Fathers: Classical Pseudonyms During the American Revolution and Early Republic*, 23 J. EARLY REPUBLIC 151, 164 (2003); SANDRA M. GUSTAFSON, *ELOQUENCE IS POWER: ORATORY AND PERFORMANCE IN EARLY AMERICA*, at xv (2000).

38. On Lincoln’s legal background, see FEHRENBACHER, *supra* note 14; GUY C. FRAKER, *LINCOLN’S LADDER TO THE PRESIDENCY: THE EIGHTH JUDICIAL CIRCUIT* (2012); MARK E. STEINER, *AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN* (2006). On Douglas’s, see ROBERT W. JOHANNSEN, *STEPHEN A. DOUGLAS* (1997); REG ANKROM, *STEPHEN A. DOUGLAS: THE POLITICAL APPRENTICESHIP, 1833–1843* (2015).

39. See *supra* note 38.



been comfortable with judicial norms. Several others listed as farmers, merchants, and editors likely interacted with the Illinois courts either in individual cases or as clerks and reporters.<sup>40</sup> Even the men and women who came to see Lincoln and Douglas debate would have been familiar with the various ways that politics and courts interacted; for generations they had organized major political rallies and gatherings around “court days”—the meetings of the county courts.<sup>41</sup>

Courtrooms and their personnel had long been closely tied to the political apparatus of the state, perhaps no more clearly than in the 1858 Senate campaign itself. In June and early July 1858, when Lincoln delivered his famous “House Divided” speech, the Republican candidate was in Chicago for the specific purpose of arguing cases in the federal courts.<sup>42</sup> The timing was not unusual; partisans knew that the meeting of a federal court brought critical political players to town who otherwise might not have the opportunity to gather.

Among these partisans were members of the federal grand jury—typically landholders in the state, many of whom were deeply involved with politics either as elected officials or community leaders.<sup>43</sup> Grand juries mixed their legal business with political concerns in a variety of ways that both Lincoln and Douglas would have recognized. For example, when official reports of the *Dred Scott* decision reached Illinois in June 1857, a grand jury in Chicago requested that Douglas speak at the courthouse “for the purpose of submitting [his] views upon certain topics,” including the case.<sup>44</sup> This was nothing new for Douglas; the Little Giant had actually launched his political career at a courthouse in Jacksonville, Illinois back in 1834.<sup>45</sup>

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40. J.G. NICOLAY, LIST OF THE MEMBERS AND OFFICERS, TWENTY-FIRST GENERAL ASSEMBLY OF THE STATE OF ILLINOIS (1859), <http://www.idaillinois.org/digital/collection/bb/id/47015/>.

41. On the phenomenon of “court day” in early America, see E. Lee Shepard, “*This Being Court Day*”: *Courthouses and Community Life in Rural Virginia*, 103 VA. MAG. HIST. & BIOGRAPHY 459 (1995); ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 26 (2000). On court days in Illinois, see PAUL M. ANGLE, ONE HUNDRED YEARS OF LAW: AN ACCOUNT OF THE LAW OFFICE WHICH JOHN T. STUART FOUNDED IN SPRINGFIELD, ILLINOIS, A CENTURY AGO (1928); WILLARD L. KING, LINCOLN’S MANAGER: DAVID DAVIS 47 (1960).

42. 3 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY: LINCOLN SERIES, VOL. 1: THE LINCOLN-DOUGLAS DEBATES OF 1858, at 37–39 (Edwin Erle Sparks ed., 1908) (quoting several newspaper sources contemporaneously reporting on the Lincoln-Douglas debates).

43. There is a limited literature on the historical composition of grand juries, but see STACY PRATT McDERMOTT, THE JURY IN LINCOLN’S AMERICA (2012); RICHARD D. YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 (1963); LEONARD LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY (1999).

44. Stephen A. Douglas, Kansas, Utah, and the Dred Scott Decision: Remarks of Hon. Stephen A. Douglas Delivered at Springfield, Illinois (June 12, 1857), <https://www.jstor.org/stable/community.33272437>.

45. MARTIN H. QUITT, STEPHEN A. DOUGLAS AND ANTEBELLUM DEMOCRACY 65 (2012).

In addition to grand juries, the courtroom personnel also served both legal and political purposes. Court reporters were typically hired for their experience as newspaper editors—a highly partisan profession in the nineteenth century.<sup>46</sup> The reporter for the Illinois Supreme Court, Ebenezer Peck, was a longtime political player who had edited a Chicago newspaper at the beginning of the decade, in addition to serving as a member of the state legislature and a key organizer of the Republican party in the state.<sup>47</sup> Lincoln knew Peck well and had even received inside information from the reporter about the judges’ reasoning in an important case in February 1858, *People ex rel. Lanphier & Walker v. Hatch*.<sup>48</sup> That case illustrated just how tied state politics were to its judicial system; Lincoln argued *Hatch* on behalf of the Republican governor who had vetoed a state Democratic redistricting bill with direct implications for the legislature that would choose the next Senator.<sup>49</sup>

Lawyers, too, followed this joint legal-political path. In the nineteenth century, many of the lawyers in the federal courts and some in the state courts served concurrently as state and national political representatives. In fact, most lawyers in Illinois needed the exposure that a political office could grant them for a successful law practice.<sup>50</sup> As one historian explains, in the western states especially, a lawyer “was almost compelled to become a politician.”<sup>51</sup> Lawyers riding circuit gained crucial political contacts as they traveled the state and practiced their political oratory in front of juries.<sup>52</sup> The Little Giant’s legal career was a microcosm of this phenomenon: As Douglas’s biographer notes, the meetings of the state circuit court were just long enough to “form valuable political acquaintances” in each city, and “[t]he courtroom[s]

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46. On the partisanship of newspapers, see JEFFREY L. PASLEY, “THE TYRANNY OF PRINTERS”: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC (2001); STEPHEN W. CAMPBELL, *THE BANK WAR AND THE PARTISAN PRESS: NEWSPAPERS, FINANCIAL INSTITUTIONS, AND THE POST OFFICE IN JACKSONIAN AMERICA* (2019); THOMAS C. LEONARD, *THE POWER OF THE PRESS: THE BIRTH OF AMERICAN POLITICAL REPORTING* (1986).

47. Ida M. Tarbell, *Abraham Lincoln*, 6 *MCCLURE’S MAG.* 307, 310 (1896); John W. McNulty, *Sidney Breese: His Early Career in Law and Politics in Illinois*, 61 *J. ILL. STATE HIST. SOC’Y* 164 (1968).

48. 19 Ill. 283 (1857), reprinted in 4 *THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES* 85 (Daniel W. Stowell et al., eds., 2008).

49. *Id.*; Letter from President Abraham Lincoln to Lieutenant Governor Gustavus Koerner (Feb. 7, 1858), in 4 *THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES*, *supra* note 48, at 84.

50. See Jack Northrup, *The Education of a Western Lawyer*, 12 *AM. J. LEGAL HIST.* 294 (1968); E. Lee Shepard, *Lawyers Look at Themselves: Professional Consciousness and the Virginia Bar, 1770–1850*, 25 *AM. J. LEGAL HIST.* 1 (1981).

51. Northrup, *supra* note 50, at 305; see STEINER, *supra* note 39, at 26.

52. Northrup, *supra* note 50, at 297–98.

provided him with an important sounding board for his political convictions.”<sup>53</sup>

As lawyers traveled to state and federal courts, they made good use of the opportunity for politicking. Particularly during election season, courtrooms typically featured legal arguments in the morning followed by political debates or lectures in the same space later in the afternoon—often by the same lawyers who had legal business before the courts.<sup>54</sup> During the 1858 election season, it was not only Lincoln and Douglas who followed legal arguments with political speeches. Orville Hickman Browning, a prominent local lawyer who sometimes collaborated with Lincoln, noted regular partisan political meetings, speeches, and rallies at courthouses throughout his journeys around the state that year.<sup>55</sup> In part because of the close affiliation between lawyers and politicians, the courthouse also could be a symbol of partisanship: When Lincoln arrived in Rushville in October 1858 on his tour with Douglas, local Democrats adorned the town courthouse steeple with a black flag in protest.<sup>56</sup>

Both Lincoln and Douglas also had experience with political relationships forged while traveling to state and federal courts. Throughout the year, a team of lawyers and judges would ride circuit, boarding, dining, drinking, and working together in the courtrooms that peppered Illinois cities and towns.<sup>57</sup> These practices helped to create a fluid relationship between politics and law. Politician-lawyers could be called on to participate in judicial capacities, including filling in for an absent judge.<sup>58</sup> Lincoln was particularly familiar with this experience. Among the Republican’s closest friends and confidants was Judge David Davis of the Illinois Eighth Judicial Circuit. The two men had ridden circuit together—along with a slew of other politician-lawyers—three months a year for almost twenty years. When Davis could not be present in Court, he routinely asked Lincoln to take his place on the bench—apparently in more than 300 cases.<sup>59</sup>

While politician-lawyers sometimes took on judicial capacities, judges, too, were deeply enmeshed in the political apparatus of the state. Political

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53. JOHANNSEN, *supra* note 38, at 31–32.

54. See McDERMOTT, *supra* note 43, at 134; 1 GUSTAVE KOERNER, MEMOIRS OF GUSTAVE KOERNER, 1809-1896, at 334 (Thomas J. McCormack ed., 1909)

55. THEODORE CALVIN PEASE, THE DIARY OF ORVILLE HICKMAN BROWNING (1925).

56. FEHRENBACHER, *supra* note 14, at 102.

57. ROGER L. SEVERNS, PRAIRIE JUSTICE: A HISTORY OF ILLINOIS COURTS UNDER FRENCH, ENGLISH & AMERICAN LAW 155 (John A. Lupton ed., 2015); KING, *supra* note 41, at 47; HERMAN DYER, RECORDS OF AN ACTIVE LIFE 91 (1886).

58. KING, *supra* note 41, at 95; HENRY C. WHITNEY, LIFE ON THE CIRCUIT WITH LINCOLN 41–42 (1892).

59. WHITNEY, *supra* note 58, at 263; BRIAN DIRCK, LINCOLN THE LAWYER 51 (2007); see also THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, *supra* note 49, at 280 (providing case statistics).

and judicial positions were often interchangeable in the nineteenth century; an ambitious partisan knew a state judgeship could serve as a temporary stop between the state legislature and Congress. As scholars know well, a majority of Supreme Court Justices in the nation's first one hundred years had ample experience as legislators or in executive offices and were often selected for their party loyalties.<sup>60</sup> But the pipeline also flowed in the other direction; many county and state judges went on to state and national political careers, just as "Judge Douglas" had.

Nor did these men shy from political engagement while on the bench. State judges (and some federal district judges) were longtime participants in party politics, including serving as delegates to state and even national party conventions.<sup>61</sup> Many participated in electoral campaigns—and not just their own after the advent of an elected judiciary.<sup>62</sup> Lincoln's friend Judge Davis, for example, spent much of his time the summer and fall of 1858 advising the Illinois Republican on his campaign strategy.<sup>63</sup> In fact, the relationship between Lincoln and Davis continued to develop in the ensuing years, when the Judge served as Lincoln's manager during the 1860 Republican Convention in Chicago—by all accounts quite effectively.<sup>64</sup>

Judges' involvement with politics extended to the national level, too. Douglas, for example, worked closely with David Smalley, who became a federal district judge in Vermont in 1857. Before his ascension to the federal bench, Smalley had been made chairman of the Democratic National Committee in 1856 and did not resign his post. As he wrote to Douglas shortly after his nomination, "I shall not forget or entirely forsake politics on the Bench."<sup>65</sup> Much like Davis in Chicago, Smalley was a key participant in

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60. See Morgan D. Dowd, *Justice Joseph Story and the Politics of Appointment*, 9 AM. J. LEGAL HIST. 265 (1965); John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1, 31-54 (1959); Evan A. Evans, *Political Influences in the Selection of Federal Judges*, 1948 WIS. L. REV. 330.

61. See Letter from Governor John Floyd to Vice President John C. Calhoun (Apr. 16, 1831) (on file with the Library of Congress, John Floyd Papers); Letter from General John Pope to Governor Ninian Edwards, (Jan. 8, 1808), in THE EDWARDS PAPERS: BEING A PORTION OF THE COLLECTION OF THE LETTERS, PAPERS, AND MANUSCRIPTS OF NINIAN EDWARDS 33 (E.B. Washburne ed., 1884); Letter from Senator Henry Clay to Justice Francis T. Brooke (April 2, 1839), in THE PRIVATE CORRESPONDENCE OF HENRY CLAY 439-41 (Calvin Colton ed., 1855); Letter from Judge E.M. Huntington to Justice John McLean (Mar. 28, 1848) (on file with the Library of Congress, John McLean Papers).

62. On judicial elections, see JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

63. KING, *supra* note 41, at 111-26.

64. *Id.* at 134-42.

65. Letter from Judge David Smalley to Senator Stephen A. Douglas, (Jan. 29, 1857) (on file with the University of Chicago Library).

the 1860 campaign—he opened the calamitous Democratic Convention at Charleston from which southern delegates bolted, splitting the party.<sup>66</sup>

Lincoln also had experience with federal judges working in electoral politics. Since the 1840s, the Illinois Republican had been arguing cases on the seventh federal circuit, where he encountered Associate Justice John McLean riding circuit.<sup>67</sup> McLean frequently used his circuit visits as a springboard for organizing his presidential campaigns: There, the court’s politician-lawyers, as well newspaper editors and other allies (sometimes including the district judges themselves) could congregate and strategize.<sup>68</sup> In 1856, McLean was even Lincoln’s top choice for the Republican nomination.<sup>69</sup>

These shared experiences with nineteenth-century judges and courts provide the backdrop for Lincoln’s charge of a conspiracy among Douglas, Pierce, Taney, and Buchanan. In the context of 1850s political culture, Lincoln’s focus clearly was not the Chief Justice acting unethically. There was nothing particularly odd about a judge discussing legislation, advocating for political positions, or even engaging in electoral politics.

Lincoln did include the Chief Justice in his conspiracy theory for a reason, however: The Illinois Republican was hoping to tie his Democratic rival to the stink of Taney’s politics.<sup>70</sup> Taney’s opinion in *Dred Scott* did not sit well with the Illinois public.<sup>71</sup> In addition to Republicans, many Democrats in the state opposed the idea that slavery could not be restricted in the federal territories.<sup>72</sup> Events in Kansas earlier in 1858 solidified concerns that southerners would impose slavery even where it was unwanted.<sup>73</sup> When a minority of Kansas voters submitted a pro-slavery “Lecompton Constitution” to Congress for statehood, the Buchanan administration ignored protests from the territory’s anti-slavery majority and

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66. *Id.*

67. ALBERT A. WOLDMAN, *LAWYER LINCOLN* 142 (1936); FRANCIS P. WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT* 184 (1937).

68. *See, e.g.*, Letter from Justice John McLean to John Teesdale (Oct. 29, 1846) (on file with the Ohio Historical Society); Letter from Justice John McLean to John Teesdale (May 12, 1847) (on file with the Library of Congress); Letter from Duff Green to Justice John McLean (July 1, 1833) (on file with the Library of Congress); Letter from Representative Elisha Whittlesey to Justice John McLean (Sept. 14, 1833) (on file with the Library of Congress, John McLean Papers).

69. Letter from President Abraham Lincoln to Illinois Secretary of State Lyman Trumbull (June 7, 1856), in *A LINCOLN CORRESPONDENCE* 619 (William H. Lambert ed., 1909); William E. Gienapp, *The 1856 Election: An Unpublished Lincoln Letter*, 70 *J. ILL. STATE HIST. SOC’Y* 18, 18 (1977).

70. MICHAEL F. HOLT, *THE POLITICAL CRISIS OF THE 1850S*, at 203 (1978).

71. GRAHAM A. PECK, *MAKING AN ANTISLAVERY NATION: LINCOLN, DOUGLAS, AND THE BATTLE OVER FREEDOM* 138–45 (2017).

72. *Id.*

73. DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861*, at 351 (Don E. Fehrenbacher ed., 1976).

pressed Democrats to approve it.<sup>74</sup> The issue split the Democratic party and placed the Taney Court firmly on the side of Lecompton.<sup>75</sup> Opponents of the fraudulent constitution saw the Court's decision not as a command, but a political position supporting pro-slavery minority rule.<sup>76</sup>

In early 1858, Douglas worked with Republicans and other congressional leaders to defeat the Lecompton Constitution.<sup>77</sup> As a result, some Republicans and other potential allies of Lincoln began to promote the Little Giant's reelection. *New York Tribune* editor Horace Greeley was among these new supporters, as was Kentuckian John Crittenden—Lincoln's old co-conspirator in the Whig Party who had been a staunch enemy of Democrats previously.<sup>78</sup> Even Lincoln's law partner, William Herndon, thought Douglas would receive widespread Republican support in the election—and even considered voting for the Little Giant himself.<sup>79</sup> For his part, the President punished Douglas's disloyalty by cutting him off from Democratic patronage and working behind the scenes to defeat his reelection.<sup>80</sup> These and other conflicts within Illinois produced a fractured and fluid political landscape; rather than definitive Democratic and Republican organizations, parties were loose coalitions with fluctuating ties.<sup>81</sup>

Douglas was a threat to siphon off Republican votes in both the statewide election and in the legislature's vote for Senator in January 1859. So Lincoln looked for a way to undercut Douglas's strength with Illinois moderates. The conspiracy charge was designed to paint his rival as a pro-slavery radical—an acolyte of Taney's politics.<sup>82</sup> Douglas's response to Lincoln in the first debate at Ottawa, Illinois, in August, illustrates how

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74. *Id.* at 314–15.

75. HOLT, *supra* note 70, at 206.

76. *Id.* at 203.

77. POTTER, *supra* note 73, at 320–22.

78. SHELDEN, *supra* note 18, at 144.

79. MICHAEL E. WOODS, ARGUING UNTIL DOOMSDAY: STEPHEN DOUGLAS, JEFFERSON DAVIS, AND THE STRUGGLE FOR AMERICAN DEMOCRACY 159 (2020).

80. See, e.g., Letter from Illinois Secretary of State Lyman Trumbull to John Palmer (June 19, 1858), in George Thomas Palmer, *A Collection of Letters from Lyman Trumbull to John M. Palmer, 1854–1858*, 16 J. ILL. STATE HIST. SOC'Y 20, 38–40 (1923); Letter from Senator Stephen Douglas to Judge Samuel Treat (Feb. 28, 1858), in THE LETTERS OF STEPHEN DOUGLAS 418, 418 (Robert W. Johannsen ed., 1961).

81. On the instability of Illinois parties, see Graham A. Peck, *Was There a Second Party System?: Illinois as a Case Study in Antebellum Politics*, in PRACTICING DEMOCRACY: POPULAR POLITICS IN THE UNITED STATES FROM THE CONSTITUTION TO THE CIVIL WAR 145–69 (Daniel Peart & Adam I.P. Smith eds., 2015); WOODS, *supra* note 79; STEPHEN L. HANSEN, THE MAKING OF THE THIRD PARTY SYSTEM: VOTERS AND PARTIES IN ILLINOIS, 1850–1876 (1980). On 1850s fractured politics throughout the North, see Jack Furniss, *Devolved Democracy: Federalism and the Party Politics of the Late Antebellum North*, 9 J. CIV. WAR ERA 546 (2019).

82. WOODS, *supra* note 79, at 170.

important it was for the Little Giant to distance himself from the kind of pro-slavery absolutism that the conspiracy suggested. Rather than criticize his rival for impugning the impartiality of Chief Justice Taney, the Illinois Democrat complained that Lincoln was challenging *Douglas's* "moral integrity" in his accusations of a conspiracy.<sup>83</sup>

The charge failed because Douglas could easily refute Lincoln's accusations. By the time of the debates, the Illinois Democrat had not only rejected Lecompton, but he had also developed an answer to the radical implications of *Dred Scott*. Though later known as the "Freeport Doctrine" after the second debate in August, the Little Giant had argued as early as the summer of 1857 that members of a territory could bar slavery informally by refusing to enforce its protection.<sup>84</sup> Douglas knew that Illinois Democrats needed assurance they could outlaw slavery despite what Taney had ruled.<sup>85</sup> Under the Freeport Doctrine, it was possible to abide by the Supreme Court's determinations regarding Congress *and* keep the territories free of the peculiar institution.<sup>86</sup> As Douglas explained in the third debate at Jonesboro in September, "you cannot maintain slavery a day in a territory where there is an unwilling people and unfriendly legislation."<sup>87</sup> In responding to Lincoln's charge, then, the Little Giant argued quite forcefully for his political independence from the most pro-slavery versions of the Democratic Party heralded by Taney and Buchanan.<sup>88</sup>

Ultimately, the lesson of Lincoln's conspiracy theory is not about judicial ethics or conduct. It is not about the exceptionalism of *Dred Scott*, or Taney's uniquely heinous decision. Instead, it is about the way nineteenth-century Americans understood the role of judges and courts in their political world. Judges had political opinions and they expressed those opinions both on and off the bench. The history of the Supreme Court in the 1850s can only be told within the broader context of this early American political culture.

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83. First Debate with Stephen A. Douglas at Ottawa, Illinois, *supra* note 1, at 35 (Mr. Douglas's reply).

84. D.E. Fehrenbacher, *Lincoln, Douglas, and the "Freeport Question"*, 66 AM. HIST. REV. 599 (1961).

85. HOLT, *supra* note 70, at 205.

86. WOODS, *supra* note 79, at 184.

87. Third Debate with Stephen A. Douglas at Jonesboro, Ill. (Sept. 15, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 1, at 103, 143 (Mr. Douglas's reply).

88. WOODS, *supra* note 79, at 180.