TRIAL BY FIRE: ABRAHAM LINCOLN AND THE LAW

by

ROBERT J. JOHNSON, JR.

A dissertation submitted to the Graduate Faculty in History in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in History in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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Abstract

TRIAL BY FIRE: ABRAHAM LINCOLN AND THE LAW

by

Robert J. Johnson Jr.

Advisor: Distinguished Professor John Patrick Diggins

Abraham Lincoln has been typically presented as a man whose professional life was somehow fated to culminate in politics. Indeed, Lincoln loved politics, but he lived the law. Lincoln practiced law for close to a quarter century, and during that time as the nation expanded, so too did Lincoln's practice and ideas about the role that law played in American society. It would have been impossible to extricate himself from this legal mindset, but more important, his legal mind was crucial to his success as President. Lincoln's legal and political professions are so often viewed as separate components to his life, but in reality they often merged each fueling the other's success. The fusion of law and politics acted as a centripetal force in Lincoln's professional life: law helped spark success in politics, and politics in turn, spurred Lincoln to the top of his profession as a practicing attorney. Thus integrated, this fusion provides the framework for this study and helps explain Lincoln's legal career as profoundly relevant to his career in politics.

Lincoln the lawyer did not disappear when Lincoln became President. Rather, Lincoln often viewed politics through the lens of the law. Law and politics were

inextricably bound in determining how Lincoln negotiated his way through the constitutional thicket of Civil War. From Lincoln's First Inaugural where he refuted the Confederates' right to secede from the Union, through the myriad decisions Lincoln was required to make during the Civil War, political and legal issues merged. Lincoln needed to consider both law and politics, and without understanding this fusion, we miss the full dimension of Lincoln. The thousands of routine cases Lincoln litigated on the fringe of the frontier made him realize that at the end of a case someone's life is affected. These were the People's cases, and as the nation was rent by Civil War, Lincoln used the law to help preserve, protect, and defend the People's government.

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To Lorraine

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INTRODUCTION

> It is strange to contemplate that in these comparatively recent, but primitive days, Mr. Lincoln's whole attention should have been engrossed in petty controversies or acrimonious disputes between neighbors about trifles; that he should have puzzled his great mind in attempting to decipher who was the owner of a litter of pigs, or which party was to blame for the loss of a flock of sheep, by foot rot; or whether some irascible spirit was justified in avowing that his enemy had committed perjury; yet I have known him to give as earnest attention to such matters, as, later, he gave to affairs of State.
>
> Henry C. Whitney[1]

> This is essentially a People's contest. 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.
>
> Abraham Lincoln[2]

What does Lincoln the lawyer tell us about Abraham Lincoln? Lincoln has been typically presented as a man whose professional life was somehow fated to culminate in politics. Indeed, Lincoln loved politics, but he lived the law. Lincoln practiced law for close to a quarter century, and during that time as the nation expanded, so too did

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[1] Henry C. Whitney, *Life on the Circuit with Lincoln*, Boston: Estes and Lauriat, 1892, 41.
[2] Roy Basler, ed., *The Collected Works of Abraham Lincoln*, 8 vols., New Brunswick, NJ: Rutgers University Press, 1953, IV, 438.

Lincoln's practice and ideas about the role that law played in American society. It would have been impossible to extricate himself from this legal mindset, but more important, his legal mind was crucial to his success as President. Lincoln's legal and political professions are so often viewed as separate components to his life, but in reality they often merged each fueling the other's success. The fusion of law and politics acted as a centripetal force in Lincoln's professional life: law helped spark success in politics, and politics in turn, spurred Lincoln to the top of his profession as a practicing attorney. Thus integrated, this fusion provides the framework for this study and helps explain Lincoln's legal career as profoundly relevant to his career in politics.

This dissertation moves on two planes. The first examines the nature of Lincoln's twenty-four years at the bar; the types of cases Lincoln tried and the venues for the administration of justice are important in understanding Lincoln the lawyer. The nature of his practice changed during the course of his years as an attorney, and it is addressed over the course of this dissertation. Some basic areas of practice, however, remained surprisingly constant. For example, throughout his time at the bar Lincoln litigated cases that revolved around the petty problems of daily life on the edge of the urban frontier. Routine debt collection, land title, slander, and divorce cases occupied the mind of our sixteenth President even as the tumultuous 1850s found Lincoln debating Stephen Douglas over "popular sovereignty" and a "house divided." As the "plain people's" attorney, Lincoln gained a deep understanding of human nature.

This dissertation, however, is more than a study of legal cases. It is also a study on ideas; specifically, Lincoln's legal philosophy. The oft-quoted "reverence for the law" of Lincoln's Lyceum Address forms the foundation of his jurisprudence, but his view of

the law changes over time. While a reverence for law dominates Lincoln's legal philosophy, the *Dred Scott* decision changes that viewpoint in a fundamental way. After *Dred Scott*, Lincoln developed a more active view of the law and came to believe that ultimately each branch of government could interpret the Constitution as each understood it. This theory, which develops from 1857 through Lincoln's election in 1860 found ultimate expression in Lincoln's confrontation of the constitutional crisis posed by secession when he suspends habeas corpus, calls out the militia and orders a naval blockade of the South. The decision to suspend habeas corpus may be viewed, not as the act of a dictator but as an exercise in bold constitutional leadership. When this suspension is challenged in federal court, Chief Justice Roger B. Taney ruled the suspension unconstitutional and claimed that "[i]f the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown."[3] Lincoln ignored Taney's decision, an act that could hardly be considered reverence for the law.

Lincoln's method of legal reasoning also undergoes a transformation as he moves from the courthouse to the White House. Lincoln's logic prior to the Civil War was grounded in reason—"cold, calculating, unimpassioned reason"—with a precision that was almost mathematical. Lincoln's study of mathematical texts such as Abel's Flints *System of Geometry and Trigonometry with a Treatise on Surveying*, which he read in preparation for his stint as a surveyor and his study of Euclidean Geometry while riding

[3] *Ex Parte Merryman*, 17 Fed. Cas., 144, Case No. 9,487, (1861).

the circuit helped inform this logic.[4] In fact, Judge Davis Davis before whom Lincoln appeared in 1,257 cases claimed that Lincoln "[s]tudied Euclid—the Exact Sciences—His mind struggled to arrive at moral & physical—Mathematical demonstration."[5] Lincoln also applied this precise logical reasoning to slavery. For example, in Lincoln's Fragment on Slavery, he argued that "[i]f A, can prove, however conclusively, that he may of right, enslave B.—why may not B. snatch the same argument, and prove equally, that he may enslave A?—You say A. is white, and B. is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be a slave to the first man you meet, with a fairer skin than your own."[6]

In his First Inaugural address Lincoln also reasoned from premise to conclusion when he assessed the legality of secession. Lincoln started from the premise "that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual."[7] Lincoln found this perpetuity in the "fundamental law of all national governments" since "no government proper, ever had a provision in its organic law for its own termination." [8] Lincoln reasoned "from these general principles…that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself."[9] Lincoln then described an unbroken effort in American political life from the Declaration

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[4] David Donald, *Lincoln,* New York: Simon & Schuster, 1995, 51; Oliver Fraysse, *Lincoln, Land and Labor: 1809-1860*, translated by Sylvia Neely, Urbana: University of Illinois Press, 1994, 59; *Collected Works*, IV, 65; Douglas L. Wilson and Rodney O. Davis, eds*., Herndon's Informants: Letters, Interviews, and Statements about Abraham Lincoln*, Urbana: University of Illinois Press, 1998, 64, 350, 519.
[5] Martha Benner and Cullum Davis, et al eds., *The Law Practice of Abrham Lincoln: Complete Documentary Edition, DVD-ROM*, Urbana: University of Illinois Press, 2000, hereinafter cited as *LPAL.* For the number of cases before Jude Davis see "A Statistical Portrait: Peers and Clients," *LPAL*; For the quote from David Davis see Wilson, *Herndon's Informants*, 350.
[6] *Collected Works*, II, 222-23.
[7] Ibid., IV, 264.
[8] Ibid.
[9] Ibid., 265.

of Independence through the Constitution "*to form a more perfect Union*."[10] Lincoln thus concluded that since the Union is perpetual, the various States could not secede.

The shots on Fort Sumter interrupted this logic. As Lincoln responded to the constitutional crises posed by Civil War, he used means-ends reasoning to justify his response to these exceptional circumstances. While the bounds of constitutional law would be stretched to the brink, the means—suspending habeas corpus, blockading southern ports, declaring martial law, emancipation by proclamation, and the many other issues of military justice—were justified as a legal exercise of Lincoln's Commander-in-Chief power toward the end of preserving the Union. Lincoln's thinking was revealed in the July 4, 1861 Message to Congress when he reasoned that "[t]he Constitution provides, and all the States have accepted the provision, that 'The United States shall guarantee to every State in this Union a republican form of government.' But, if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government: so that to prevent its going out, is an indispensable *means*, to the *end*, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory."[11] Lincoln ultimately used the law, not only to discredit secession and preserve the Union, but to eventually eradicate slavery; first when he emancipated the slaves in states still under the Confederate flag, and then before his assassination when he provided the constitutional leadership that would bear fruit after his death in the passage of the Thirteenth Amendment.

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[10] Ibid.
[11] Ibid., IV, 440.

The impetus for a deeper understanding of Lincoln the lawyer emerged from the publication of the *Law Practice of Abraham Lincoln: Complete Documentary Edition*, which contains documents relating to Lincoln's three law practices.[12] This publication contains 100,000 documents on almost five thousand cases. This dissertation draws upon not only these records, but also my own twenty-two years as a practicing attorney to appreciate the full dimension of Lincoln the lawyer. All of Lincoln's biographers deal with Lincoln's law practices, but they are either dealt with in a superficial way, or are part of niche studies that focus solely on Lincoln the lawyer to the exclusion of his true mistress, politics. When the crucible of the courtroom is brought to bear on the life of Lincoln it is, for the most part, viewed as separate rather than a significant part of Lincoln the politician.

Another important publication that this dissertation relies upon is *Herndon's Informants: Letters, Interviews and Statements about Abraham Lincoln*.[13] This is a compilation of materials culled from the Herndon-Weik Collection at the Library of Congress edited by Lincoln scholars Douglas L. Wilson and Rodney O. Davis. At sixteen years, Lincoln & Herndon lasted twice as long as Lincoln's two previous partnerships combined. Except for Mary Todd, William Herndon—or "Billy" as Lincoln called him—spent more time with Lincoln than anyone else. Particularly with respect to Lincoln's life at the bar, Herndon is an invaluable source.[14] These two critical sources allow for a more complete picture of Lincoln the lawyer to emerge as they enrich the base

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[12] *LPAL.*
[13] Wilson, *Herndon's Informants.*
[14] Douglas L. Wilson, *Lincoln Before Washington: New Perspectives on the Illinois Years*, Urbana: University of Illinois Press, 1977, 21-36. Charles B. Strozier, "The Lives of William Herndon," *Journal of the Abraham Lincoln Association*, Vol. 14, No. 1, 1993, 1-13. Douglas Wilson, *Honor's Voice: The Transformation of Abraham Lincoln*, New York: Alfred A. Knopf, 1998, 7-15.

of evidence from Lincoln's earliest days in New Salem through his initial years at the bar, and the tumultuous years leading up to the Civil War.

Lincoln arrived in New Salem, Illinois, in 1831 at the age of twenty-two. Lincoln's New Salem years find him searching for an occupation that would give his life meaning and satisfy his peculiar ambition.[15] He struggled to find his place in the new town: clerking in a grocery store, surveying land, handling the mail as a Postmaster. But knowing how to read and write helped set Lincoln apart. The local Justice of the Peace, Bowling Green, allowed Lincoln to pettifog, that is to draft legal documents and help others with deeds and mortgages without a license to practice law. This ability combined with Lincoln's debating skills led New Salem's elite to encourage Lincoln to run for public office. Thus at the earliest stages of Lincoln's professional yearnings law and politics are intertwined. Although Lincoln lost his first bid for public office in 1832, he won in 1834 and went on to serve four consecutive terms in the Lower House of the Illinois legislature. While serving in the legislature Lincoln was encouraged to study law by fellow Whig, John Stuart. The two men had first met during the Black Hawk War, while Lincoln still lived in New Salem. Lincoln heeded Stuart's advice and was admitted to practice law in March 1837. Law and politics led Lincoln out of New Salem and the young penniless beginner arrived in Springfield with his dual-career path set. For the rest of his life Lincoln practiced law and politics.

As a young practitioner in Springfield, Lincoln worked at the firm Stuart & Lincoln (1837-1841). In this partnership, law and politics fused in a fundamental way as both men used the law to further their political ambitions; Lincoln as a Whig leader and

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[15] *Collected Works*, I, 8. In this first appeal for public office Lincoln states that his peculiar ambition as "being truly esteemed by my fellow men, by rendering myself worthy of their esteem."

Stuart as a Congressman. With Stuart, Lincoln was also introduced to the types of cases that were litigated on the edge of the urban frontier. The tedious nature of frontier practice emerged in Lincoln's routine land, debt, and divorce cases. But it was also here that Lincoln began riding the circuit, a common aspect of frontier practice that would come to shape him as both a lawyer and politician.

Lincoln's nascent legal philosophy also emerged while partnered with John Stuart. In his Address to the Young Men of Springfield or the "Lyceum Address" as it is known, the twenty-eight year old Lincoln examined the importance of law and order and warned of the dangers of mob violence.[16] In this address Lincoln proclaimed that "reverence for the law" should "become the *political religion* of the nation."[17] At this early stage of his career at the bar, Lincoln developed a legal philosophy that would inform much of his thinking about not just law, but politics as well. The scholarship on this speech is rich, but much of it seems to be preoccupied with determining the identity of the great tyrant Lincoln refers to in this Address.[18] Rather than fall into this historical quagmire, this dissertation examines the influences of Lincoln's jurisprudence that inform this speech. Lincoln was a member of the Illinois bar for about ten months when he delivered the Lyceum Address and one of the books that was central to Lincoln's preparation for the bar was Blackstone's *Commentaries*. For many frontier practitioners, this text was the whole of their legal education. The influence of Blackstone is the focus of this Lyceum Address, and the reverence Blackstone had for tradition, precedent, and custom, Lincoln adopts for the law.

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[16] Ibid., 108-115.
[17] Ibid., 112.
[18] Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War*, New York: Oxford University Press, 1962, 99, 108, 129-30; Donald, *Lincoln*, 81.

Lincoln's second law practice, Logan & Lincoln, began in 1841, and lasted until the men amicably parted ways in 1844. Stephen Trigg Logan was an established practitioner and former judge who was described as quite meticulous in his practice. Logan did not tolerate sloppy lawyering and was more of a taskmaster than Lincoln's first partner, John Stuart. In fact, Stuart's lackadasical approach was belied by Logan's precision in preparing a case for court. In short, this is where Lincoln learned the law. There are also some significant differences between the two practices in terms of cases. Most notable was the degree to which Lincoln appeared before the Illinois Supreme Court while partnered with Logan. Stuart & Lincoln appeared ten times, while Logan & Lincoln litigated over seventy appeals before the highest court in the state. By practicing at this level Lincoln received a thorough grounding in the law.

Politics was also important to the firm of Logan & Lincoln. Lincoln did not serve in any elected office, however, while partnered with Logan. In fact, it was Logan who was elected to the legislature during this period, not Lincoln. Lincoln also experienced great personal changes in his life while partnered with Logan. Lincoln married Mary Todd on November 2, 1842 and on August 1, 1843 their first son, Robert, was born. The growing family needed a larger living space and the Lincoln's purchased their first and only house on the corner of Eighth and Jackson on January 16, 1844. Thus by the time the Logan & Lincoln partnership ended, Lincoln was beginning to enjoy some of the "promises of American life." Lincoln was a husband, father, and homeowner. Logan and Lincoln dissolved this partnership at the end of 1844, as Logan wanted to make room in the practice for his son. Lincoln then assumed senior status in a firm of his own when

he asked William Herndon, a young clerk in the Logan & Lincoln office, to be his partner.

Lincoln & Herndon (1844-1860) at sixteen years, was Lincoln's longest partnership. Herndon, however, was more than a law partner. "Billy" was a political collaborator, a sounding board for Lincoln's ideas, and a trusted friend. The partnership began when Lincoln offered: "Billy, I can trust you if you can trust me."[19] When Lincoln lost the Senate seat to Stephen Douglas, Lincoln lamented "I expect everyone to desert me except Billy."[20] Lincoln hoped to come back to Springfield and practice law with Herndon after his presidency was over. In fact, before leaving for Washington, Lincoln told Herndon to leave the firm's Lincoln & Herndon sign "undisturbed" and "give our clients to understand that the election of a President makes no change in the firm Lincoln and Herndon. If I live I'm coming back some time, and then we'll go right on practicing law as if nothing ever happened."[21] Neither man could know what the next four years would bring.

Considering Lincoln's reverence for the law is fundamental in understanding Lincoln both as a legal thinker and a political philosopher. The consequences of this reverence were revealed in two specific situations—one legal, the other political—when Lincoln was approaching mid-career. Lincoln's defense of a slave owner in the Matson slave case has generated a significant amount of debate among Lincoln scholars. Lincoln not only found himself on the wrong side of the case, but on the losing side as well. Some contend that Lincoln argued weakly and threw the case, and others have claimed

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[19] William H. Herndon and Jesse W. Weik, *Herndon's Life of Lincoln*, DaCapo Press edition, 1942, 390.
[20] Wilson, *Herndon's Informants*, 622.
[21] Herndon, *Life of Lincoln*, 211.

that he argued with the intensity he brought to any other case.[22] The evidence reveals that Lincoln argued as best he could, given the law and facts of the case. But this raises another question. How could the great emancipator defend a slave owner? Lincoln has been accused of being indifferent to the consequences of sending people back to slavery.[23] Others who recognized that Lincoln, like other antebellum practitioners, took cases as they came, have claimed that Lincoln's "business was law, not morality." [24] Finally another explanation states that "the slavery issue had not yet seared itself into his conscience to the point of inducing him to place the plight of a few hapless Negroes above the abstract legal aspects of the question."[25] Does Lincoln's willingness to take either side demonstrate indifference? Was he wrong to let the law of Illinois lie prostrate before the slave laws of Kentucky?

Shortly after Lincoln litigated the Matson case, he moved to Washington to serve his only term in Congress. The application of Lincoln's reverence for the law is illustrated through his work in the Thirtieth Congress. Lincoln's stance against the Mexican War expressed his abiding respect for constitutional law. Lincoln demanded evidence of President Polk, asking for the exact "Spot" where hostilities started and the Mexican War began. Taking a principled stance against the war, which is what reverence for the law demanded, Lincoln paid a heavy political price back home with his pre-war constituents in Springfield who claimed he was unpatriotic. After his one term in

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[22] Albert J. Beveridge, *Abraham Lincoln, 1809-1858, 2 vols*., Boston: Houghton Mifflin Company, 1928; Benjamin Thomas, *Abraham Lincoln*, New York: Barnes & Noble edition, 1952; and Albert A. Woldman, *Lawyer Lincoln*, New York: Carroll & Graff Publishers, 1936 are representative of the "argued weakly" school. John J. Duff, *A. Lincoln: Prairie Lawyer*, New York: Rinehart & Company, 1960; and Stephen B. Oates, *With Malice Toward None: The Life of Abraham Lincoln*, New York: Harper & Row Publishers, 1977 represent the "argued strongly" school.

[23] Lerone Bennett, Jr., *Forced Into Glory: Abraham Lincoln's White Dream*, Chicago: Johnson Publishing Co., 2000.

[24] Donald, *Lincoln*, 104.

Congress Lincoln returned to Springfield with a political career in ruin and "practiced law more assiduously then ever before."[26] This dedication meant that Lincoln had to once again ride the back roads of the Eighth Judicial Circuit.

Without sufficient legal business in Springfield to support a full-time practice, Illinois practitioners needed to travel from county seat to county seat each spring and autumn in search of new clients. This itinerant practice revealed a hard, but happy life for Lincoln. The physical challenges of riding by horseback for miles only to find bad food and lawyers sleeping two and three in a bed are legendary. The cases were for the most part routine, but the significance for Lincoln immense. This type of practice allowed Lincoln to learn the customs of the people of central Illinois and the importance of public opinion. As an ancillary benefit, traversing the circuit enabled Lincoln to campaign for a good part of each year. Itinerant lawyers are well described by Alexis de Tocqueville as the aristocratic branch of society as they rode into town with their legal bravado, expected to not only know the law, but to be conversant with the issues of the day.[27] Often they would give speeches on political and economic issues that not only informed but entertained the community. The circuit was also a place where original reasoning and judicial principles based on fundamental fairness trumped a strict application of legal precedents. This rough form of justice forced Lincoln to think about the law organically and "search the depths of his mind for original arguments."[28]

Lincoln also had time away from home to study, think, and learn, which was the most significant aspect of circuit practice for understanding his education. Free from the

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[25] Thomas, *Abraham Lincoln*, 112.
[26] *Collected Works*, III, 512.
[27] Alexis de Tocqueville, *Democracy In America*, translated by George Lawrence, edited by J.P. Meyer, New York: Harper, 1969, 268-70.

demands of the domestic sphere, Lincoln became a self-educated man. John Stuart, Lincoln's first partner, described his study habits:

> In the evening Lincoln would strip off his coat and lay down on the bed—read—reflect and digest—After supper he would strip—go to bed—get a Candle—draw up a chair or table and read till late of night: he read hard works—was philosophical—logical—mathematical—never read generally—didn't know anything about history—had no faith in it or biography—didn't know geography generally—knew it in spots. He had nothing Rhetorical in his nature—no belles letters—he read specially—dug out things—He never read poetry as a thing of pleasure, except Shakespeare—he read Poe because it was gloomy—So of Burns at "*Bottom*". Lincoln was a scholar from 1835—rather a hard student to 1845—He was an educated man in 1860—more than is generally known. [29]

In the 1850s Lincoln's law practice began to change with the coming of the railroad. This was a new source of business and eventually circuit practice could be accomplished by rail. Lincoln was not, however, strictly a railroad attorney as he sued the railroads just as often as he represented them, with the Illinois Central a notable exception to this rule.[30] Even thought the railroads provided new business with new opportunities, Lincoln still had to ride circuit and scratch out a livelihood litigating the problems of daily life. The "plain people" as he referred to them in his July 4, 1861 Message to Congress were his client base.

Lincoln's reaction to the *Dred Scott* decision in 1857 signaled a significant shift in Lincoln's attitude toward the law. In Lincoln's response to this Supreme Court decision his reverence for the law frays. Although Lincoln stated that the Republicans would offer no resistance to the *Dred Scott* decision, he suggested that constitutional

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[28] Whitney, *Life on the Circuit with Lincoln*, 255.
[29] Wilson, *Herndon's Informants*, 519.
[30] "A Statistical Portrait, Lincoln and the Railroads, Table 14-Lincoln and Partners Railroad Clients," *LPAL*. Lincoln's law partnerships handled 133 railroad cases. Of those cases, Lincoln represented the railroad 71 times and sued the railroad on 62 occasions. It should be understood, however, that two railroads in particular Lincoln represented many more time than he sued them. For example, Lincoln

interpretation is not the sole province of the Supreme Court. Lincoln argued for a more active role in constitutional interpretation for each branch of government. Lincoln's denunciation of the *Dred Scott* decision continued during his famous debates with Stephen Douglas. The Lincoln-Douglas debates were formatted similar to a legal trial and occupied about as much time as a circuit court term would. This was a quasi-legal forum in which political issues were tried to the jury of Illinois public opinion. The debates created political drama of a high order as thousands watched "popular sovereignty" compete with the claim that "the people do not have the right to do wrong."[31] Lincoln, however, was denied his much sought after seat in the U.S. Senate.

Although not on the same stage, the debates with Douglas continued. In 1859 Lincoln spoke in Columbus and Cincinnati in response to Douglas' earlier appearances in Ohio. Lincoln's ostensible purpose was to refute the ideas Douglas expressed on "popular sovereignty" in an article published in the September 1859 issue of *Harper's Magazine*. Lincoln also took the opportunity to continue his diatribe against *Dred Scott* by warning of the dangers of a second *Dred Scott* decision that would carry slavery into the free northern states. Finally, the following year the Lincoln–Douglas "debates" ended when Lincoln articulated his most wide ranging historical and legal analysis on the Founders' intent on slavery at Cooper Union in New York City.

Lincoln's response to secession and the constitutional issues this tumultuous event raised concludes this dissertation. From the outset of his administration, Lincoln is surrounded by the constitutional crisis, but must still function as a legal thinker. Secession, rebellion, and the momentous event of Civil War forced Lincoln to make

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represented the Illinois Central 47 times, but only sued the 5 times. Likewise with the Alton & Sangamon Railroad, Lincoln represented that railroad 12 times, but only sued them once.

crucial legal and political decisions that would have consequences for the survival of the Union. When Lincoln must confront the enemies of liberty he prophesized about in the Lyceum Address, he used the law as a weapon to fight for popular government. Lincoln's Commander-in-Chief powers allowed him to suspend habeas corpus, impose a naval blockade, declare military law, and ultimately issue the Emancipation Proclamation. Lincoln's decision to suspend habeas corpus has been called a dictatorial, but I reject that view.[32] Rather than wait for Congress to act, Lincoln used the law to meet the secession crisis as a legitimate *means* to preserve the noble *end* of popular government.

Lincoln the lawyer did not disappear when Lincoln became President. Rather, Lincoln often viewed politics through the lens of the law. Law and politics were inextricably bound in determining how Lincoln negotiated his way through the constitutional thicket of Civil War. From Lincoln's First Inaugural where he refuted the Confederates' right to secede from the Union, through the myriad decisions Lincoln was required to make during the Civil War, political and legal issues merged. Lincoln needed to consider both law and politics, and without understanding this fusion, we miss the full dimension of Lincoln. The thousands of routine cases Lincoln litigated on the fringe of the frontier made him realize that at the end of a case someone's life is affected. These were the People's cases, and as the nation was rent by Civil War, Lincoln used the law to help preserve, protect, and defend the People's government.

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[31] *Collected Works*, III, 315.
[32] James G. Randall, "Lincoln in the Role of a Dictator," *South Atlantic Quarterly*, Vol. 28, No. 3, 236-252, 1929, reprinted in Kenneth L. Deutsch and Joseph R. Fornieri, *Lincoln's American Dream: Clashing Perspectives*, Washington, D.C.: Potomac Books, 2005.

CHAPTER ONE

ADRIFT

> The life of a great and good man is like the current of a great river. When you see its force and power, you at once think of its source, and what tributaries go to make the great river.
>
> Joshua Speed[1]

> I was a piece of floating driftwood.
>
> Abraham Lincoln[2]

New Salem

The Sangamon River washed the twenty-two year old future president onto the shores of New Salem, Illinois, in July1831. Fate dictated that in this small village Abraham Lincoln would stake his career claim. Lincoln's professional life had not yet taken shape. In six years time, however, politics and law combined to produce a dual career that fed Lincoln's ambition. Law and politics dominated Lincoln's professional life from 1831 until April 15, 1865 when he fell victim to the assassin's bullet. Without distinction of birth or wealth, Lincoln took what New Salem had to offer and worked as a general store clerk, served in the Black Hawk War, lost his first election for public office, failed in

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[1] Joshua F. Speed, "Reminiscences of Abraham Lincoln & Notes of a Visit to California: Two Lectures by Joshua F. Speed," The Bradley & Gilbert Co. (Louisville, Ky.) 1896, 18.

business, attended the mails as postmaster, learned the land as a surveyor, was elected to the Illinois Legislature, and before he left New Salem, was pursuing a career in law. This checkered career path allowed Lincoln to find his way by trial and error. Since he had neither experience, nor social standing, Lincoln learned on the job, and his legal career was no exception. Trial by fire defined Lincoln's working life.[3]

New Salem, a pioneer town on the "urban frontier," was located on the bluffs of the Sangamon River. At the height of its population it counted about twenty-five families and some one hundred people. This community comprised people who "were young, enthusiastic, self-reliant, willing to take a chance. Equality of opportunity was in large degree a fact, and courage, endurance, and ingenuity were the requisites of success. Wealth, 'kin and kin-in-law didn't count a cuss.' Government was of, by, and for the people, with public opinion a most effective force."[4] The cast of mind that pervaded this pioneer community, however, was southern in temperament.[5] In fact, this mentality was reflected in the composition of the Illinois legislature during Lincoln's time in office as "[m]ost of Lincoln's legislative colleagues were men of Southern background. All but one of the first judges in the state were from the South. At least three of the first governors were themselves slaveowners. Several United States senators and congressmen from Illinois were slaveholders." [6] This disposition, however, was most

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[2] Herndon *Life of Lincoln*, 66, 76.
[3] For a discussion of Lincoln's years in New Salem see generally, Donald, *Lincoln*, 38-65; Charles B. Strozier, *Lincoln's Quest for Union: A Psychological Portrait*, second edition, revised, Philadelphia: Paul Dry Books, 2001, 36-43; Wilson, *Honor's Voice,* 3-167; Beveridge, *Abraham Lincoln*, vol. 1, 9,100-160; Herndon, *Life of Lincoln,* 66-146; Fraysse, *Lincoln, Land, and Labor,* 47-76; Benjamin Thomas*, Abraham Lincoln: A Biography*, 23-67; Benjamin Thomas, *Lincoln's New Salem,* Carbondale and Edwardsville: Southern Illinois University Press, 1954.
[4] Thomas, *Lincoln's New Salem*, 39.
[5] Ibid.
[6] Paul Simon, *Lincoln's Preparation for Greatness: The Illinois Legislative Years*, Urbana and Chicago: University of Illinois Press, 1971, 126.

clearly reflected in Illinois history during the debates in early 1820s to alter the state constitution to allow slavery.

Illinois was admitted to the Union in 1818. The territory that comprised Illinois was carved from the Northwest Territory. The provisions of the Northwest Ordinance dictated that this land, which would ultimately form the states of Ohio, Indiana, Michigan, Wisconsin, and Illinois, would be free soil.[7] The Northwest Ordinance or Ordinance of 1787 originally passed by the government presiding under the Articles of Confederation, was adopted by the Continental Congress, and stated that "[t]here shall be neither slavery nor involuntary servitude in the said territory."[8] Thus Illinois was admitted to the Union as a free state. This legal impediment, however, did not seem to concern Illinois' pro-slavery forces. Negroes were allowed to sell their labor in a system of indentured servitude that was but a notch above slavery.[9] The state also enacted "Black Laws." These laws passed at the outset of Illinois history stated among other things that:

> No negro or mulatto should settle in the State until he had first produced a certificate of freedom under seal of a court of record…The overseers of the poor were empowered to expel such negroes or mulattos whenever they desired. Any person bringing slaves into the State with a view of emancipating them was required to execute a bond in the sum of one thousand dollars as a guaranty…and if he neglected to execute the bond, he was liable to a fine of two hundred dollars….To harbor any slave or servant, or to hinder the owner in retaking any slave was made a felony punishable by a fine two-fold the value of the slave and a whipping not to exceed thirty stripes….A slave found ten miles from home was subject to arrest and to be punished by thirty five stripes….In all cases where free persons were punished by a fine, slaves were to be punished by whipping at the rate of twenty stripes for each eight dollars of fine.[10]

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[7] George Anastaplo, *Abraham Lincoln: A Constitutional Biography*, Lanham, Maryland: Rowman & Littlefield Publishers, Inc.,1999, 39-51.
[8] Ibid., 40.
[9] Simon, *Lincoln's Preparation for Greatness*, 122.
[10] Ibid., 125.

The admission of Missouri just two years after Illinois statehood provided a wedge for renewed debate over slavery in the Prairie State. Theoretically, the states that were admitted after American independence were to join the Union on an equal basis as the original states. The pro-slavery argument posited that the states that were to come into the Union that did not have the right to decide for themselves whether to allow slavery could not be considered as equal to the older states that had that choice.[11] The anti-slavery faction used the sanctity of the Northwest Ordinance in defense of freedom.[12]

This issue was played out in the political arena during the gubernatorial election of 1822 that pitted the anti-slavery candidate, Edward Coles, against the pro-slavery candidate, Joseph B. Phillips. Coles narrowly won the election, but the Illinois slave interest would not give up. Without avid support from the chief executive, the pro-slavery faction sought to advance their cause by calling for a state constitutional convention. In sum, the argument contended that the admission of Illinois was dictated by the slavery prohibition in the Northwest Ordinance, but now that Illinois was a sovereign state, slavery could be reconsidered in a new state constitutional convention. The pro-slavery faction was able to bring the matter to the people for a vote and an eighteen-month period of intense campaigning commenced. It was generally understood that a vote in favor of the constitutional convention was a vote for the introduction of slavery into the Prairie State. After the ballots were counted, the pro-slavery position was rejected. The fact that such a debate took place, however, and that the people were actually considering the use of a state constitutional convention to re-open the slavery issue is critical to understand Lincoln as a man of his time and place. Illinois public opinion, although anti-slavery, was

[11] Theodore Calvin Pease, *The Frontier State: 1818-1848*, Chicago: A.C. McClure & Co., 1919, 70-74.
[12] Ibid., 70, 71, 76-77.

also anti-abolition with a strong strain of racism brewing below the surface. Any politician who wanted to be elected needed to understand the political realities of this southern mentality.[13]

The town of New Salem was far from dull as men drank and took part in "[a]ll the manly sports that pertained to a frontier life such as "running, wrestling, jumping, gander-pulling, and horse racing."[14] Lincoln, never a drinker or gambler nevertheless had to prove himself using physical prowess. Perhaps the most notorious episode involving Lincoln's toughness was his wrestling match with Jack Armstrong, the leader of the Clary Grove Boy's, a local gang of rambunctious young men. Armstrong challenged Lincoln to a wrestling match, and once the gauntlet had been dropped, saving face meant accepting the challenge. The historical accounts are murky, but Lincoln emerged as Armstrong's equal for entering the arena, and won the respect of this high-spirited group in the process.[15] This gained the newcomer social acceptance in this rough-and-tumble world. Lincoln, however, wanted to be known for more than his physical strength. Lincoln sought a life of the mind and New Salem also offered opportunities for intellectual growth.

New Salem's intelligentsia included Dr. John Allen, James Rutledge, and Mentor Graham. Allen, a graduate of Dartmouth College, was an antislavery advocate and started New Salem's first Sunday school. Graham, a self-educated man, taught school in New Salem. Rutledge, who owned twenty-five or thirty books, started the New Salem Debating Society. All three men influenced Lincoln. Allen encouraged Lincoln's political ambitions, Graham taught Lincoln grammar, and Rutledge provided the forum

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[13] Simon, *Lincoln's Preparation for Greatness*, 127.
[14] Speed, "Reminiscences," 20.

for Lincoln's first formal debate training. Skilled argumentation was essential for success in both court and on the campaign trail. Lincoln's first appearance before the Debate Society was described by R.B. Rutledge as follows:

> As he rose to speak his tall form towered above the little assembly. Both hands were thrust down deep in the pockets of his pantaloons. A perceptible smile at once lit up the faces of the audience for all anticipated the relation of some humorous story. But he opened up the discussion in splendid style to the infinite astonishment of his friends. As he warmed with his subject his hands would forsake his pockets and would enforce his ideas by awkward gestures; but would very soon seek their easy resting place. He pursued the question with reason and argument so pithy and forcible that all were amazed. The President at his fireside after the meeting remarked to his wife that there was more in Abe's head than wit and fun, that he was already a fine speaker; that all he lacked was culture to enable him to reach the high destiny which he Knew was in store for him. From that time Mr. Rutledge took a deeper interest in him.[16]

Social acceptance and a logical mind were important attributes, but Lincoln also needed a job. Lincoln's initial entry into New Salem's nascent economy was as Denton Offutt's general store clerk. Lincoln served in this position during the fall of 1831 and winter of 1832. Here Lincoln met the inhabitants of New Salem and earned their trust. Mentor Graham, the local schoolmaster, described Lincoln "as among the best clerks I ever saw: he was attentive to his business—was kind and considerate to his customers & friends and always treated them with great tenderness—kindness & honesty." [17] Lincoln "was a good—obliging clerk & an honest one: he increased Offuts business much by his simplicity—open—candid—obliging & honest—Evrybody [sic] loved him."[18] His tasks included "unloading sacks of wheat from farmers wagons, measure out and settle with

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[15] Wilson, *Honor's Voice*, 19-51.
[16] Wilson, *Herndon's Informants*, 384; Thomas, *Lincoln's New Salem*, 47; Donald, *Lincoln*, 41; Strozier, *Lincoln's Quest for Union*, 36.
[17] Wilson, *Herndon's Informants*, 9.
[18] Ibid.,14

them for the same"[19] Lincoln's position as store clerk gave him the vantage point to meet and politic with the community. Within about one month, however, Denton Offut's business was heading for collapse. Eventually, Offut's business "petered out" and Lincoln was one of the economic casualties.[20] Unemployed and again adrift in the economic current of New Salem Lincoln found "employment" in the local militia in April 1832 when the Black Hawk War broke out.

Prior to reporting for duty in the Black Hawk War, Lincoln cast his hat into the political ring. In March 1832, just eight months after he arrived in New Salem "in a frail canoe down the north fork of the Sangamon River, friendless, penniless, powerless, and alone," Lincoln announced his candidacy in a letter to the people of Sangamon County.[21] In this letter dated March 9, 1832, Lincoln outlined the issues in a communication that is far reaching in terms of the matters it raises for public concern. Lincoln had clearly thought about these issues and the letter reflects a man well versed on local issues. First and foremost was his belief in the "utility of public improvements."[22] Lincoln believed in the "expediency of constructing a rail road from some eligible point on the Illinois river, through the town of Jacksonville, in Morgan county, to the town of Springfield, in Sangamon county."[23] Improved navigation of the Sangamon River was also an issue that Lincoln first addressed publicly in this letter. Lincoln's continuing reflection on this problem would also lead to him to apply for and receive U.S. Patent.[24] In addition, Lincoln also went on record in this letter opposing the "baneful and corroding system" of

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[19] Ibid.,539.
[20] Herndon, *Life of Lincoln*, 71.
[21] Emanuel Hertz, *The Hidden Lincoln: From the Letters and Papers of William H. Herndon*, New York: The Viking Press, 1938, 418; *Collected Works*, I, 5.
[22] *Collected Works*, I, 5.
[23] Ibid.
[24] Ibid., II, 32-36.

"loaning money at exorbitant rates."[25] Education also found a place in Lincoln's first political platform. In Lincoln's view, it was "the most important subject which we as a people can be engaged in." [26] This initial campaign document identifies the issues that would occupy Lincoln's lawmaking efforts during his eight years in the Illinois legislature.[27] Lincoln's statement of political issues was eclipsed in the final paragraph of his letter. Here Lincoln revealed what he was really after: the esteem of his fellow man. Lincoln possessed what John Adams eloquently described as a "passion for distinction."[28] Lincoln's "peculiar ambition" was served well by his ultimate career choice of law and politics.[29]

In 1832 the Sauk and Fox Indians returned to Illinois to reclaim tribal lands. Illinois Governor John Reynolds called for volunteers and Lincoln promptly enlisted. [30] This twist of fate had implications for Lincoln's future. In the short term, it interrupted his campaign for the legislature, but also gave rise to another election. During this service he ran against William Kirkpatrick and was elected captain of his unit.[31] This was in a sense his first campaign for office and the success in election by his fellow men was one that Lincoln claimed, prior to his two elections to the Presidency, had never been equaled.[32] Notable for the lack of actual combat, this experience was none the less significant since it introduced Lincoln to his future law partner John Stuart. Their paths would cross again in the Illinois Legislature as elected officials, and this personal and

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[25] Ibid., I, 7.
[26] Ibid., 8.
[27] Simon, *Lincoln's Preparation for Greatness*.
[28] *The Political Writings of John Adams*, George A. Peck, Jr., ed., New York: Macmillan Publishing Company, 1985, 175-195.
[29] *Collected Works*, I, 8.
[30] Donald, *Lincoln*, 44.
[31] Wilson, *Herndon's Informants*, 6, 18, 19, 20, 361.
[32] *Collected Works*, III, 512.

political association would eventually lead to Lincoln's first law partnership, which would last from 1837 to1841.

Lincoln's military tenure was short, and after a summer in the service, he returned to New Salem and the campaign trail. Flush with the esteem he enjoyed from his election as captain, Lincoln resumed his first quest for public office. In one of his campaign speeches Lincoln stated: "Gentlemen and fellow citizens I presume you all know who I am. I am humble Abraham Lincoln. I have been solicited by many friends to become a candidate for the Legislature. My politics are short and sweet like the old woman's dance. 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. If elected I shall be thankful; if not it will be all the Same."[33] August 6, 1832 was election day and Lincoln lost. Lincoln finished eighth out of fifteen candidates, but could take solace from the fact that of the 300 votes cast in his home district, 277 voted in his favor. Significantly, Lincoln would remember these exact numbers many years later. The Black Hawk War was over and the election lost. Again it was time for Lincoln to move on.[34]

Lincoln's next business endeavor was a failure that would follow him for years to come. Lincoln decided to partner in business with William Berry. The business plan was to open a general store. After securing the necessary financing, the store was open. Lincoln's partner turned out to be a drunk and squandered the meager profits of the enterprise. Soon Berry died, the business "winked out," and Lincoln was left holding the

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[33] Wilson, *Herndon's Informants*, 171; Herndon, *Life of Lincoln*, 86. Both sources credit Abner Y. Ellis as the source; cf., Alan Guelzo, *Abraham Lincoln: Redeemer President*, Grand Rapiids, Michigan: William B. Eerdmans Publishing Company, 1999, 65. Guelzo gives a slightly similar account of this "stump speech" that was recorded not by Ellis but by James Herndon.

[34] Donald, *Lincoln*, 46.

responsibility to pay off the promissory note.[35] This "national debt" as Lincoln called it took years to pay off.[36] Later, William Herndon claimed that "[a] more unfortunate selection than Berry could not have been found; for while Lincoln at one end of the store was dispensing political information, Berry at the other was disposing of the firm's liquors, being the best customer for that article of merchandise himself. To put it more plainly, Lincoln's application to Shakespeare and Burns was only equaled by Berry's attention to spigot and barrel."[37] Lincoln, however, "assumed all the liability and set resolutely to work to pay everything, was strictly in keeping with his fine sense of honor and justice."[38] As late as 1848 Lincoln was paring down this debt, "but in time he extinguished it all, even to the last penny."[39]

Lincoln's next position, garnered with the help of some New Salem friends, was village postmaster. Jason Duncan, aware that Lincoln closed his business with Berry at a loss, and considered Lincoln for the job: "commiserating his condition I put forth an effort to procure the appointment of Mr. Lincoln to the office of Postmaster. Lincoln objected to the move on the ground that he did not want the then incumbent supplanted but considerations connected with the public good, prompted me with others to prefer charges at the department against Postmaster Hill, who on receiving notice from the department to acquit himself of the charges preferred, or steps would be taken to turn him out as Post. Mast. Shortly after receiving this notice he resigned the office in Mr. Lincoln's favor, which post he held until the office was discontinued at that place."[40] As

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[35] *Collected Works*, IV, 65.
[36] Donald, *Lincoln*, 608, note 54.
[37] Herndon, *Life of Lincoln*, 90.
[38] Ibid.
[39] Ibid.
[40] Wilson, *Herndon's Informants*, 540.

postmaster, Lincoln was able to keep his finger on the pulse of New Salem life, but the position paid little. This assignment also allowed Lincoln to learn about the larger world through the press. Newspapers that Lincoln routinely read were the *Louisville Journal*, which covered national and regional issues, and the *Intelligencer*, which covered the United States Congress. Other papers included the *Sangamo Journal* and the *Missouri Republican*.[41] It seems as if Lincoln was more interested in reading the news than in the actual administration of the mail. In fact, he appears to have been rather lazy in his attending to postage. Two instances underscore Lincoln's lackadaisical approach. First, "[t]he postmaster is very careless about leaving his office open and unlocked during the day—half the time I go in and get my papers, etc., without anyone being there as was the case yesterday. The letter was only marked twenty-five and even if he had been there and known it was double, he would not have charged me any more. If he is there when I carry this into the office—I will get him to Frank it…" [42] Another letter from Lincoln to George Spears reveals that "At your request I send you a receipt for the postage on your paper. I am somewhat surprised at your request. I will, however, comply with it. The law requires News paper postage to be paid in advance and now that I have waited a full year you chose to wound my feelings by insinuating that unless you get a receipt I will probably make you pay it again."[43]

In order to supplement his income as Postmaster, Lincoln became a surveyor. One of Lincoln's friends, Pollard Simmons, approached John Calhoun, the surveyor of Sangamon County, and petitioned Calhoun to give Lincoln the job of deputy surveyor. Concerned that he would have to compromise his political principles because Calhoun

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[41] Simon, *Lincoln's Preparation for Greatnes*, 12; Thomas, *Lincoln's New Salem*, 64-68.
[42] Thomas, *Lincoln's New Salem*, 66; Strozier, *Lincoln's Quest for Union*, 38-39.

was a "very active Democratic politician," Lincoln was initially reluctant.[44] Once Pollard, however, assured Lincoln that this would not be necessary, Lincoln took the job. With no prior experience, Lincoln "accepted, procured a compass and chain, studied Flint, and Gibson a little, and went at it."[45] Like his attempts at business, war, and election to public office, Lincoln's lack of experience did not deter him as he desperately needed a source of income. Lincoln was grateful for this opportunity and as he would write years later, the surveyor position "procured bread, and kept soul and body together."[46]

The Legislature

In 1834 Lincoln once again ran for the state legislature. On August 4, 1834 Lincoln was elected to his first public office and would go on to serve four consecutive terms in the lower house of the Illinois legislature. In the short term this position satisfied Lincoln's ambition for esteem from his fellow men and also helped provide much needed income. In a larger sense, service in the legislature provided Lincoln with a powerful illustration of the effect that law could have on individuals in a developing society. Lincoln's first act was to put the legislature on notice that he intended to introduce legislation that would limit the jurisdiction of the Justices of the Peace. Lincoln's bill, which passed the House, was tabled by the Senate who noted that "Justices of the Peace shall not e[n]tertain jurisdiction of any civil case whatever—unless it be in the precinct in which the defende[nt] resides or [sic]—or in which the contract on which suit is brought was made and entered into, or made payable—any thing in former laws to the contrary

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[43] Ibid.
[44] Donald, *Lincoln*, 51.
[45] *Collected Works*, IV, 65; See also Fraysee, *Lincoln, Land, and Labor*, 59.
[46] Ibid.

notwithstanding."[47] There was a concern that Justices of the Peace often showed bias toward plaintiffs who resided in their districts at the expense of defendants who might live in another community. Without proper safeguards such as jurisdictional limitations these defendants could be subjected to arbitrary and capricious justice. This was one of Lincoln's first bills as an elected representative and it is important to recognize that at the earliest stage of his legislative career, before he began practicing law, Lincoln was giving serious consideration to the role law played in shaping the "urban frontier."

During his legislative career as a resident of New Salem, Lincoln also introduced legislation that would have an immediate impact on the development of antebellum Illinois. Lincoln supported legislation calling for the receipt of revenue from the sale of public lands, the development of various roads within Illinois, and provisions for debtor relief.[48] Lincoln also played a central role in having the state capitol moved from Vandalia to Springfield.[49] Significantly Lincoln also went on public record concerning his views toward slavery.[50] Each of these legislative activities had an impact on the community and reflected Lincoln's view on how the law should be used to shape society.

During Lincoln's years in the legislature, many of the laws that were either introduced or passed sought to impact issues of daily life and would ultimately find a way into his law practice. For example the legislature was responsible for granting divorces. People had a choice of using either the courts or the legislature to end a marriage and "Lincoln opposed motions to take this responsibility away from the legislature. He

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[47] *Collected Works*, I, 28; Simon, *Lincoln's Preparation for Greatness*, 25-26.
[48] *Collected Works*, I, 32, 34, 35, 39, 41, 45; Simon, *Lincoln's Preparation for Greatness*, 14-41.
[49] Simon, *Lincoln's Preparation for Greatness,* 76-105; Beveridge, *Abraham Lincoln*, I, 205, 246, 268.
[50] *Collected Works*, I, 74-75; Simon, *Lincoln's Preparation for Greatness*, 133; Donald, *Lincoln*, 63-64; Fraysse, *Lincoln, Land and Labor*, 107-8.

introduced bills for divorce and supported other members who also used this privilege."[51] In addition, in order to conduct business under the corporate form, an act of the legislature was required. Thus positioned, the legislature performed a vital economic function in approving certain businesses to incorporate while denying others this privilege, and in many other cases the legislature "did not hesitate to set limits and assign responsibilities to the corporations."[52] Among some of the companies that Lincoln voted in favor of incorporating were "the Spoon River Navigation Company, the St. Clair Silk Company, the Pekin Hotel Company, the Illinois Beet Manufacturing Company, the Alton Exporting Company."[53]

Service in the legislature had ancillary effects for Lincoln as well. Vandalia at its height had a population of between eight and nine hundred people.[54] This was a significant increase from the one hundred or so residents in New Salem. In the legislature Lincoln was also reunited with John T. Stuart whom he first met during his service in the Black Hawk War. Stuart, a fellow Whig, encouraged Lincoln to study law.[55] Life in Vandalia also proved to be a great learning experience for Lincoln. Rooming with Stuart, who was also the Whig leader, allowed Lincoln to participate in the debates and discussions that would take place in Stuart's room when the legislature was not in session. In fact, "[m]uch more than his participation in legislative activities at this session were the acquaintances that he made. Here he saw wealth, education, breeding, charm—things relatively unknown to him. Indeed to Lincoln, with his hitherto limited contacts, narrow horizon, and in some respects provincial point of view, his first term in

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[51] Simon, *Lincoln's Preparation for Greatness*, 27.
[52] Ibid., 26-27.
[53] Ibid., 27.
[54] Ibid., 20.

the legislature was a liberal education more valuable than anything he could learn from books."[56] During the course of Lincoln's first term in the State legislature, he decided to follow the advice of Stuart and began his preparation for admission to the Illinois bar.

At the end of 1836 Lincoln's career path was set. For the rest of his life he would practice law or politics. Often he practiced both while one field influenced and converged with the other. Politics gave him the greater path toward fulfilling his ambition, but law served the practical need in earning a living. Membership in the bar, however, also served Lincoln's ambition. It set him apart from others and gave him a special place in the community, thus also feeding Lincoln's "passion for distinction." Alexis de Tocqueville noted that "[I]n America there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore lawyers form the political upper class and the most intellectual section of society."[57] Furthermore, the law provided Lincoln with a clear path to politics. "Lawyers, forming the only enlightened class not distrusted by the people, are naturally called on to fill most public functions," Tocqueville wrote.[58] Practicing law helped place Lincoln in an environment that was charged with politics as office seeking was the national pastime, and everybody from lawyers to farmers wanted to get into the game. Lincoln was no exception. William Herndon, Lincoln's third law partner, stated that "Mr. Lincoln was an extremely ambitious man and that ambition found its gratification only in the political field. Politics were his life and newspapers his

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[55] *Collected Works*, IV, 65; Herndon, *Life of Lincoln*, 91.
[56] Thomas, *Lincoln's New Salem*, 80.
[57] Tocqueville, *Democracy In America*, 268.
[58] Ibid., 269.

food, merely using the law as a stepping stone to a political life and it was in this field that he seemed to be happy."[59]

Lincoln would spend the best part of his professional career using the law as a springboard to the political arena. Tocqueville observed the connection between the bar and public service noting that "[t]he legislatures are full of them, and they head administrations; in this way they greatly influence both the shaping of the law and its execution."[60] In fact, the tendency was for Americans, as Tocqueville observed, to translate social issues into legal ones. The relevance of the choice of a career in law for understanding Lincoln lies in understanding the connection between law and politics. Scholars such as David Donald have suggested that Lincoln's career was fated to culminate in politics and that his true calling and ambition could only be sated by politics. Ultimately this may be true, but what is important for Lincoln studies is an understanding of the primacy that his legal career played in helping Lincoln realize his political ambition.[61] Without Lawyer Lincoln there might have not been President Lincoln. Moreover it was Lincoln's legal mind, shaped by a quarter century of practice, that confronted the Constitutional crisis posed by secession.

Once established as an attorney, Lincoln would never again work as a laborer or businessman. Lincoln made his way in the world by using his mind rather than his

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[59] Hertz, *The Hidden Lincoln*, 425.
[60] Tocqueville, *Democracy In America*, 269.
[61] See Donald, *Lincoln*, 38 where he suggests that Lincoln's career direction was firmly established by the time he was thirty. This implies Lincoln's career was fated to culminate in politics. Lincoln's career in law needs to be viewed as a vital aspect of Lincoln's political ambition. Another career choice may not have complemented Lincoln's political yearnings as law was able to do. Compare Donald's view with the connection that Charles B. Strozier makes in *Lincoln's Quest for Union* where he connects Lincoln's circuit practice and the time this caused him to be on the road, and argues that this gave Lincoln the opportunity to campaign almost half of each year for the vast majority of his twenty-four years at the bar. Since Lincoln spent so much of his adult life as a lawyer, his career it best viewed as law and politics rather than law or politics.

muscle. While Lincoln's love was politics, his labor was law. The life of a frontier lawyer required hard work, a strong constitution, and the patience to confront the petty problems of daily life. Lincoln lived and thrived in this environment for nearly twenty-five years. With the exception of four terms in the Illinois State Legislature (1834–1842) and one term in the United State House of Representatives (1847–1849), practicing law was Lincoln's full-time occupation prior to his election as President.

Lincoln's Legal Education

"He studied with nobody" sums up Lincoln's legal education.[62] Lincoln approached his preparation for the law as he did with his other career choices in New Salem: on his own. William Herndon stated that Lincoln's "ambition was a little engine that knew no rest."[63] In 1830s Illinois there were no law schools.[64] Consequently, an apprentice system developed in which an aspiring attorney would work under the tutelage of a more experienced practitioner until the seasoned attorney believed the novice was ready for the rigors of the law. Such was the custom for much of the nineteenth century. This apprentice system included drafting legal documents as well as reading the various legal texts that were available such as Blackstone's *Commentaries on the Laws of England,* which Lincoln studied as part of his preparation for the bar. [65] Years later in 1858, Lincoln offered his own advice on the proper prescription for legal study. He advised that "[w]hen a man has reached the age that Mr. Widmer has, and has already been doing for himself, my judgment is, that he reads the books for himself without an instructor.

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[62] *Collected Works*, IV, 65.
[63] Herndon, *Life of Lincoln*, 304.
[64] Alfred Zantzinger Reed, *Training for the Public Profession of the Law*, Boston: D.B. Updike, Merrymount Press,1921.

That is precisely the way I came to the law. Let Mr. Widmer read Blackstone's *Commentaries*, *Chitty's Pleadings, Greenleaf's Evidence, Story's Equity* and *Story's Equity Pleadings*, get a license, and go to the practice, and still keep reading. That is my judgment of the cheapest, quickest, and best way for Mr. Widmer to make a lawyer of himself."[66] Similar advice was given to John Brockman in 1860 when Lincoln advised "to get the books, and read, and study them carefully. Begin with Blackstone's *Commentaries,* and after reading it carefully through, say twice, take up *Chitty's Pleadings, Greenleaf's Evidence & Story's Equity &c* in succession."[67]

The one thing Lincoln insisted upon, however, in an aspiring attorney was honesty. Concerned about the reputation of the legal profession, and in a fragment of his notes for a law lecture Lincoln cautioned: "Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."[68]

Lincoln's practical preparation for a career in law began, however, soon after he arrived in New Salem. The law intruded into the daily life of frontier Illinois in a variety of ways. Deeds required witnesses, courts needed testimonial evidence, and debts demanded collection. Lincoln's ability to read and write placed him at an advantage as just four months after arriving in New Salem, Lincoln began drafting legal documents for friends. This was over five years before he was admitted to the Illinois bar. In November

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[65] William Blackstone, *Commentaries on the Laws of England, 4 vols*. Chicago: University of Chicago Press edition, 1979.
[66] *Collected Works*, III, 334.
[67] Ibid., IV, 121.

1831 James Eastep gave Solomon Teter a bond for title to a tract of land, which Eastep's wife had inherited from her father's estate. Lincoln wrote and witnessed the bond for title.[69] Lincoln's ability to perform these legal activities also helped make him an attractive candidate for service in the legislature. Lincoln wrote deeds for the transfer of land on three occasions in 1834, all without a license to practice law.[70] This method of practice, generally referred to as pettifogging, was tolerated in a small settlement such as New Salem. Jason Duncan, who arrived in New Salem about the same time as Lincoln told William Herndon that "As there were no attorneys nearer than Springfield his [Lincoln's] services were sometimes sought in suits, at law, and he frequently consented to appear before Esq Bowling Greens' court, to argue case, but never charged his clients any fees so far as I knew, the only law book which Mr. Lincoln had in his possession was the first Old revised code of Illinois. From this he drew all his legal knowledge, the manner in which he used to force his law arguments upon Esqr Bowling Green was both amusing and instructive, so laconic often as to produce a spasmatic shaking of the very fat sides of the old law functionary of New Salem. Bowling Green permitted him to speak at first more for amusement than any thing else. But in a short time was led to pay great respect to his powers of mind in a forensic point of view."[71] Herndon claimed that Lincoln "figured conspicuously as a pettifogger before the justice of the peace, but regarding it as a kind of preliminary practice, seldom made any charge for his services."[72] Lincoln continued this practice until he was admitted to the bar in 1837. Lincoln not only

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[68] Ibid., II, 82.
[69] Lincoln wrote bond for title for Eastep & Teter, *LPAL.*
[70] Lincoln wrote deed for Baker et al., *LPAL*; Lincoln wrote deed for Colson et al., *LPAL*; Lincoln wrote deed for Cox et al., *LPAL.*
[71] Wilson, *Herndon's Informants*, 540.
[72] Herndon, *Life of Lincoln*, 93.

drafted legal documents for others, but served as a witness during trial proceedings, conducted various forms of legal research, witnessed legal documents, appraised real property, petitioned the court on behalf of others, served as a surety, was sued on several occasions, and finally drafted legislative documents while serving in the state legislature.[73] These experiences amounted to a first-hand orientation into the ways in which the law affects daily life, all of which occurred well before Lincoln was admitted to the bar. Thus the formal connection between law and politics that defined Lincoln's professional life in Springfield began during his earliest days in New Salem.

Lincoln's experience in New Salem as the co-owner of a general store with William Berry also initiated him into the harsh nature of legal proceedings. In *VanBergen v. Lincoln*, Green, Lincoln, and Berry gave Radford a promissory note for $379.82, and Radford assigned the note to VanBergen. After the note went into default, VanBergen sued to recover the debt. The court issued a writ of scire facias, which is a

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[73] *Green v. Purcapile, LPAL.* In *Green*, a slander case, Lincoln served as a witness for Green. *Harrell v. Woldridge, LPAL.* In *Harrell*, also a slander case, Lincoln served as a witness for Harrell. *LPAL.*
Lincoln researched the records in the Auditor's office for information about the sale of certain land for non-payment of taxes and in a second matter wrote to Davis in Vandalia asking him to examine deed records to determine the current owner of a parcel of land in the bounty tract*., LPAL.*
Lincoln witnessed fourteen deeds and one mortgage while a resident of New Salem, *LPAL.*
Lincoln, Armstrong, and Clement appraised two lots in New Salem at the request of the deputy sheriff of Sangamon County*, LPAL.*
Lincoln wrote a petition for twenty-seven citizens to the Sangamon County Commissioner's Court. The petition requested maintenance for Benjamin Elmore whom they considered to be insane and unable to earn a livelihood., *LPAL.* In another case Lincoln wrote and signed a petition to the Sangamon County Commissioner's Court requesting the appointment of viewers to locate a road from Musick's ferry on Salt Creek through New Salem to the Sangamon County line in the direction of Jacksonville, Illinois, *LPAL.*
Lincoln signed as a surety on three occasions while a resident of New Salem. Once for Enole in support of his bond to ensure the performance of his duties as the warden of the Illinois State Penitentiary. On another occasion, Lincoln signed as a surety for Gregory to ensure the performance of his duties as state treasurer. Finally, Lincoln signed as surety for Oakley to ensure the performance of his duties as fund commissioner for the internal improvement system., *LPAL.*
Lawsuits Lincoln was involved in include *VanBergen v. Lincoln et al., LPAL, Watkins v. Lincoln & Berry, LPAL.*
Lincoln wrote and introduced to the Illinois House of Representatives a bill for an act to limit the jurisdiction of justices of the peace., *LPAL* .For a complete analysis of Lincoln's years in the Illinois Legislature see Paul Simon, *Lincoln's Preparation for Greatness.*

legal device used to change parties to a lawsuit where a judgment forms the underlying action.[74] Thus Lincoln and Berry were made parties to the judgment. After Green paid some money on the judgment, the court reduced the award to $154. The unsparing nature of a civil judgment was clear to Lincoln when the court sold his surveying equipment, saddle and bridle for $81 to satisfy part of the judgment.[75] Luckily for Lincoln, he was well liked and had friends. James Short, one of these friends, bought Lincoln's attached property back and "restored it to the hopeless young surveyor." [76]

Lincoln experienced the ways of the law well before John T. Stuart suggested he make it his career. The problem was timing and Lincoln needed more preparation to be ready for the bar. The process, however, had already begun early on in New Salem and once Lincoln made the decision to practice law, he "went at it in good earnest."[77] Lincoln could not commute on a daily basis from New Salem to Springfield where Stuart's law office was located, so an apprenticeship was not a viable alternative. Lincoln therefore borrowed books from Stuart's office, read and returned them, and by 1836 was firmly committed to a legal career. Henry E. Dummer, Stuart's first law partner, stated that "Lincoln used to come to our office—Stuart's and mine—in Springfield, from New Salem and borrow law books. Sometimes he walked but generally rode. He was the most uncouth looking young man I ever saw. He seemed to have little to say; seemed to feel timid, with a tinge of sadness visible in the countenance, but when he did talk all this disappeared for the time and he demonstrated that he was

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[74] *Black's Law Dictionary*, Fifth edition, St. Paul: West Publishing, 1979.
[75] *VanBergen v. Lincoln et al., LPAL.*
[76] Herndon, *Life of Lincoln*, 101.
[77] Ibid., 91.

both strong and acute. He surprised us more and more at every visit."[78] Lincoln studied at every opportunity and his "determination to master any subject he undertook and his application to study were of the most intense order."[79] In the study of law Lincoln "became wholly engrossed, and began for the first time to avoid the society of men, in order that he might have more time for study."[80] Lincoln needed the time to prepare as the Springfield bar was "considered the best in the State."[81]

In the antebellum American west, the requirements for admission to the bar were minimal. Reading several legal texts such as Blackstone's *Commentaries* and finding another attorney to act as a sponsor was usually preparation enough. Law School was not required, nor was a written bar examination. Lincoln was admitted to practice on these rather thin credentials as was his future adversary Stephen Douglas. In fact as one moved west, the requirements for admission to the bar stood in stark contrast to the requirements for an eastern practitioner. Stephen Douglas's experience provides a good geographical comparison: In Douglas' "home state of New York a seven years course of 'classical and legal study before admission to the bar' was necessary. This prompted Douglas toward 'removing to the western country…' He found, however, that in Ohio he must study for a minimum of one year within the state before he could be admitted to practice. Moving westward into Illinois he found the advice he was seeking. Confessing to a prominent attorney that he had never practiced law and had no license, he was told that 'a license was a matter of no consequence, that I could practice before a justice of the peace without

[78] Ibid., 145.
[79] Ibid.
[80] Ibid., 93.
[81] Speed, "Reminiscences," 20.

one, and could get one any time I desired to do so.'"[82] Douglas would ultimately appear before Judge Samuel D. Lockwood for an examination. While Douglas's knowledge of the law was sparse, it was not deficient enough to be denied admission to the bar. Judge Lockwood passed Douglas but cautioned him to apply himself to the study of law more rigorously in the future.[83] Not all aspiring practitioners such as Lincoln and Douglas, however, were as thinly prepared for practicing law.

Lincoln was about to enter the legal arena and would be competing with educated men steeped in the knowledge of the law. His first partner, John T. Stuart, graduated from Centre College in Danville, Kentucky, studied law with Judge Daniel Breck in Richmond, Kentucky, and was admitted to the bar in 1827.[84] Lincoln's second partner, Stephen T. Logan, studied law with Judge Tomkins and was admitted to practice in 1820, and was also a judge prior to his partnership with Lincoln.[85] Lincoln's third partner, William H. Herndon, was also an educated man. Herndon attended, but did not graduate from, Illinois College at Jacksonville.[86] Judge David Davis, the judge for the Illinois Eighth Circuit and a close associate of Lincoln's, attended Yale Law School.[87] Lincoln, on the other hand, borrowed books from John Stuart and "studied them at his humble home on the banks of the Sangamon, without a preceptor or fellow student. With such

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[82] Jack Northrup, "The Education of a Western Lawyer" 12 *American Journal of Legal History* 294, 298-99 (1968).
[83] Ibid,; Robert W. Johannsen, *Stephen A. Douglas*, Urbana: University of Illinois Press, 21-22 (1973).
[84] "John T. Stuart," Biography, *LPAL*; Duff, *Prairie Lawyer*, 35-51; Woldman, *Lawyer Lincoln*, 25-38.
[85] "Stephen T. Logan," Biography, *LPAL*; Duff, *Prairie Lawyer*, 78-97; Woldman, *Lawyer Lincoln*, 38-48.
[86] "William H. Herndon," Biography, *LPAL*; Duff, *Prairie Lawyer*, 97-118; Woldman, *Lawyer Lincoln*, 48-60; David Donald, *Lincoln's Herndon,* New York: Alfred A. Knopf, 1948.
[87] "David Davis," Biography, *LPAL*; Willard King, *Lincoln's Manager: David Davis*, Cambridge, Massachusetts: Harvard University Press, 1960.

preparation he came to the bar."[88] The main legal text that Lincoln studied was Blackstone's *Commentaries*.

Blackstone's *Commentaries*, obtained by Lincoln at a Springfield auction, was a significant requirement on the antebellum practitioner's reading list. William Blackstone was an English judge, legal educator, and Member of Parliament. He wrote his *Commentaries* between 1765 and 1769 and published it as an introduction to the law for general study. Blackstone's intended audience was not the professional practitioner but the layman. In fact, the outline of the work was originally used as the basis for a series of lectures on the law for university students. Blackstone's work was enormously popular in America with both judges and lawyers, and his *Commentaries* has been called "the most influential law book in Anglo-American history."[89] For example, Supreme Court Justices John Marshall and Joseph Story admired Blackstone and his *Commentaries*, and "[a]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Blackstone's Commentaries."[90] American jurisprudence had not yet produced a basic introduction to the law, and Blackstone thus filled a need.[91] Historian Daniel Boorstin has argued that "In the first century of American Independence, the *Commentaries* were not merely an approach to the study of

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[88] Speed, "Reminiscences," 21; Herndon, *Life of Lincoln*, 92.
[89] Albert W. Alschuler, "Rediscovering Blackstone," *University of Pennsylvania Law Review*, Vol. 145, No. 1, 1, 2 (1996).
[90] Dennis R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact", *New York University Law Review*, Vol.51:731, 758, November 1976. In this article, Nolan quotes Justice Story praise for the Commentaries. Story claimed that the *Commentaries* was "a work of such singular exactness and perspicacity, of such finished purity and propriety of style, and of such varied research, and learned disquisition, and constitutional accuracy, that, as a textbook, it probably stands unrivaled in the literature of any other language." quoting Joseph Story, "The Value and Importance of Legal Studies" in *The Miscellaneous Writings of Joseph Story* 503, 547.
[91] Ibid. 763-764.

law; for most lawyers they constituted all there was of the law."[92] Although ostensibly directed at a British audience, the American inheritance of the English common law helped retain the *Commentaries* validity as a fundamental text. By the mid 1830s, Lincoln had already proved to himself that he could learn a skill on his own. Legal study, however, posed a more significant challenge for Lincoln. The availability of Blackstone's *Commentaries,* helped ease Lincoln's transition from layman to lawyer. The *Commentaries* was the main text recommended to aspiring attorneys and many seasoned practitioners had their clerks read the *Commentaries* to prepare for the bar. As the *Commentaries* moved west, lawyers, lacking a formal legal education "moved to unsettled areas and argued to lay judges out of the primary text of the most sophisticated legal system in the world. In the process, those lawyers steeped themselves in the rules, history and principles of that system."[93] One of Blackstone's contributions to the American bar lied in his capacity to provide country lawyers such as Lincoln "as much of the law as they could absorb, and he gave it to them in a simple, attractive and above all highly utilitarian form."[94] Thus Blackstone's *Commentaries* combined with his pettifogging practice in New Salem and his service in the legislature provided Lincoln with some of the basic legal fundamentals that an aspiring attorney on the "urban frontier" needed for admission to the bar.

Blackstone, through his *Commentaries,* offers a great testament to the common law. The work is divided into four parts: "1. The rights of persons; with the means

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[92] Daniel J. Boorstin*, The Mysterious Science of the Law: An Essay on Blackstone's Commentaries Showing How Blackstone, Employed Eighteenth-Century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made of the Law at Once a Conservative and Mysterious Science*, Glouster, Mass.: Peter Smith edition 1973, 3.
[93] Nolan, "Sir William Blackstone," 731.
[94] Ibid.

whereby such rights may be either acquired or lost. 2. The rights of things; with the means also of acquiring and losing them. 3. Private wrongs, or civil injuries; with the means of redressing them by law. 4. Public wrongs; or, crimes and misdeameanours; with the means of prevention and punishment."[95] Each book deals with a specific area of the law. The common law comprises those principles applicable to legal rights that do not rest upon express written statutes or other written documents but rest upon statements of principles found in the decisions of courts. The source of law was general custom as pronounced by judges. These judges were "the depositaries of the laws—the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[96] Blackstone portrayed the common law as a dynamic system that was capable of growth and revision through judicial pronouncements. Thus the law is discovered through precedents and judicial decisions of the past become guidance for the development of the law in the future. The law seeks out the past, which turns the lawyers' minds to custom and tradition. Blackstone was committed to the common law of England and used the *Commentaries* to validate this system. Blackstone also cautioned against a complete revision of this system and prized prior judicial pronouncements as an expression of the wisdom of the ages. Change could come, but it would come slowly under the common law.[97] The United States adopted the English common law system and with it the relevance of Blackstone's *Commentaries*. Through

[95] Blackstone, *Commentaries*, I, 122.
[96] Lawrence M. Friedman*, A History of American Law*, second edition, New York: Simon & Schuster, Touchstone edition, 1985, 21.
[97] Boorstin, *The Mysterious Science of the Law*, 64.

the *Commentaries,* the common law emerged as a jurisprudence steeped in tradition and changed with caution.[98]

Lincoln's encounter with the *Commentaries* had enormous consequences for his developing legal mind.[99] A reverence for law and tradition emerged from Blackstone and this influenced Lincoln. It cast his legal mind in a conservative direction. Blackstone appealed to tradition and custom. Tradition for Lincoln was grounded in the revolutionary generation and their ideals expressed in the Declaration of Independence and the Constitution. Lincoln's first expression of a developing legal philosophy appears in his address before the Young Men's Lyceum of Springfield, Illinois, less than a year after he started practicing law.[100] The influence of Blackstone on this speech is discussed in greater detail in the following chapter to preserve the chronology of Lincoln's development as a lawyer. The obvious connection, however, for introductory purposes is that both Lincoln and Blackstone appealed to the past, demanded a reverence for the laws and expressed a willingness to preserve the legal status quo. Consequently, Lincoln's jurisprudence prior to the Supreme Court's decision in *Dred Scott v. Sandford*, developed a reluctance to use the law to argue for radical change. Blackstone's influence finds consistent expression in Lincoln's legal decisions. Lincoln accepted the status quo and defended the existence of the law in the face of the overwhelming injustice of slavery. For example, he wrote his friend Joshua Speed in 1855 that "I also acknowledge your rights and my obligations, under the Constitution, in regard to your slaves. I confess I

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[98] Ibid.
[99] Cf. John Duff, *A. Lincoln: Prairie Lawyer*, where Duff argues that the most significant factor in Lincoln's preparation for the law was the experience gained as a member of the legislature. Here I argue that it was Lincoln's reading Blackstone and the effect this work had on Lincoln's legal mind that had the more significant impact.
[100] *Collected Works*, I, 108.

hate to see the poor creatures hunted down, and caught, and carried back to their stripes, and unrewarded toils; but I bite my lip and keep quiet."[101] Law and order can form a powerful check on social change.

Reading some basic texts and part-time pettifogging was not enough to be admitted to practice. The requirements were minimal but had to be satisfied nonetheless. Entry into the legal profession was governed by statute and the Illinois statutory scheme contained three basic requirements.[102] First, a prospective attorney needed to present a "certificate of some county judge of his good moral character."[103] On March 24, 1836 Lincoln's certificate was filed in the Sangamon County Circuit Court.[104] The second step was the receipt of a license from "some two justices of the supreme court."[105] At this point an examination was given. Lincoln's license was issued on September 9, 1836.[106] The third and final requirement was to have your name enrolled by the clerk of the court.[107] Lincoln's name was enrolled on March 1, 1837. [108] Thus certified Lincoln was free to practice law. Between the time Lincoln was admitted, however, and the date his name was enrolled by the clerk he was involved in the case of *Wooldridge v. Hawthorne*. David Wooldridge brutally assaulted James P. Hawthorne rendering him incapacitated and unable to work for six weeks. Seeking justice, Hawthorne sued Wooldridge and demanded restitution. Abraham Lincoln, the junior partner of the firm Stuart & Lincoln, assisted in the defense of this case that Stuart & Lincoln ultimately lost.[109] This

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[101] Ibid., II, 320.
[102] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), pp.81-83, *LPAL.*
[103] Ibid.
[104] "Lincoln Chronology," *LPAL.*
[105] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), pp.81-83, *LPAL.*
[106] "Lincoln Chronology," *LPAL.*
[107] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839, pp.81-83, *LPAL.*
[108] "Lincoln Chronology," *LPAL.*
[109] *Hawthorne v. Wooldridge*, *LPAL.*

inauspicious beginning launched a career at the bar that would last until his election to the Presidency.

Lincoln arrived in New Salem a piece of floating driftwood, and left a lawyer. Lincoln entered Springfield penniless. Lincoln's friend Joshua Speed tells the story of Lincoln's appearance in Springfield best.

> It was in the spring of 1837, and on the very day that he obtained his license, that our intimate acquaintance began. He had ridden into town on a borrowed horse, with no earthly property save a pair of saddle-bags containing a few clothes. I was a merchant at Springfield, and kept a large country store, embracing dry goods, groceries, hardware, books, medicines, bed-clothes, mattresses, in fact every thing that the country needed. Lincoln came into the store with his saddle-bags on his arm. He said he wanted to buy the furniture for a single bed. The mattress, blankets, sheets, coverlid, and pillow, according to the figures made by me, would cost seventeen dollars. He said that was perhaps cheap enough; but small as the sum was, he was unable to pay it. But if I would credit him till Christmas, and his experiment as a lawyer was a success, he would pay then, saying, in the saddest tone, "If I fail in this, I do not know that I can ever pay you." As I looked up at him I thought then, and I think now, that I never saw a sadder face.[110]

Lincoln lived in Springfield for the next twenty-four years. There he practiced law, was married, bought a home, and raised his children. In short, this is where Lincoln found his American Dream. Law and politics played a vital role in achieving that dream. When Lincoln left for the White House in 1861, he left with a quarter century of legal experience that would help guide him through the constitutional crisis and the Civil War that would transform the nation.

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[110] Speed, "Reminiscences," 21.

CHAPTER TWO

REVERENCE FOR THE LAW

> 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; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.
>
> Abraham Lincoln[1]

> What lawyers love above all things is an ordered life, and authority is the greatest guarantee of order.
>
> Alexis de Tocqueville[2]

> The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.
>
> William Blackstone[3]

Stuart & Lincoln

"Well, Speed, I am moved!"[4] With these five words, Lincoln confirmed his arrival in Springfield. Joshua Speed, taking pity on the poor newcomer, offered Lincoln the use of

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[1] *Collected Works*, I, 108, 112.
[2] Tocqueville, *Democracy In America,* 266.
[3] Blackstone, *Commentaries,* I, 70.

his bed and board. Owning nothing more than the clothes on his back and the personal possessions contained in his saddlebags, Lincoln accepted the offer, put his bags on the floor of Speed's room and announced that his move was completed.[5] Lincoln's friendship with Speed would have a significant impact on his personal development.[6] After finding a place to call home, Lincoln set out for the main task at hand: practicing law.

On April 15, 1837 the *Sangamo Journal* announced Abraham Lincoln's entry into the legal profession. "John T. Stuart and A. Lincoln, Attorneys and Counsellors at Law will practice conjointly in the Courts of this Judicial Circuit-office N. 4 Hoffman's Row, upstairs. Springfield, April 12, 1837."[7] This was a lucky break for Lincoln since John T. Stuart then presided over one of the most thriving law practices in Springfield. Consequently, Lincoln was spared the novice's time-consuming search for clients. The partners had much in common. Both Lincoln and Stuart were born in Kentucky. The men were also close in age with Stuart the elder by two years. In addition, both had served in the Black Hawk War where they became fast friends. This friendship continued in the legislature where the men roomed together in Vandalia during the legislative sessions. Stuart thus had ample opportunity to assess the qualities Lincoln possessed that led to the creation of a law partnership. Both men were also politically ambitious. When the Stuart & Lincoln partnership began, Lincoln had been elected and re-elected to the state legislature and was one of the rising stars of the Whig Party. Stuart's political ambition, however, extended beyond state office. In 1836, Stuart was defeated in his bid for a congressional seat, but intended to run again in 1838, this time against Stephen

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[4] Speed, "Reminiscences," 22.
[5] Ibid.
[6] Strozier, *Lincoln's Quest for Union*, 36-65.
[7] Duff*, Prairie Lawyer*, 36; Woldman, *Lawyer Lincoln*, 26.

Douglas. Thus Lincoln could serve Stuart's needs both legally as the junior partner, but also politically in helping Stuart win a seat in the U.S. House of Representatives. In fact, on one occasion Lincoln substituted for Stuart in a debate against Stephen Douglas during the congressional canvas.[8] The Stuart & Lincoln law office was described by Lincoln's third partner, William Herndon: "The furniture was in keeping with the pretensions of the firm—a small lounge or bed, a chair containing a buffalo robe, in which the junior member was wont to sit and study, a hard wooden bench, a feeble attempt at a book-case, and a table which answered for a desk."[9] Stepping into this practice together with the impending relocation of the Illinois State capitol to Springfield made Lincoln's legal prospects bright. Lincoln could count on the continued business an established practice would bring. In addition, as state capitol, Springfield was the site of not only the Sangamon Circuit Court, but the U.S. Circuit and District Courts and the Illinois Supreme Court. The courts combined with the state legislature made Lincoln's new hometown a center of legal and political activity.

Springfield, Illinois, was located in Sangamon County. On January 30, 1821 Sangamon County came into existence and Springfield became the county seat on April 10 of that year when Zachariah Peter and William Drennan, two of the elected commissioners, "drove a stake into the ground and called it Springfield."[10] Soon thereafter a courthouse was constructed and in 1823 "the first land sales took place."[11] By 1826, five hundred people lived in Springfield and the town was beginning to "take

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[8] Johannsen, *Stephen A. Douglas*, 66.
[9] Herndon, *Life of Lincoln*, 148.
[10] Paul M. Angle, *"Here I Have Lived" A History of Lincoln's Springfield 1821-1865,* Chicago & Lincoln's New Salem: Abraham Lincoln Book Shop, 1971, 5.
[11] Ibid., 11.

root."[12] Farming and the general store were the first businesses. Cash was scarce but the barter system kept the economic wheels grinding. Soon Springfield attracted craftsmen and by 1828 there were " 'five dry goods stores with good assortments for a new county three groceries well supplied, which operates to the injury of the morals and purses of the Inhabitants—a post office a printing office a carding machine and power grist mill two blacksmith shops, two first rate shoe makers, and several coblers—three cabinet shops where good cherry work can be obtained at a pretty extravigant price—Carpenders, joiners and other mechanicks in the same proportion.'"[13] By 1828 there were also four doctors and six lawyers. Thus Springfield was rapidly advancing toward civilization as the settlement of America moved West.

There was a school "established during the town's first winter, and never thereafter were the children without the opportunity of learning their a b c's."[14] Methodists and Presbyterians were the main religious denominations. The Presbyterians were the first to contract a permanent place of worship in 1830 and prior to that religious inspiration was delivered by traveling preachers like Peter Cartwright who ran against Lincoln for a seat in Congress in 1846. By the early 1830s Springfield was attracting more and more people, and by the time Lincoln moved to Speed's store there were about 1,500 Springfield residents. The decision of the legislature, led by Lincoln, to relocate the state capitol from Vandalia to Springfield assured Springfield's continued growth and development; in fact, on the eve of Lincoln's arrival, Springfield boasted "nineteen dry goods stores, six retail groceries, one wholesale grocery, four hotels, four coffee houses, four drug stores, two clothing stores and two shoe stores. Among the craftsmen

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[12] Ibid., 17, 18-34.
[13] Ibid., 24 quoting Pascal Paoli Enos who was the receiver of the Springfield Land Offices.

represented were hatters, tailors, shoemakers, tinsmiths, painters, carpenters, blacksmiths, wagon makers, saddlers, watchmakers and one barber. Eighteen doctors (including steam doctors) and eleven lawyers resided in the town. The beginning of domestic manufacture were evident in the enumeration of one foundry, one mill, four carding machines and five brick yards."[15] In sum, this was a place that had much to offer a young ambitious man looking for success on the edge of the American frontier.

Most important for the firm of Stuart & Lincoln, however, was the presence of the courts in Springfield. At the top of the state judicial ladder was the Illinois Supreme Court where appeals were decided. Below the state's highest tribunal were the Circuit Courts where cases were tried before either a judge or jury. There was one Circuit Court for each county and each county was part of a particular judicial district. The circuit courts were the busiest courts in the Illinois judicial system since the Supreme Court only entertained appeals and most cases were not appealed but decided at the circuit level.[16] When Lincoln began practicing law Sangamon County was part of the First Judicial Circuit.[17] This district also included Calhoun, Greene, Macon, Macoupin, Morgan, and Tazewell counties. In 1839, a redistricting of the judicial circuits was enacted and Sangamon County became part of the Eighth Judicial Circuit along with Christian, Livingston, Logan, Macon, McLean, Menard, Dewitt, and Tazewell counties.[18] The Eighth Judicial Circuit would become the center of Lincoln's life as a lawyer.

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[14] Ibid., 26.
[15] Ibid., 45-46.
[16] "Cases by Court Jurisdiction," *LPAL* indicate that 4,737 of Lincoln's partnership cases were tried at the Circuit level, while 444 were decided in the Supreme Court, *LPAL*.
[17] "Lincoln Chronology," *LPAL*.
[18] Ibid.

John T. Stuart had been practicing law for about ten years when he asked Lincoln to join his firm. Stuart studied law as a clerk in the office of Judge Daniel Breck in Richmond, Kentucky. After immigrating to Illinois, Stuart became one of the leading attorneys in Springfield. When the Black Hawk War broke out in 1832, Stuart enlisted and earned the rank of major. As political allies in the Illinois legislature, Lincoln and Stuart worked together on issues important to economic development such as internal improvements, and were instrumental in pushing for the relocation of the state capitol from Vandalia to Springfield.[19] This close working relationship also offered Stuart the opportunity to suggest to Lincoln a career in law, and when the time was ripe, Stuart offered Lincoln a partnership in one of Springfield's most successful law practices.[20]

Often, the junior partner learns about the nuances of practice from the senior member of the firm and this helps ease the transition from layman to lawyer. On this count, Lincoln and Stuart's working relationship was short lived as a result of Stuart's political ambitions. Stuart was elected to the U.S. House of Representatives in 1838 and re-elected in 1840. Thus, Lincoln was left to run the firm on his own from a very early stage in his career, and on November 2, 1839 marked the firm's fee book "Commencement of Lincoln's Administration."[21] Lincoln was once again learning through a baptism by fire. Left alone in Springfield while Stuart was in Washington, Lincoln was thrust headfirst into not only the law practice, but now he was responsible for the administrative tasks involved in operating a law office. These responsibilities would have been more than enough to occupy Lincoln's time as a young attorney, but

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[19] Donald, *Lincoln*, 62-64.
[20] Duff, *Prairie Lawyer*, 35-51; Woldman, *Lawyer Lincoln*, 25-37; Donald, *Lincoln*, 70-71,73-74; Herndon *Life of Lincoln*, 91, 147.

Lincoln's political career was beginning to take off as well. Lincoln at this point had been thrice elected to the legislature and was one of Illinois' rising Whig politicians.

While the more established states in the East such as New York and Massachusetts had legal systems that generated the necessary cases to form a body of law, Illinois' early jurisprudence was based in large part on principles of fundamental fairness and "[l]awyers depended for success, not on their knowledge of the law or their familiarity with its underlying principles, but placed their reliance rather on their frontier oratory and the influence of their personal bearing before the jury." [22] In civil cases, juries were the judges of the facts, but in Illinois, juries in criminal cases also were judges of the law.[23] Lincoln was particularly suited to this style of practice. Lincoln's forensic abilities more than compensated for the technical deficiencies in his legal education. The courtroom became an extension of his friend Joshua Speed's store where Lincoln made his headquarters. At Speed's place, "politics, religion, and all other subjects were discussed. There also public sentiment was made. The store had a large fireplace in the rear, and around it the lights of the town collected every evening. As the sparks flew from the crackling logs, another and more brilliant fire flashed when these great minds came into collision. Here were to gather Lincoln, Douglas, Baker, Calhoun, Browning, Lamborn, Jesse B. Thomas and others." [24] Lincoln, twenty-eight years old when admitted to the bar, needed to direct his attention to the types of cases that were litigated in antebellum Illinois. With Stuart, Lincoln began learning the skills he would rely upon

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[21] Earl Schenck Miers and William E. Baringer, eds. *Lincoln Day By Day 1809-1865*, 3 vols., vol. 1: 1809-1848, Washington: Lincoln Sesquicentennial Commission, 1960, 119.
[22] Herndon, *Life of Lincoln*, 149-50.
[23] Mark Steiner, "Lawyers and Legal Change in Antebellum America: Learning From Lincoln," *University of Detroit Mercy Law Review*, Vol. 74, Spring 1997, 427.
[24] Herndon, *Life of Lincoln*, 150.

during the course of his legal career. Lincoln also learned about the areas of the law that comprised frontier practice. Debt collection, breach of contract, and real property matters such as mortgage foreclosure and land titles formed the bulk of Lincoln's caseload. Lincoln was also initiated into cases that affected women such as divorce, dower, and child custody, as well as the social importance of reputation to both men and women during his tenure with John T. Stuart. This orientation was important, as Lincoln would continue to litigate the routine problems of daily life until his election to the presidency. In fact, even as Lincoln developed a corporate practice in the 1850s, one of the constants in his life at the bar was the representation of common people.

Contracts and Collections

Antebellum America was regarded as "the golden age of the law of contract." [25] The law defines a contract as an exchange of promises where a meeting of the minds has taken place.[26] Contracts created binding relationships between the parties to the agreement. Courts generally construed contracts narrowly and were reluctant to allow evidence that contradicted the terms of the contract. Thus the law interjected an element of certainty to help the movement of goods in an expanding market economy. Of particular importance to this area of the law was the doctrine of *caveat emptor*. This term translates as "buyer beware."[27] It was incumbent upon a prospective purchaser to investigate thoroughly the object of purchase. Thus the law would not save you from a bad bargain. For example, In *Anderson, Bell & Co. v. Gambrel*, a case litigated by Stuart & Lincoln, Moses Coffman sold James Gambrel a tract of land. As payment, Gambrel

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[25] Lawrence M. Friedman, *A History of American Law, second edition*, New York: Simon & Schuster, Touchstone Edition, 1985, 275.
[26] *Black's Law Dictionary, 5th edition,* St. Paul, Minnesota: West Publishing Co., 1979.

gave Coffman a promissory note for $200. Coffman assigned the note to Anderson, Bell & Co. After Gambrel refused to pay, Anderson Bell & Co. retained Stuart and Lincoln and sued Gambrel in an action of *assumptit*, a nineteenth-century legal term describing a cause of action for breach of contract, and requested $300 in damages.[28] Gambrel pled not guilty claiming that the land was conducive to "milk sickness" and was therefore worthless. The jury found for Anderson, Bell & Co. and awarded $207.65 in damages.[29] This case is significant not only for the illustration of *caveat emptor* at work but that the jury also accepted the obligation of a purchaser to investigate fully the subject of the sale. In addition, the case also demonstrated the manner in which negotiable instruments such as promissory notes were exchanged in a cash-poor economy.

The money trail in the nineteenth century was typically chartered through a succession of transfers of negotiable instruments such as written promises to pay. Antebellum America lacked sufficient circulating specie, which became particularly acute as one approached the frontier. Consequently, commercial paper such as bills and notes became critical to keep commerce circulating. Generally, a promissory note could be freely transferred by a simple endorsement.[30] This is evident in the Anderson case where Coffman used his $200 promissory note from Gambrel to pay Anderson, Bell & Co. for some type of debt. Nineteenth Century creditors had to worry about the credit worthiness of those who passed these negotiable instruments. In many transactions, especially in frontier societies such as 1830s Illinois, the parties were known to one another so an assessment of the debtors' ability to honor the note could be made.

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[27] Ibid.
[28] *Anderson, Bell & Co. v. Gambrel*, *LPAL.*
[29] Ibid.
[30] Friedman, *A History of American Law*, 266-69.

However, those not familiar with the debtors' financial situation ran the risk of being unable to collect under the note. While the case against the debtor could be easily made by proof of signature and testimony about the nature of the transaction, collection could be more problematic.[31] A judgment debtor needed to have attachable assets in order for a litigant to claim his due. Thus an economic leap of faith was required to fully engage the business of business on the urban frontier. One had to take a calculated risk and hope that at the end of the day should the contract be breached, there would be a tangible asset to attach.

The tension between debtors and creditors can be viewed in its most basic form in the many lawsuits Lincoln participated in as a partner in the firm of Stuart & Lincoln from 1837 to 1841. The economic distress produced by the Panic of 1837 was beginning to hit home for Springfield's business life. Lincoln represented both debtors and creditors in his law practice and the state legislature passed laws that protected both. Service in the legislature from 1834 to 1842 also helped Lincoln understand the origins of the laws and how the laws were interpreted in the local courts where he practiced.

To protect creditors, the legislature passed attachment laws that made it easier for creditors to attach property and more difficult for debtors to escape the execution of judgments. In a cash-poor economy, real and personal property take on added importance. Collateral provides the basis for others to loan money, pass promissory notes into the economy, and keep the economic wheels turning. The law provides the grease for those wheels as judicial decisions keep the economy moving. Forcing property to be attached or otherwise subject to judicial control was an important element in a

[31] Ibid.

frontier economy. That importance was heightened when an economic depression hit, forcing creditors to demand their due.

The concern for creditors was that debtors would create insurmountable debt and then flee the state for greener pastures. Consequently the Illinois legislature passed legislation to protect their citizens from absconding deadbeats. The law provided that "if any creditor or his agent shall make a complaint…that his or her debtor is about to depart the state, or has departed from this state, with the intention in either case of having his effects and personal estate removed from the limits of the state… it shall be lawful for such creditor to sue or cause to be sued out of the office of the said clerk a writ of attachment, directed to the sheriff of the county in which he is clerk…commanding him to attach the said debtor, by all and singular his or her lands and tenements, goods and chattels, rights and credits, moneys and effects of what nature so ever, or so much thereof as will be sufficient to satisfy the debt."[32]The fluid nature of frontier society required some type of economic enforcement mechanism. The law of attachment served this function. In *H.T. Foster & Co. v. Lockerman*, Stanley Lockerman owed H.T. Foster & Co. $80.54, but failed to pay. H.T. Foster & Co. feared that Lockerman would leave the state without paying his debts. H.T. Foster & Co. retained Stuart & Lincoln and sued to attach Lockerman's personal property and to garnish the debts that others owed Lockerman.[33] This illustrates the importance of the legal remedy of attachment. Without this, debtors could flee and move on to incur more debt. It also illustrates the risky nature of this economy. Keeping tabs on your debtors was critical as the boom and bust nature of the antebellum economy made the financial viability of debtors even more difficult to

[32] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), pp.63-78, *LPAL.*
[33] *H.T. Foster & Co. v. Lockerman*, *LPAL.*

predict. One default in payment triggered a succession of defaults as debtors and creditors moved to protect their precarious economic position. Hence, in hard times the rippling effect of a depressed economy reached far and wide.

Armed with the law of attachment, creditors spared no mercy in prosecuting their claims. Just as Lincoln lost his surveying instruments to an aggrieved judgment-creditor, others in antebellum Illinois lost what little they could call their own. In *Hurt v. Winters*, John M. Hurt sold Reuben Winters a horse for $61, but Winters failed to pay. Hurt retained Stuart & Lincoln and sued Winters in an action of assumpsit.[34] Hurt feared that Winters would leave the state without paying his debt and also asked the court to attach Winters' personal property. The court ruled for Hurt and the jury awarded $61in damages. Winters' personal property, a horse, a mare, a harness, and a wagon were sold to satisfy the judgment. Courts authorized to seize vital personal possessions provided creditors with ample ammunition to protect their interests.

This legal remedy also permitted others who possessed property that belonged to the debtor to be subject to attachment. Robert McNabb gave one promissory note to Samuel Hill and three promissory notes to Nelson Alley, who assigned them to Hill. After McNabb failed to pay, Hill retained Stuart & Lincoln and sued McNabb in an action of attachment to collect the debt of $207.73.[35] Hill requested that the court seize McNabb's personal property on the grounds that McNabb had left the state and intended to remove his property as well. Hill also requested that the court name Mr. Elmore a garnishee since Elmore possessed McNabb's property. The sheriff seized four yoke of oxen and the running gears of one road wagon. Hill and Elmore reached a settlement that

[34] *Hurt v. Winters*, *LPAL.*
[35] *Hill v. McNabb*, *LPAL.*

ended the case. The degree to which courts went in protecting judgment creditors not only satisfied the aggrieved litigant, but also sent a message to the community to honor legal obligations or suffer the consequences.

Land as Capital

While personal property was all that some unfortunate litigants could use to satisfy the judgment-creditors, land was a more valuable asset for purposes of attachment. Two cases, *Trotter v. Phelps* and *Trumbo v. George Power and Roe* are typical of the role the court played as a land broker.[36] In *Trotter,* Ebenezer Phelps gave Leroy Hill a promissory note for $345, and Hill assigned the note to George Trotter. After Phelps failed to pay, Trotter retained Stuart & Lincoln and sued Phelps in an action of *assumpsit*. The court ruled for Trotter, awarded $357.07 in damages and sold two parcels of land that belonged to Phelps to satisfy the judgment. Similarly in *Trumbo*, the firm of George Power and Roe gave Adam Trumbo a promissory note for $240, but failed to pay. Trumbo retained Stuart & Lincoln and sued George Power and Roe in an action of assumpsit to recover the debt. The court ruled for Trumbo, awarded $252.30 in damages and sold 160 acres of land that belonged to Power to satisfy the judgment. In these situations, land became capital and through the authority invested in the courts the law became an agent of economic change.

In some cases, the courts also became a type of clearinghouse for the apportionment of assets to various creditors owed money by a debtor. For example, in *Herndon v. Smith*, Thomas P. Smith gave John Herndon a promissory note for $100, and

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[36] *Trotter v. Phelps*, *LPAL*; *Trumbo v. George Power and Roe*, *LPAL.*

John Herndon assigned the note to William Herndon.[37] Smith paid $29.75 on the note but failed to pay the balance. William Herndon feared that Smith would leave the state without paying his debts. Herndon retained Stuart & Lincoln and sued Smith to attach Smith's real and personal property to recover the debt. The court awarded $73.75 in damages. The court sold Smith's property but since several different people had sued Smith, the court divided the proceeds among the creditors thereby serving as a type of bankruptcy trustee as it apportioned the assets of Smith among the various creditors.

Even in death, one could not escape the reach of the judgment creditor. At the time of his death in 1836, Isaac Martin owned at least 221 acres of land in Sangamon County, Illinois. His estate owed debts totaling $127.07. Moses Martin, the administrator of the Isaac Martin estate, retained Stuart & Lincoln and sued Isaac Martin's widow and heirs to sell the land to pay the estate's debts. The court ruled for Moses Martin and sold the land for $137.63 thus facilitating the movement of capital from debtors to creditors.[38] Yet while the law certainly favored the creditor, debtors were not without relief.

Debtors were provided for by the Illinois legislature through acts passed in 1825 and revised in 1833 that exempted certain property from the reach of judgment creditors such as clothing, beds, household furniture, spinning wheels, and wool as well as provisions for the family for three months. This exemption only applied to the property of heads of households reflecting the community's concern for the health and welfare of the family. [39] This legislation was revised and expanded during the 1840s as the effects of

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[37] *Herndon v. Smith*, *LPAL.*
[38] *Martin v. Martin, LPAL.*
[39] Stephen F. Gale, *Statute Laws of the State of Illinois*, (Chicago: Stephen F. Gale, 1839), pp. 389-395, *LPAL.*

the Panic of 1837 became more pronounced in Illinois and is discussed more fully in the following chapter in conjunction with the Bankruptcy Act of 1841.

On the edge of the frontier the legal system injected a critical enforcement mechanism that assured an element of certainty in economic affairs. Should lawlessness prevail, few would lend money and promissory notes and other bills of exchange would not be viable mechanisms for economic exchange. Lincoln embraced this notion of law and order, but nonetheless, like many other practitioners, continued to represent both debtors and creditors.[40]

Women and the Law

Women as well as men looked to the antebellum law for protection, and women as litigants comprised a significant share of Lincoln's law practice throughout his legal career.[41] Lincoln's representation of women also revealed his impulse to take cases as they came regardless of the client's status. Lincoln's concern that all should have a fair chance in the race of life actually did encompass "all," and this ideal found expression in the courtroom. Lincoln also believed in the political equality of women. He confirmed this in his letter to the people of Sangamon County in support of his bid for re-election in 1836. In that quest for office, Lincoln stated that "I go for all sharing the privileges of the government, who assist in bearing its burthens [sic]. Consequently I go for admitting all

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[40] "Narrative Overview," *LPAL.*

[41] Daniel Stowell, *In Tender Consideration: Women, Families, and the Law in Abraham Lincoln's Illinois*, Urbana: University of Illinois Press, 2002.This collection of essays examines the main areas of practice that involved women and family law. Particularly helpful in this collection are Daniel Stowell, "Femes UnCovert: Women's Encounters with the Law"; Dennis E. Suttles, "For the Well Being of the Child: The Law of Childhood"; Stacy Pratt McDermott, "Dissolving the Bonds of Matrimony: Women and Divorce in Sangamon County, Illinois, 1837-1860." Collectively these authors develop the argument that the Illinois judicial system was paternalistic, distinguishing it from the notion of patriarchy.

whites to the right of suffrage, who pay taxes or bear arms (by no means excluding females.)"[42]

Stuart & Lincoln represented women as both plaintiffs and defendants. Often the issue, like many on the frontier, was money. There were, however, many cases where women asserted legal claims where more than money was at stake. The most significant category of these types of cases involved family law. Divorce, dower, child custody, seduction and bastardy comprised this body of the law. During Lincoln's tenure with John T. Stuart, the partnership handled ten divorces and five dower cases. Throughout his legal career Lincoln would continue to handle these types of cases, and litigated cases that helped shape antebellum family law. These cases are significant not only for understanding Lincoln's legal career, but they also serve as a basis for understanding the changes in familial legal relationships that were percolating in antebellum America.

Divorce was a cause of action in antebellum America that involved more than money.[43] While monetary issues were implicated, often more important for women was the need to break the legal chain that bound them to a man who either derived too much pleasure from alcohol, behaved in a cruel manner, or assaulted their dignity through repeated sexual transgressions with other women. Divorce struck at the heart of one of the fundamental institutions of American society: marriage. The historical roots of

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[42] *Collected Works*, I, 48.

[43] Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States*, New York: The Macmillan Co., 1962; Norma Basch, *In The Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York,* Ithica and New York: Cornell University Press, 1982; Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians*, Berkeley: University of California Press, 1999; Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America*, Chapel Hill: University of North Carolina Press; Martin Schultz, "Divorce in Early America: Origins and Patterns in Three North Central States," *The Sociological Quarterly* 25 (Autumn 1984) 511-526; Rebecca Looney, "Migration and Separation: Divorce in Kane County, 1837-1869," *Illinois Historical Journal* 89 (Summer 1986): 70-84; Jamil Zainaldin, "The Emergence of a Modern

marriage run deep. Religious imperatives such as the Christian belief in the sanctity of marriage made divorce sinful.[44] In addition, the English system of law granted divorce in very few instances. When granted, it was decreed through the jurisdiction of the ecclesiastical courts. These elements combined with a patriarchal society that valued property rights made it difficult for women to end a marriage, especially when all the power both economic and political belonged to the husband.[45]

In the eyes of the law, after women married their status changed from *feme sole* to *feme covert*. This meant the husband and wife, for legal purposes, merged into one entity—and that entity was the husband. The wife could not enter into a contract without the husband's authority. It was tantamount to legal death.[46] This placed women in a precarious economic position. If they came to the marriage with property, it was merged with the husband's assets. The husband was free to squander these new assets on reckless speculation, gambling, or drink without having to answer legally to his wife. The only check on this economic imbalance was the woman's right to dower, which in land sales required her consent. Poverty might be the inevitable consequence of a bad marriage bargain. Sad as this reality was for a woman, it was particularly severe for the children who had to bear the brunt of an irresponsible father. After squandering the family assets, the husband still had choices, especially in sparsely settled areas along the antebellum frontier. The simplest method for extricating himself from a marriage was not through the courts but by flight. Often men would desert their wives and move west to start over. This decision left economic and emotional damage in its wake. There were also legal

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American Family Law: Child Custody, Adoption, and the Courts, 1796-1851", *Northwestern University Law Review*, Vol. 73, No. 6 (1979) 1038-1089.

[44] Blake, *The Road to Reno,* 9-22.

[45] Basch, *In The Eyes of the Law*,15-41.

consequences that could only be corrected through the court system. Technically, the woman was still married to her husband who was now far away, never to be heard from again. Legally she could not re-marry unless a court of competent jurisdiction terminated the first marriage. With few job opportunities and a family to support, marriage was an important economic consideration for women. Divorce became a critical legal remedy for women and often necessary to their economic survival.

The structure of the legal system divided itself into courts of law and courts of equity. Under the common law, courts of law could rule on rights and duties, but could not compel specific behavior: the authority of these courts extended only to the issuance of monetary damages. In response to this, courts of equity developed that were administered by chancellors which is why some jurisdictions refer to these courts as chancery courts. The focus of these courts was equity and determining a fair outcome given the current situation of the parties. For example, courts of equity were empowered to issue injunctions to compel a person either to do something or refrain them from performing certain acts. If the party disobeyed they could be put in jail. Courts of equity were not bound by the stricter rules that governed courts of law, but were more flexible in their procedures and their application of the rules of evidence. Another difference between the two systems is that juries sit in courts of law, but the judge or chancellor was the final decision-maker in courts of equity.[47] In antebellum America a party seeking a divorce would have to commence their action in a court of equity.

Divorce was a matter of state law and the grounds for divorce varied from state to state. New York, for example, had a restrictive divorce statute in the antebellum period

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[46] Ibid., 42-69.
[47] Freidman, *A History of American Law*, 26-27.

that only recognized adultery as sufficient cause for ending a marriage.[48] On the other hand, Illinois had a more liberal divorce statute during Lincoln's tenure at the bar that recognized adultery, desertion, cruelty, and habitual drunkenness.[49] In addition, the legislature made it easy for a poor woman to seek judicial relief as it provided that upon a satisfactory showing to the court that she was poor and unable to pay the expenses of a suit, she was permitted to proceed without costs or fees.[50] This was particularly important for a woman who had been deserted by her husband after he liquidated the family assets. States on the western edge of the American frontier were more accepting of this remedy to end a failed marriage than states in the East. Consequently states such as Illinois and Indiana led antebellum America in granting divorce.

The divorce cases Lincoln litigated with Stuart & Lincoln also reveal his willingness to take the cases as they came without a bias one way or another toward the litigant. Of the ten divorces, Stuart & Lincoln represented husbands five times and wives five times. Regardless of who retained the firm, the specific grounds for divorce were articulated in the complaint or bill for divorce. The parties' complaints about the marriage as contained in these documents provide some insight into gender roles and expectations of men and women in a marriage.

In each divorce more than one ground could be alleged. In fact it was customary to plead all grounds in order to give the court alternate means to decide the case. For example in *Ethridge v. Ethridge*, Ruthie Ethridge retained Stuart & Lincoln and sued her husband Thomas alleging cruelty, drunkenness, desertion, and suspected bigamy.

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[48] Basch, *In The Eyes of the Law*; Basch, *Framing American Divorce.*
[49] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), pp. 249-251, *LPAL.*
[50] Ibid.

Thomas failed to appear in court and the divorce was granted.[51] Often a deserting spouse would not answer the complaint for divorce and default. This did not matter to the divorcing spouse since a judicial decree dissolving the marriage could be granted on default and would have the same legal effect in dissolving the marriage as if the divorce was granted after trial.

The "self-help" divorce, where one party simply abandons the other, was a popular method for achieving marital independence in a sparsely settled locale. In all five cases in which women sued for divorce through Stuart & Lincoln desertion was one of the grounds alleged.[52] Similarly, men complained in four of the cases of a deserting wife. In two of the cases in which men sued for divorce they coupled the claim of desertion with adultery.[53] Apparently wives ran off on their husbands, too. Of the various grounds alleged by both men and women—desertion, adultery, bigamy, cruelty and drunkenness—men only complained of desertion and adultery. Women on the other hand claimed all five grounds. Three of the five women Lincoln represented complained of drunkenness and two complained of cruelty. [54]

The specific bills for divorce reveal an understanding that marriage was a social contract in which certain behavior was expected. For example, Ruthie Etheridge claimed in support of her complaint for divorce that her husband, Thomas, used "the most harsh and abusive language to wound [her] feelings," and on one occasion "proceeded so far as to strike [her] two or three severe blows," and was habitually drunk. She suffered all

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[51] *Ethridge v. Ethridge*, *LPAL.*
[52] *Baker v. Baker,LPAL; Ethridge v. Ethridge,LPAL; Green v. Green, LPAL;Lloyd v. Lloyd,LPAL; Roll v. Roll*, *LPAL.*
[53] *Clary v. Clary ,LPAL; Rogers v. Rogers*, *LPAL.*
[54] The cases that alleged drunkenness were *Ethridge v. Ethridge,LPAL; Shelby v. Shelby,LPAL; Lloyd v. Lloyd*, *LPAL. Ethridge v. Ethridge*, and *Rogers v. Rogers,*both alleged cruelty, *LPAL.*

"this abuse and all this drunkenness without complaining hoping that he would alter his conduct."[55] Left with no recourse and hope that he would change, Ruthie filed for divorce. While no one should be subjected to violence and verbal abuse, it is interesting that Ruthie felt compelled to suffer these indignities without complaining, and made this part of her bill for divorce.

In many of the divorce bills the complaining spouse felt the need to alert the court that they completed their end of the marriage contract. For example, George Foster's wife, Charlotte, left him. He retained Stuart & Lincoln and sued for divorce on the grounds of desertion. The bill for divorce recites the desertion, but George also added that "your orator states that while he and the said Charlotte lived together he, your orator, did and performed all and every duty as a faithful and affectionate husband toward the said Charlotte."[56] After retaining Stuart & Lincoln, Eliza Lloyd sued her husband Peter Lloyd on the grounds of desertion and habitual drunkenness. She also wanted the court to know that "she performed everything on her part as a dutiful and affectionate wife."[57] Her husband, Peter, however, "left her in a helpless condition with a new born infant," was a habitual drunkard and was indicted for larceny.[58] Likewise in *Green v. Green*, Nancy Green complained of desertion, but added that "it was not brought about by any fault of hers."[59]

The most contested divorce during Lincoln's partnership with John Stuart was *Rogers v. Rogers*.[60] Samuel Rogers retained Stuart & Lincoln to commence divorce

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[55] Bill for Divorce, 30 November, 1836, *Ethridge v. Ethridge*, *LPAL.*
[56] Bill for Divorce, 16 August 1838, *Foster v. Foster*, *LPAL.*
[57] Bill for Divorce, October 1837, *Lloyd v. Lloyd*, *LPAL.*
[58] Ibid.
[59] Bill for Divorce, 04 September 1837, *Green v. Green*, *LPAL.*
[60] *Rogers v. Rogers*, *LPAL.*

proceedings against his wife, Polly. Even though Samuel "performed every duty on his part as a tender and affectionate husband," Polly deserted him.[61] Polly answered and claimed that "she was forced to leave him" claiming "abuse and unmanly treatment." Polly concluded her answer by stating that "she has not violated the marriage contract but she says that the said complainant has himself since the said marriage committed adultery."[62] Samuel then amended his bill for divorce to include a count for adultery claiming that Polly was the adulterer, not he.[63] The court found that Polly in fact deserted Samuel, but that she did not commit adultery. The court then dissolved the marriage and awarded Polly $126 in alimony and $39 twice a year thereafter.[64]

The charges and counter charges of adultery reveal the tension surrounding sexual behavior and reputation in a community where most people knew their neighbor's business. Lincoln's slander cases demonstrate just how important reputation was on the edge of an expanding frontier society. Defamation of character can take two forms. The first is libel, which seeks to destroy a reputation through the printed word. The second is an action of slander, predicated upon the spoken word. These cases reveal the importance of not just reputation in antebellum Illinois, but what aspect of reputation was most important. Moreover, the amount of damages requested were often quite substantial, which underscores the importance of reputation in a small community. Salacious stories travel quickly, and character assassination, especially in a small community, can have serious consequences for the victim of this personal assault. To be branded a cheat, liar, or sexually deviant could ruin a person's reputation.

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[61] Bill for Divorce, 14 August 1838, *Rogers v. Rogers*, *LPAL.*
[62] Ibid.
[63] Amended Bill for Divorce, 20 October 1838, *Rogers v. Rogers, LPAL.*
[64] Decree, 15 March 1839, *Rogers v. Rogers*, *LPAL.*

The concern about reputation was different for men and women, which is also illustrated through Lincoln's slander cases.[65] For men the character traits most valued were honesty and trustworthiness. These virtues were essential in developing a reputation in business that would enhance the chances for success. Charges of larceny and unsavory business practices would spread like wildfire and failure would engulf the business. Thus when John and Phebe Blakely accused Cyrus Chase of stealing sheepskin, chickens, and eggs and poisoning their colt, Chase commenced an action for slander. Lincoln represented the Blakelys and the jury found for Chase but awarded minimal damages of one cent.[66] The theft of hogs, corn, and horses would often lead to a lawsuit that sought to repair the damaged reputation. Perjury or lying in an official capacity also formed the basis of litigation. In short, honesty was the best policy for success in business, law, or politics for that matter.

Women, on the other hand, commenced slander proceedings when their sexual behavior was questioned. *Moore v. Patterson* illustrates this concern. John Moore claimed that Margaret Patterson, an unmarried woman, was three months pregnant. Patterson sued for slander and demanded $2,000 in damages. Moore retained Stuart & Lincoln and denied the charge of slander. The jury found for Patterson and awarded

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[65] See Mark Steiner, "The Lawyer as Peacemaker: Law and Community in Abraham Lincoln's Slander Cases" Journal of the Abraham Lincoln Association, vol. 16, number 2, Summer 1995. In this article Steiner argues that Lincoln often took advantage of the opportunity to resolve disputes amicably and this was particularly true when it came to cases of slander where a member of the community's reputation was at stake. In this article Steiner offers many examples of when both men and women were slandered. Here the point is not that this was an opportunity for dispute resolution, but that men and women had different concerns about reputation that were grounded in gender roles. Women complained of slander when their sexual practices were indicted. Men on the other hand complained about charges of dishonesty and trustworthiness. See also, Stowell, *In Tender Consideration,* McDermott, "Dissolving the Bonds of Matrimony: Women and Divorce in Sangamon County, Illinois, 1837-1860."

[66] *Chase v. Blakely & Blakely*, *LPAL.*

$808.44 in damages.[67] This was a significant sum of money. Women with few economic opportunities outside the home needed marriage for economic protection, and could ill afford to be branded as "damaged goods." The charge of "harlot," "hussy," and the like could ruin a woman's reputation beyond repair. Consequently, claims of sexual misconduct before, during, and after marriage needed to be challenged, and the law gave women a forum to contest the charges and protect their valuable reputations. This also helps explain why Polly Rogers needed to vigorously defend the adultery allegations levied against her by her husband, Samuel Rogers. The usual instance in which a man would complain about sexually based slander, however, was when someone claimed that the fellow committed "the infamous crime against nature" such as sex with a dog, a cow, or in one instance impregnating a sow.[68]

The third main category of cases in which women asserted their rights was through an action for dower.[69] Dower is a category of the law that makes provision for a widow out of the real property of her former husband's estate. The widow's dower is equal to one third of the decedent's estate and provides her a life estate in such lands. Dower was an important right for women in antebellum America.[70] In 1839 Mississippi passed the first of the various "Married Women's Property Acts."[71] This was a tentative law and the issue of married women's property was addressed on a state-by-state basis. By 1850 seventeen states had some type of statute that concerned the issue of married

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[67] *Patterson v. Moore*, *LPAL.*
[68] *Torrence v, Galloway*, *LPAL.*
[69] Stowell, *In Tender Consideration*, John A. Lupton, "Inheriting the Earth: The Law of Succession"; Christopher A. Schnell, "Wives, Widows, and Will Makers: Women and the Law of Property."
[70] Marylynn Salmon, *Women and the Law of Property in Early America,* Chapel Hill: University of North Carolina Press, 1986,140.
[71] Freidman, *History of American Law*, 209.

women's property.[72] In 1836, however, when Lincoln began practicing law *feme covert* reigned and dower was the legal mechanism that allowed women to make claims to their husband's real property.

Real property was plentiful in Illinois of the 1830s. Specie was scarce, but land was an abundant asset that was freely bought and sold as some people speculated and others settled. In either case land was the prime economic asset of many frontier families. The rights of a married woman at the time of her husband's death affected the subsequent real estate transactions. Armed with her one-third life-estate, the widow's interest in her husband's land became paramount to the claims of her husband's creditor's. Dower, however, did have significant legal limitations. Since she was only entitled to a life-estate, the widow did not own the land outright, or in legalese "fee simple." When she died her dower rights, and interest in the land, died with her. The one-third would revert back to the husband's estate and would be distributed according to his will if one was written or in the absence of a will, the heirs would take under the state's intestacy formula, which was a predetermined scheme for the distribution of an estate where a person died without a will.

The Illinois statute provided that "when the heir or other person, having the next immediate estate of freehold or other inheritance, shall not, within one month next after demand made, assign and set over to the widow of the deceased to her satisfaction, her dower in, and to all lands, tenements, and hereditaments, whereof by law, then such widow may sue for, and recover same, in the manner hereafter prescribed."[73] This meant that a widow was obligated to make a demand for her dower. This assertion of rights was

[72] Ibid., 210.

accomplished by asking the executor of her dead husband's estate to assign her dower. The law was also sensitive to the needs of the grieving widow and allowed for a period of time to pass where she remained in full possession of the marital residence. The dower statute provided that "[t]he widow may, in all cases, retain the full possession of the dwelling-house in which her husband most usually dwelt next before his death, together with the out houses and plantation thereto belonging, free from molestation and rent until dower be assigned."[74] This created a buffer between the widow who was by law entitled to her one-third and the creditors and heirs who would be seeking their share of the estate.

The Illinois statutory scheme also provided for a situation where if the land could not be neatly divided between the dower's one-third and the remaining two-thirds subject to the claims of creditors and heirs. This scenario could arise where a small amount of land is left and a division was impossible. Another situation could be where all the valuable real estate is condensed in a small section of the overall property. The statute provided that "if the commissioners shall report that the lands or other estate is not susceptible of a division without great injury thereto a jury shall be empanelled to enquire of the yearly value of the widow's dower therein and shall assess the same accordingly and the court shall thereupon render a judgment that there be paid to such widow as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of her dower, and the like sum on the same day in every year thereafter during her

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[73] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), pp.253-256, *LPAL*.
[74] Ibid.

natural life."[75] Thus if the land could not be partitioned equitably, the widow could count on a guaranteed income from the sale of the property.

Typically a widow would commence a proceeding in court to have her dower assigned. Sometimes this was prompted by the husband's last will and testament that left his wife little if anything. If a will did not provide at least a one-third interest in the husband's estate, the wife could renounce the bequest and demand her dower. This scenario arose in *Bevans v. Brown* where John Bevans died leaving an estate with two hundred acres of land and some personal property. John Bevan's will stipulated that his wife, Margaret Bevans, should receive only a bed and bedding and some food supplies. Margaret renounced the meager bequest and asked the executor to assign her dower. When the executor refused, she commenced an action and asserted her claim for dower. John Bevans, one of the heirs, retained Stuart & Lincoln and the parties eventually settled the matter.[76] The case illustrates the importance of dower protection for a woman whose husband makes little in any provision for her in his will.

Hungry heirs prompted another scenario that forced women into court to protect their dower rights. With a land-owning male now dead and gone, the estate is up for grabs and the heirs all wanted their piece of the estate. The heirs, usually the children, would sue the widow and demand a partition of the estate. The widow only retained a one-third life estate so two-thirds were open for distribution. *Mason v. Mason* illustrates this scenario. At the time of his death Noah Mason, Sr. owned four hundred acres of land in Sangamon County. Noah Mason, Jr. retained Stuart & Lincoln and sued Noah Mason Sr.'s widow, Lucinda Mason and other heirs to have the land partitioned. The court ruled

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[75] Ibid.
[76] *Bevans v. Bevans*, *LPAL.*

for Noah Mason, Jr. and appointed commissioners to divide the land. The commissioners assigned Lucinda Mason her dower and partitioned the remainder of the land amongst the heirs.[77]

Cases involving child custody, seduction, and bastardy add another layer of legal experience to Lincoln's family law practice. Although not litigated by Lincoln during his tenure with John Stuart, they did, however, become important in his later partnerships. This was especially true in regard to child custody cases, which are discussed in the next chapter, where the Illinois courts began to move away from the notion that the children were the property of the father to the more modern idea of "the best interests of the child." [78] Just as the law began to interject a necessary element of certainty in economic affairs, the law also sought to define social relationships on the urban frontier. Lincoln also began to consider the law in a broader perspective while partnered with Stuart, and argued that reverence for the law should be the political religion of the nation.

Lincoln, Blackstone, and Reverence for the Law

Abolition provided the social and political framework for Lincoln's first major address on the rule of law in American society. The year before his Lyceum Address, Lincoln leveled a protest against slavery with fellow legislator Daniel Stone as "founded on both injustice and bad policy," but, nonetheless, disdained abolition and claimed "that the promulgation of abolition doctrines tends rather to increase than to abate its evils."[79] This pervasive strain of abolition animosity greeted Elijah Lovejoy when he moved west

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[77] *Mason v. Mason*, *LPAL.*
[78] Grossberg, *Governing the Hearth*; Michael Grossberg, "Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy In Nineteenth-Century America" *Feminist Studies* 9, no. 2 (Summer 1983); Stowell, *In Tender Consideration*, Dennis E. Suttles, "For the Well-Being of the Child: The Law and Childhood."
[79] *Collected Works*, I, 75.

from Massachusetts in 1833. Initially Lovejoy settled in St. Louis where he published the *Observer*, a religious newspaper. Lovejoy was, at the outset of his enterprise in St. Louis, a moderate, but he eventually became more vehement in his denunciation of slavery. The abolitionists provoked a response all over the nation including St. Louis where a free mulatto named McIntosh murdered another person while resisting arrest. Rather than justice in a court of law, McIntosh was indicted by an angry mob that first lynched him then burned his body. Lovejoy's criticism of the mob actions led to an attack on the *Observer's* office, prompting Lovejoy to move across the river to Alton, Illinois. In the "Prairie State" abolitionist tensions were also running high. In fact, Lovejoy's press was thrown into the river soon after his arrival on the eastern bank of the Mississippi. Lovejoy claimed that the *Observer* was a religious tract, not an abolitionist press, but this would lead to no avail since abolitionist sentiment was so strong that violence was inevitable. On November 8, 1837 anarchy prevailed as Lovejoy's warehouse was set ablaze and Lovejoy was shot dead. About two months later Lincoln addressed the Young Men's Lyceum of Springfield and used the anarchic events in Alton as a warning for the need to respect law and order. Lincoln spoke to the Lyceum with less than a year of legal practice under his belt.

Lincoln's Address to the Young Men's Lyceum of Springfield Illinois was entitled "The Perpetuation of Our Political Institutions."[80] In this address Lincoln

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[80] *Collected Works*, I, 108, Lincoln's "Lyceum" address has received a great deal of scholarly attention. Most of the analysis has focused on the part of the address where Lincoln warns of a possible overthrow of our nation's political institutions by a man of great ambition with a burning passion for distinction. This has been interpreted as Lincoln projecting himself into this role. See, Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War,* New York: Oxford University Press, 1962, 99, 108, 129-30.; See also Donald, *Lincoln*, 81; For a psychological analysis see Strozier, *Lincoln's Quest for Union*, 76-83; Strozier suggests that it is possible that Lincoln did not have any one person in mind. Historians by and large have focuses on the historical detective work in uncovering this tyrant and have consequently missed the significance of this speech as it relates to Lincoln's developing legal philosophy.

revealed his nascent legal philosophy. The speech also illustrated the influence of Blackstone on Lincoln's developing jurisprudence. Lincoln read Blackstone's *Commentaries,* as did so many other antebellum lawyers. If Lincoln's advice to an aspiring attorney in 1858 and 1860 is any evidence of Lincoln's legal curriculum, the reading list is short: Blackstone's *Commentaries*, Chitty's *Pleadings,* Greenleaf's *Evidence,* Story's *Equity* and Story's *Equity Pleadings*. The two substantive writers are Blackstone and Story and with such a short reading list, each book takes on added significance. This is a legal education heavily influence by Blackstone, not only because Lincoln advised that the *Commentaries* should be read twice, but also because Story revered Blackstone, and it was one of the few legal texts available to antebellum practitioners, especially those who practiced on the urban frontier.[81] At the time of his Lyceum Address Lincoln had only ten months of legal practice to his credit. Blackstone was fresh in his mind and it was the text Lincoln knew best.

At the heart of this speech is a claim that reverence for the law should be our political religion. This is strong language and it has as its influence Sir William Blackstone's *Commentaries*.

In *Law and Letters In American Culture*, Cambridge: Harvard University Press, 1984 Robert A. Ferguson argues that Lincoln was "the last Blackstone lawyer to lead the nation." Ibid. 305. Ferguson notes the connection Lincoln makes to his predecessors such as Jefferson, Clay and Webster and posits this in a legal aesthetic representative of the early nineteenth century. In this scheme Lincoln and other lawyers find an ordering device that allows then to connect with American history.

This connection to the past creates a conservative legal philosophy that reveres the past and institutions of long standing. Daniel Boorstin, while not using Lincoln, analyzed Blackstone's *Commentaries* in *The Mysterious Science of the Law*, and argued that Blackstone used prevailing ideas and assumptions of his day so as to make the legal institutions of the eighteenth century appear to be a coherent and rational system. Boorstin also claimed that Blackstone presented his *Commentaries* in such a way as to prevent questioning of existing social arrangements.

I seek to expand the Ferguson and Boorstin analyses and argue that rooted in Blackstone, Lincoln demanded a reverence for the law that prevented him from arguing for a more dynamic application of the law to effect change until the later part of the 1850s when the Supreme Court decided *Dred Scott v. Sandford*.

[81] Dennis R.Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review*, November 1976, 731, quoting Justice Joseph Story on Blackstone's Commentaries: "a work of such singular exactness and perspicacity, of such finished purity and propriety of style, and of such varied research, and learned disquisition, and constitutional accuracy, that, as a textbook, it probably stands unrivaled in the literature of any other language." Ibid. 758.

Lincoln began his Lyceum address with an appeal to history and an expression of American exceptionalism. Here "we find ourselves under the government of a system of political institutions, conducing more essentially to the ends of civil and religious liberty, than any of which the history of former times tells us" Lincoln claimed.[82] Likewise Blackstone grounded his admiration of the English common law in the history of the British Empire and its common law. Blackstone argued that "[t]he protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it, to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind."[83] Both men exhibit a reverence for the past and certify the value of the exceptional nature of their respective societies. This served as a foundation upon which Lincoln began to build a theory of jurisprudence that placed him within the larger stream of American history and formed a legal connection to America's founding generation.[84]

Lincoln warned that the danger to our political institutions would come from within and the "ill omen" is the "growing disposition to substitute the wild and furious passions, in lieu of the sober judgments of Courts; and the worse than savage mobs, for the executive ministers of justice." [85] Lincoln defended the common law tradition and expressed confidence in the "sober judgments of Courts."[86] This defense was rooted in an understanding of Blackstone' *Commentaries*. Blackstone claimed that "the first ground and chief cornerstone of the laws of England, which is general immemorial

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[82] *Collected Works*, I, 108.
[83] Blackstone, *Commentaries,* IV, 443.
[84] John Patrick Diggins, *On Hallowed Ground: Abraham Lincoln and the Foundations of American History*, New Haven & London: Yale University Press, 2000, 37-39.
[85] *Collected Works*, I, 108, 109.
[86] Ibid.

custom, or common law, from time to time declared in the decisions of the courts of justice, which decisions are preserved among our public records explained in our reports and digested for general use in the authoritative writings of the venerable sages of the law."[87] Custom and tradition pervaded both Lincoln's and Blackstone's legal reasoning with a societal anchor in reverence for the law. Defense of the laws became imperative as life, liberty, and property came under attack.

Lincoln believed that the danger to our political institutions would come from within: "If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."[88] Blackstone also saw a danger to the civil liberties of free Englishmen as self-inflicted. "The ideas and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner."[89] The storied past of America's experiment in self-government and the rights of the British Empire both faced domestic demons that lurked in the shadows waiting for anarchy to arise to the calls of "wild and furious passions."[90]

Lincoln had ample evidence of lawlessness generated by the intense emotions over slavery. Lincoln was concerned about the growing tendency to mobocracy pervading "the country from New England to Louisiana."[91] Lincoln chose two examples that focused on people of color. He stated that "negroes, suspected of conspiring to raise an insurrection, were caught up and hanged in all parts of the state: then white men,

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[87] Blackstone, *Commentaries.*
[88] *Collected Works*, I, 108, 109.
[89] Blackstone, *Commentaries* I, 127.
[90] *Collected Works,* I, 109.
[91] Ibid., I, 108, 109.

supposed to be in league with the negroes…were subjected to the same fate." [92] To buttress his case, Lincoln then turned to a "horror-striking scene at St. Louis. A single victim was only sacrificed there. His story is very short; and is, perhaps, the most highly tragic, of any thing of its length, that has ever been witnessed in real life. A mulatto man, by the name of McIntosh, was seized in the street, dragged to the suburbs of the city, chained to a tree, and actually burned to death; and all within a single hour from the time he had been a freeman, attending to his own business, and at peace with the world." [93] These graphic illustrations warned of an impending crisis in the legal foundations of antebellum society as the power of the mob posed a clear and present danger to law and order.

The consequences were ominous if "the perpetrators of such acts going unpunished, the lawless in spirit, are encouraged to become lawless in practice; and having been used to no restraint, but dread of punishment, they thus become, absolutely unrestrained."[94] Blackstone also realized that there needed to be some type of enforcement mechanism grounded in the law that prevents "ungovernable passions" from destroying the edifice of the law. Blackstone stated that "[t]he infirmities of the best among us, the vices, and ungovernable passions of others, the instability with all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern."[95] Here Lincoln reflecting

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[92] Ibid.,108, 109-110.
[93] Ibid.,108, 110.
[94] Ibid.,108, 111.
[95] Blackstone, *Commentaries*, IV, 2.

Blackstone was fulfilling the lawyer's social role that Tocqueville commented upon when he observed that "[w]hen the American people let themselves get intoxicated by their passions or carried away by their ideas, the lawyers apply an almost invisible brake which slows them down and halts them."[96]

Lincoln recognized that the American people were attached to their government, but that a fortification against the mob and lawless spirit was necessary. Blackstone found the English common law "built upon the soundest foundation and approved by the experience of the ages."[97] The effect of Blackstone's reliance upon custom and tradition was to blunt criticism of the law. Blackstone contended that legal institutions that had withstood the test of time demanded reverence.[98] Likewise, Lincoln demanded a reverence for the American legal system when he stated: "Let reverence for the laws, be breathed by every American mother, to the listing babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, 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; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altar."[99] Lincoln's moving tribute to the laws and courts of justice was tempered, however, by two paragraphs later in the speech when he claims that there are, however, "bad laws."[100] Blackstone believed that the English common law was the best protection for civil rights and claimed "that laws, when prudently framed, are by no means subversive but rather

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[96] Tocqueville, *Democracy In America*, 268.
[97] Blackstone, *Commentaries*, I, 5.
[98] Boorstin, *Mysterious Science of the Law*, 149-153.
[99] *Collected Works*, I, 108, 112.

introductive of liberty; for (as Mr. Locke has well observed) where there is no law there is no freedom."[101] Lincoln recognized that there were bad laws and that grievances may arise from time to time. Nevertheless, he proclaimed that "although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed."[102] Religious observation of bad laws is strong language since the word religious implies a heightened degree of faith. This faith can stifle dissent and evidences a legal conservatism bred from Blackstone. Commenting on this legal mentality, Tocqueville noted that "[t]he English or American lawyer who thus, in a sense, denies his own reasoning powers in order to return to those of his fathers, maintaining his thought in a kind of servitude, must contract more timid habits and conservative inclinations than his opposite number in France."[103] An understanding of this legal perspective helps explain why Lincoln was willing to "keep his mouth shut" about the Fugitive Slave Law. Lincoln realized that laws could be changed, but until they were submission was required. Obedience to the law and preservation of tradition is the main point of the Lyceum speech. This attitude is rooted in Blackstone and is historically significant in understanding Lincoln's development as both a lawyer and politician.

Mob rule is the antithesis of law and order. While the litigants Lincoln defended in his law practice often battled each other for sums of money, the law was a venue to protect the rights of the individual as well as his or her property. Mob rule threatened not only the tragic loss of life. Unrestrained action also threatened the loss of property. The

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[100] Ibid.
[101] Blackstone, *Commentaries*, I, 126.
[102] *Collected Works*, I, 108, 112.
[103] Tocqueville, *Democracy In America*, 267.

nature of Lincoln's law practice during his tenure with John Stuart forced Lincoln to view the law in terms of the everyday concerns of the individual, especially in regard to property rights. This partnership also provided a forum for Lincoln to think more philosophically about the law in the Lyceum Address. Lincoln's clients were trying to make a life on the fringes of the frontier. For good or bad, the law was an integral part of this experience. Recognizing that lawlessness threatened life, liberty and property, Lincoln recommended that "every American, every lover of liberty, every well-wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others."[104] Thus the law, for Lincoln, was the best defense against the enemies of liberty.

Life on the Circuit

During Lincoln's partnership with John Stuart he was initiated into the lawyer's life on the circuit. Riding the circuit became a way of life that Lincoln cherished. Years later as president he looked back on his days of circuit practice with nostalgia. Lincoln as the junior member of Stuart & Lincoln, spent a considerable amount of time on the road in search of legal business. This pattern continued as the junior partner in Logan & Lincoln from 1841 to 1844. When Lincoln became the senior man at Lincoln & Herndon he still carried the bulk of the circuit work. Thus travel and the consequent time away from home for a significant period each year would become one of the defining characteristics of Lincoln's professional life. Chapter six of this dissertation addresses, in detail, the importance of circuit practice in Lincoln's life as both a lawyer and politician. The

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[104] *Collected Works,* I, 108, 112.

following general observations, however, serve as an introduction to this important part of antebellum practice.

Circuit practice required attorneys to travel from county to county to try their cases. On the edge of the frontier, with many sparsely settled areas there was not enough legal business to support a full-time law practice. Consequently lawyers needed to travel from town to town in search of new cases. The itinerant lawyers would travel together as a group comprising a judge, state attorney, and fifteen to twenty-five lawyers. A regular rotation was in place as they moved from county seat to county seat. Typically the circuit courts would hear cases twice each year in each county, once in the spring with another session in the fall. The local communities would save up their legal business awaiting the arrival of the lawyers as they sped into town eager to dispense justice. This pattern of practice would continue for Lincoln until his election to the presidency.[105]

On the circuit, justice was often argued on broad principle of right and wrong. The nature of the practice dictated this method. Upon arrival in town, the itinerant attorneys were retained by the locals to handle the myriad legal problems the frontier generated. Since they had no offices, the initial interviews would take place near the village square, on a sidewalk or sometimes under a tree—wherever people could talk with a modicum of privacy. Since they were in town just a short time, usually several days or a week at most, time was of the essence. The lawyers would then draft complaints, answers, or other documents on short order. Brevity and felicity of language was preferred. In fact, Lincoln was known to state the bare essentials of his client's case

[105] Whitney, *Life On The Circuit*; Donald, *Lincoln*, 104-6, 146-49, 150, 158; Duff, *Prairie Lawyer*, 168-221; Woldman, *Lawyer Lincoln*, 82-115; Herndon, *Life of Lincoln*, 248-51; Strozier, *Lincoln's Quest for Union*, 145-51, 176-79; Fraysse*, Lincoln, Land and Labor,* 95-96.

so as not to fall into the trap of having to prove all that was pleaded. Witnesses were rounded up and trial strategy was prepared in short order.[106]

Accommodations on the circuit were poor. The lawyers slept two or three in a bed wherever they could find lodgings. Sometimes they slept "with 20 men in the same room—some on old ropes—some on quilts—some on sheets—a straw or two under them."[107] Often the lawyers had to share their "mattress" with bedbugs as well. A pitcher of cold water with one towel was shared by the group, and those who overslept "found the towel too wet to use."[108] Breakfast was greasy and one of Lincoln's associates described the coffee as "pretty mean."[109]

Life on the circuit was not all hardship, however. In the evening when court was not in session, the lawyers read, played cards, drank, or debated politics. Lincoln eschewed alcohol and cards, but read voraciously and debated vociferously. Often the locals would join in the evening's events. The circuit provided Lincoln an opportunity to exchange ideas with the other men of his time and allowed him to broaden his knowledge of human experience. Lincoln also made constructive use of his time on the road to enhance his education. Here Lincoln studied, read, and reflected on the life of the mind. On the circuit there was not much opportunity to carry law books or much of anything for that matter. Lincoln usually carried with him an old green umbrella and a small carpet bag with a change of clothes and other necessities. Significantly, Lincoln always found room for some books. "Mr. Lincoln commenced carrying around with him on the Circuit—to the various Courts, books such as Shakespeare—Euclid as early as 1844 and

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[106] Ibid.
[107] Donald, *Lincoln*, 105.
[108] Ibid.
[109] Ibid.

continued to do so down as late as 1853: he loved Burns—Carried Poe around on the Circuit—read and loved the Raven—repeated it over and over."[110] Lincoln's desire and focus amazed his fellow attorneys. William Herndon, Lincoln's third law partner, pondered "how he could maintain his mental equlibrium or concentrate his thoughts on an abstract mathematical proposition, while Davis, Logan, Sweet, Edwards and I so industriously and volubly filled the air with our interminable snoring as a problem none of us could ever solve."[111] Riding the circuit provided Lincoln with more than an opportunity to generate law business. It gave him friends with whom to exchange ideas, time to read and discuss the ideas of the day, an excused absence from domestic life, and the freedom to think.

Lincoln became the people's president, but years before he was the people's lawyer. The routine debt and estate matters Lincoln handled grew from the experience of daily life. Lincoln viewed his clients as more than just a paycheck. They were individuals who deserved their day in court. Lincoln's ability to relate to his clients in human terms also helped him understand the mood of public opinion. Lincoln not only represented "the people," but by riding the circuit he was also able to get to know the people of central Illinois. Traveling the eighth circuit enabled Lincoln to keep his finger on the political pulse of the frontier and make political connections throughout the state. Through these basic breach of contract, divorce, and real property cases Lincoln not only gained an insight into human nature, but was also able to survey a broad sample of public

[110] Wilson, *Herndon's Informants*, 519.
[111] Herndon, *Life of Lincoln*, 248.

opinion as he defended and prosecuted cases that defined life on the edge of the American frontier.[112]

Politics and the end of Stuart & Lincoln

Both Stuart and Lincoln practiced law, but they both also had great political ambition. In 1838 Lincoln won his third term in the state legislature and was one of the rising politicians in Illinois. Stuart, on the other hand, was on his way to defeat Stephen Douglas in the 1838 congressional race. Lincoln had his work cut out for him, as he handled not only his legislative duties, but was now responsible for the day-to-day operation of the firm. Lincoln was a busy man. For example, on November 23, 1839, Lincoln was responsible for eleven cases in the Sangamon Circuit Court. Just over two weeks later the legislature was in session. With just over two years experience at the bar, this was a challenge. The legal pace was grueling. Once the legislature adjourned in February, the Sangamon Circuit Court opened for its spring term in March. Most of May and into June found Lincoln attending to the firm's circuit practice. Mid-June marked the opening day of the United States Courts, with the later part of that month reserved for the Illinois Supreme Court. July and August found the Sangamon Circuit Court back in session while Lincoln sought a fourth term in the legislature. This was a tough race and although Lincoln won a fourth term, he polled the smallest number of votes of the elected candidates. Lincoln continued a frenetic campaign schedule throughout the summer of 1840 as a presidential elector pledged for William Henry Harrison. In September Lincoln was back out on the circuit splitting his time between campaigning and the courts. On November 9, just one week after the presidential election, the Sangamon Circuit

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[112] Strozier, *Lincoln's Quest for Union*, 179.

convened for the fall term, which ran until December 3. In the midst of this court term, a special session of the legislature was called to address the mounting economic and political pressure to face the state fiscal crisis created by the internal improvement program. During this period Lincoln was pulling double duty as he worked both the courthouse and the legislative chamber.[113]

On December 5 the special session of the legislature adjourned. The conclusion to this session, however, came crashing down with great embarrassment to Lincoln. Once the special session ended, the state bank, which Lincoln supported, would be required to pay debts in specie. Knowing that the bank could not meet this obligation Lincoln tried to prevent the recess. Lincoln and some of his fellow legislators sought to prevent the adjournment by preventing the requisite number of members from attending. The goal was to prevent a quorum, which meant that the legislature could not adjourn since no vote could be had without the necessary quorum. The regular session was slated to commence two days later on December 7 and this parliamentary maneuver was designed to keep the legislature in session until March 1841 when the regular session was scheduled to conclude. When it appeared as if a quorum was present, Lincoln, followed by several other Whigs, jumped out the window of the second floor so as not to be counted. This miserable strategy failed on two counts. First, the sergeant at arms had already counted them. Second, this escapade made Lincoln look ridiculous.[114]

Lincoln's last session in the legislature began on December 7, 1840 and ended on March 1, 1841. During this session Lincoln continued to suffer the ridicule of his leap from the window, broke his engagement with Mary Todd, and watched the Whig

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[113] Ibid., 119-148.
[114] Simon, *Lincoln's Preparation for Greatness*, 223-231.

legislative agenda come unraveled. Finally, with Stuart seeking another term in Congress, it did not make sense for Lincoln and Stuart to continue their partnership. The year had taken a toll and Lincoln fell into a state of depression. Lincoln was absent from the legislature for the third week in January and wrote his law partner in Washington claiming that he was "the most miserable man living. If what I feel were equally distributed to the whole human family, there would not be one cheerful face on the earth."[115] Pondering his options Lincoln stated that "If I could be myself, I would rather remain at home with Judge Logan." [116] Within two months, Stuart & Lincoln would disband. Lincoln then accepted a junior partnership with Stephen T. Logan.

Lincoln and Stuart parted amicably and this first law partnership was notable for several reasons. Lincoln held his own in his initial entry into the legal profession. Joshua Speed claimed that this was the beginning of the real battle of life as Lincoln left "the field of his youthful sports, pleasures, and pains, where he was the leading man,"[117] and "came to a bar then considered the best in the State, and perhaps as good as any in the West."[118] Lincoln was no longer playing with the boys of New Salem. He was in a professional arena now and had to prove his manhood, not with his fists, but with his intellect. The conditions were particularly trying without the benefit of his law partner who was serving in Congress for much of their partnership. Lincoln also articulated a reasoned legal philosophy in the Lyceum Address. Although this nascent jurisprudence was steeped in legal conservatism, it demonstrated Lincoln's ability to ponder the law in more universal terms. Lincoln's legal successes were also creating opportunities for his

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[115] *Collected Works*, I, 229.
[116] Ibid., 230.
[117] Speed, "Reminiscences," 20.
[118] Ibid.

political ambitions. His ability to argue a case before a jury and debate society's issues while riding circuit placed Lincoln at the center of both politics and law. These two career paths would continue to intersect during the next nineteen years and create not only economic security but also the means to satisfy Lincoln's "passion for distinction."

CHAPTER THREE

LEARNING THE LAW

> So far as his reading and knowledge of law went he had a quite unusual grasp of the principles involved. When he was with me, I have seen him get a case and seem to be bewildered at first, but he would go at it and after a while he would master it. He was very tenacious in his grasp of a thing that he once he got hold of.
>
> Stephen T. Logan[1]

> When I have a particular case in hand I love to dig up the question by the roots and hold it up and dry it before the fires of my mind.
>
> Abraham Lincoln[2]

> He was greatest in my opinion as a lawyer in the Supreme Court of Illinois.
>
> William H. Herndon[3]

Lincoln once told his friend Joshua Speed that he was "slow to learn and slow to forget that which I have learned—My mind is like a piece of steel, very hard to scratch any thing on it and almost impossible after you get it there to rub it out."[4] Lincoln's legal mind had ample opportunity for indelible imprints as the junior member of the firm

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[1] Michael Burlingame, ed., *An Oral History of Abraham Lincoln: John G. Nicolay's Interviews and Essays*, Carbondale and Edwardsville: Southern Illinois University Press, 1996, 39.
[2] Donald, *Lincoln*, 99, n.614.
[3] Herndon, *Life of Lincoln*, 272.
[4] Wilson, *Herndon's Informants*, 499; Speed, "Reminiscences," 38-39; Beveridge, *Abraham Lincoln*, I, 300.

Logan & Lincoln, his second law partnership which commenced in April 1841. The lack of supervision that characterized John Stuart's relationship with Lincoln was belied by Stephen T. Logan's watchful eye. Logan was a demanding partner who insisted on precision of thought and careful preparation. This tutelage grounded Lincoln's legal education and helped him grow as an attorney since Logan was the "law school professor" that Stuart was not.[5]

Born in 1800, Stephen Trigg Logan was nine years older than Lincoln. Like Lincoln, Logan was a native of Kentucky. Logan studied law with his uncle who was a judge and was admitted to the Kentucky bar when he was twenty years old. After emigrating to Illinois in 1832, Logan practiced law for three years and then served as judge for the First Judicial Circuit from 1835 to 1837. Logan shared a Whig ideology in politics with Lincoln and was elected to the Illinois legislature in 1842, 1844, and 1846. Thus while Lincoln was Logan's junior in law, Lincoln was senior in politics. From 1841 Lincoln served as Logan's partner, and the two men practiced law together until 1844 when the partnership amicably dissolved so Logan could practice law with his son David.[6]

Prior to asking Lincoln to join him in practice, Logan had become dissatisfied with his previous partner, Edward Baker, because he "could not trust him in money matters."[7] According to Logan, Baker got him "into some scrapes by collecting and using money though he made it alright afterwards'…and that "Baker was a perfectly

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[5] Herndon, *Life of Lincoln*, 209; Donald, *Lincoln*, 97-99; Duff, *Prairie Lawyer*, 78-96; Woldman, *Lawyer Lincoln*, 38-48,
[6] Ibid.
[7] Burlingame, *An Oral History of Abraham Lincoln*, 37.

reckless man in matters of money."[8] The professional fallout from a partner acting recklessly with money had a dangerous potential. Honesty was essential to success in communities on the edge of the frontier. Stephen Logan, a former judge and respected practitioner, worked hard to earn the respect of the legal community and could ill afford Baker ruining this professional goodwill. Lincoln's notorious honesty is described in detail in chapter six of this dissertation, but suffice to say Logan needed someone he could trust. Lincoln and Baker, however, shared a common characteristic that benefited Logan. According to Logan, both men "were exceedingly useful to me in getting the good will of the juries." [9] Thus Logan benefited from Lincoln's political prominence, public speaking skills, and impeccable reputation for trustworthiness; a sound choice.

Logan, a seasoned practitioner, was described as "methodical, industrious, particular, painstaking and precise."[10] Logan grilled these qualities into his junior partner as he reviewed and revised Lincoln's work. Inherent in this endeavor was the utility in a thorough understanding of both sides of the case at bar. Logan demanded thorough preparation from Lincoln. This mentality was an enormous help to Lincoln in presenting and prosecuting the various cases he handled while associated with Stephen Logan. This cast of mind helped lay the legal foundation that would support Lincoln for the next nineteen years as a practicing attorney.

Prior to their partnership, Logan observed Lincoln as both an adversary and co-counsel. Furthermore, Logan served as a judge on the first circuit and viewed Lincoln's abilities from the bench. As adversaries, the future partners opposed each other in *Bailey v. Cromwell* during the trial phase of the case that would eventually be appealed to the

[8] Ibid., 37.
[9] Ibid.

Illinois Supreme Court.[11] At issue in *Bailey* was the consideration that formed the basis of a contract. Consideration is a legal term of art that defines the object of the exchange. The consideration that forms the basis of a contract can be money, services, goods as well as a variety of other possible items of value. In *Bailey*, however, the consideration was an alleged slave. The facts of the case indicate that in 1836 David Bailey gave Nathan Cromwell a promissory note for $376.48 for a black female indentured servant. Cromwell was supposed to provide proof that the woman was a slave. Cromwell died before he had the opportunity to provide the agreed upon evidence and his estate then sued Bailey for payment on the note. At the trial level Lincoln argued an evidentiary point and claimed the failure to provide proof of the woman's status rendered the agreement void. The trial court ruled for the estate and Lincoln on behalf of Bailey appealed to the Illinois Supreme Court. Lincoln's position was adopted by the court and held that "[t]he sale of a free person is illegal, and that being the consideration of the note, that is illegal also, and consequently no recovery can be had upon the note."[12] The court reasoned that there is a presumption that a person in the state is free until proven otherwise, and relied upon a prior case *Kinney v. Cook* which stood for the proposition that the "presumption of law was, in this state, that every person was free, without regard to color."[13]

The future partners also opposed each other in *Cannon v. Kinney.*[14] At stake in *Cannon* were the rights to a horse. The facts reveal that Manly F. Cannon loaned a horse to John Harris who hired his brother, James Harris, to care for the horse. James gave the

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[10] Woldman, *Lawyer Lincoln*, 40.
[11] *Bailey v. Cromwell*, 4 Ill. 70 (1841).
[12] Ibid. ,73.
[13] Ibid.

horse to another brother, Robert Harris, who let the horse loose to graze in the spring. Matthew P. Kinney then took the horse for his own use. Cannon retained Lincoln and sued for damages. Kinney pled not guilty and claimed that since he did not take the horse from Cannon, there could be no cause of action against him. The trial court found for Kinney. Lincoln on behalf of Cannon then appealed to the Supreme Court. Lincoln prepared a clear concise brief in support of the possession issues the appeal raised and argued that "If the plaintiff showed himself to be the general owner of the horse, and also entitled to the immediate possession of him, at the time the defendant seized him, he showed a constructive possession which is sufficient."[15] Lincoln further argued that "the general owner of personal property, who deposits such property with a bailee, and such bailee places the property in the hands of a third person for safe keeping, may maintain trespass against a stranger who takes such property from such safekeeper."[16] The court adopted Lincoln's legal rationale and concluded that "If property is loaned to another for an indefinite term, the one who owns it can maintain trespass against him who takes it tortiously; and the constructive possession of an owner is sufficient to entitle him to maintain trespass for taking the property out of the hands of a person to whom it is lent."[17] Thus Lincoln was successful in having the Illinois Supreme Court reverse the trial court's decision and confirm the doctrine of constructive possession.

In both lawsuits, Logan, the former judge and established practitioner, lost his appeal to Lincoln. The facts and equities appeared to be on Lincoln's side, but in each case Lincoln also presented a cogent and well thought out legal argument that had to

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[14] *Cannon v. Kinney*, 4 Ill. 8 (1841).
[15] Ibid.
[16] Ibid.
[17] Ibid., 10.

impress Mr. Logan. Logan also knew Lincoln from the circuit. The vast majority of cases were tried before a jury or one judge on the circuit level rather than a panel of judges in the Illinois Supreme Court.[18] Logan as Circuit Court judge from 1835 to 1837 had numerous occasions to watch his future partner in action. Lincoln appeared before Judge Logan eleven times. [19] Lincoln's client prevailed in four cases, were defeated in three others, and four of the cases settled. In addition, Logan presided in two cases where Lincoln served as a witness.[20] Given this evidence, Logan was certainly able to assess Lincoln's advocacy skills before a jury. The witness instances are particularly relevant since the court has an opportunity to judge the veracity of the witness under both direct and especially cross-examination. Both of these cases involved allegations of slander where reputation was at stake and the testimonial evidence of witnesses such as Lincoln was critical in prosecuting or defending the case.

Once Logan retired from the bench he met Lincoln as an adversary at the trial level close to fifty times.[21] The future partners were also co-counsel in twenty cases.[22]

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[18] "Cases By Court Jurisdiction,"reveal that 4,737 cases were tried at the Circuit level while 444 cases were argued before the Illinois Supreme Court, *LPAL.*

[19] *Broadwell v. Broadwell, LPAL., Chilton v. Chilton, LPAL, Edwards v. Shannon, LPAL, Ely v. Edmund R. Wiley & Co., LPAL, Enos v. Capps, LPAL, Hawthorn v. Wooldridge, LPAL, People v. Capps, LPAL, People v. Capps, LPAL, Rathbone & Rathbone v. Kirkpatrick, LPAL, Wickersham v. Rucker, LPAL.*

[20] *Green v. Purcapile, LPAL, Harrell v. Woldridge, LPAL.*

[21] *Allen v. Maxey, LPAL, Atwood et al v. Links, LPAL, Ball v. Lockeridge, LPAL, Bell v. Mitchell, LPAL, Bennett v. Ratford, LPAL, Billon v. Porter, LPAL, Brooks & Cogswell v. Dodge & Dodge, LPAL, Cannon v. Kenney, LPAL, Carman & Carman v. Glasscock, LPAL, Chiles v. Sudduth, LPAL, Connor v. Kenny, LPAL, Darling v. Norred, LPAL, Darling v. Norred & Baker, LPAL, Elkin v. People for use of Fleming, McIntire & Co., LPAL, Estep v. Wagoner, LPAL, Fredenburg v. Hussey, LPAL, Garret v. Levering, LPAL, Gay v. Short, LPAL, Hay v. Lasswell, LPAL, Hickman v. Braucher, LPAL, Hungerford & Livingston v. Hughes, LPAL, Jackson v. Newsome & Newsome, LPAL, Kendall v. Richardson, LPAL, Klein v. Spear, LPAL, Malone v. Coffman & Coffman, LPAL, Manning v. Morgan, LPAL, Mason & Mason v. Renshaw & Renshaw, LPAL, May v. Spear, LPAL, Morrow v. Witter, LPAL, Peter v. Elkin & Constant, LPAL, Powers v. Bailey, LPAL, Ragsdell v. Spear, LPAL, Rathbone v. Hudson E. Bridge & Co., LPAL, Reed v. Fleming, LPAL, Robinson v. Garvey, LPAL, Rogers v. Rogers, LPAL, Roll v. Anderson, LPAL, Sams v. Witter, LPAL, Shackleford & Shackleford v. Shackleford, LPAL, Sinnard v. Kyle, LPAL, Spear v. Camp., LPAL, Stevenson v. Abrams, LPAL, Stockton v. Tolly, LPAL, Stringfield v. Orendorf, LPAL, Torry v. Green, LPAL, Torry v. Loyd, LPAL, Webster & Crandall v. Walling, LPAL.*

Co-counsel status does not mean that Lincoln and Logan were necessarily both representing the same person. Often different parties to a lawsuit retained separate counsel, but nonetheless the attorneys had to coordinate strategy. From Lincoln's earliest trials where Logan sat on the bench to the adversarial relationship at trial and co-counsel cases, Logan had ample opportunity to take stock of his future partner's potential for the legal profession. Logan claimed that "Lincoln was growing all the time, from the time I first knew him. He was not much of a reader. Lincoln was never what might be called a very industrious reader. But he would get a case and try to know all there was connected with it; and in that way before he left this country he got to be quite a formidable lawyer."[23] Lincoln worked hard to earn the respect of Stephen Logan and this hard work paid off. The firm was successful, which was important for Lincoln economically since during his tenure with Stephen Logan he married, became a father, and bought a home. The firm's continued success also allowed a move from their offices at 108-110 North Fifth Street to a more prestigious space in the Tinsley Building.[24] The practice grew and Lincoln grew with it.

Logan & Lincoln was a busy firm. Their Supreme Court practice, which is discussed below, was significant. In addition, only three other firms in Illinois exceeded their bankruptcy practice, which is also discussed later in this chapter.[25] The Circuit Courts, however, were where the bulk of the attorney's time was spent. While, the

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[22] *Baker v. M.O. Reeves & Co., LPAL, Bevans v. Brown, LPAL, Canedy v. Spear, LPAL, Estep v. Wagoner, LPAL, Ford & Ford v. Ford & Ford, LPAL, H.B. Truett & Co. v. Ransdell, LPAL, Harwood v. Forsythe & Buckner, LPAL, Heredith v. Matheny, LPAL, John A. Corneau & Co. v. Whitney, LPAL, Levick & Jenkins v. A. Withers & Co., LPAL, Lewis for use of Longworth v. Lewis, LPAL, Morgan v. Sudduth, LPAL, Newsom v. Newton, LPAL, People v. Truett, LPAL, Porter v. Porter, LPAL, Reed & Radford v. Phillips, LPAL, Reed & Rickard v. Phillips, LPAL, Reed & Rickard v. Early, LPAL, Spear et al v. Newton & Newton, LPAL, Taylor v. Stuart, LPAL, Ware v. Duncan, LPAL.*

[23] Herndon, *Life of Lincoln*, 210.

[24] "Lincoln Chronology," *LPAL.*

demands of the Circuit outside of Springfield are important for understanding Lincoln as both lawyer and politician, the Sangamon Circuit Court in Springfield was the court where Lincoln's combined law practices heard over two thousand cases.[26] During Lincoln's tenure with Logan, the Sangamon Circuit would typically hold court several times a year. There would be a Spring and Fall court term that would coincide with the overall term of the Eighth Judicial Circuit with a separate Summer session that would begin in July. The length of the term would vary depending on the caseload and was timed so as not to conflict with other County's Circuit Courts.

The fall term of 1842 of the Sangamon Circuit Court is representative of the voluminous nature of their practice. The term began on November 21, 1842 for an eleven-day session. On the first day of the term the partnership had eight cases on the docket. The following day Logan & Lincoln had seventeen cases. This turned out to be a good day in court as "in six cases they get judgments totaling $4,410.18."[27] The firm tried one case, Lincoln had another matter referred to arbitration and was successful in having the court award his client a tract of land in a third. The firm procured a divorce for a client on November 23 as well as garnering another $260.15 in judgments for their clients. The following day seven cases were disposed of summarily as Logan & Lincoln had two cases dismissed and five more were won by default. Two days later they procured a "judgment for $1,155 in *Van Buren v. Walters*, and Lincoln wrote the court order."[28] On November 30, they successfully obtained an award for $2,714.83 for their

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[25] Donald, *Lincoln*, 97.
[26] "Map of Circuit Cases," *LPAL.*
[27] Miers, *Lincoln Day by Day*, I, 195.
[28] Ibid.

client and the term rounded out as numerous cases appeared on the daily docket as the lawyers fulfilled the demanding nature of circuit practice.[29]

Lincoln became an integral part of Logan's practice as he not only handled the day-to-day legal work that was required, but also solicited business and developed confidence in his developing legal mind.[30] Lincoln wrote to James S. Irvin that "Logan & myself are willing to attend to any business in the Supreme Court you may send us. As to fees…we believe we are never accused of being very unreasonable in this particular."[31] Lincoln's legal mind was clearly developing as he wrote Samuel D. Marshall that "I have looked into the Dorman & Lane case, till I believe I understand the facts of it; and I also believe we can reverse it."[32] Lincoln would display this confidence in the venue where his third partner, William Herndon, claimed he did his greatest work: the Illinois Supreme Court.

The Illinois Supreme Court

The most striking difference in actual practice between Lincoln's tenure with the firms of Stuart & Lincoln and Logan & Lincoln was their Illinois Supreme Court practice. In the four years Lincoln practiced with Stuart, the firm argued no more than ten appeals before the Illinois Supreme Court. In Lincoln's three and one-half years with Logan, however, the firm handled close to seventy appeals before the state's highest tribunal. The differences in trial practice and appellate advocacy are significant and require different methods of argumentation. In general, a dissatisfied litigant has the right to appeal an adverse decision at the trial level and attempt to persuade an appellate

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[29] Ibid., 196.
[30] *Collected Works*, I, 304, 305; Miers, *Lincoln Day By Day*, I, 193, 194.
[31] *Collected Works*, I, 304; Miers, *Lincoln Day By Day*, I, 193.

court that lower court's ruling should be reversed. The party seeking a reversal on appeal must cite specific legal errors at the trial level warranting a reversal. These points must be supported by legal research and analysis, and requires a more scholarly presentation to a panel of judges as compared with the equitable arguments a trial lawyer advances in front of a jury.

Unlike cases heard at the trial level, appellate cases require written briefs that contain a detailed analysis of the legal principles involved in the case and an argument as to why the proffered legal analysis should prevail. The submission of these briefs is followed by an appearance before the court in which each attorney also has the opportunity to present an oral argument. During Lincoln's tenure with Logan, the Illinois Supreme Court seated nine judges. The appellate argument was frequently interrupted with questions from the court in an effort to expose any weaknesses in the attorneys' legal position. After oral argument, the judges retire to chambers to consider the merits of the attorneys' contentions. After due deliberation, the court renders a written opinion, complete with legal analysis that is then published for public consumption. These cases are then used as precedent for similar cases in the future and form the cornerstone of the common law system that Blackstone identified in his *Commentaries*. Illinois, still a relatively young state, was beginning to develop a body of case law as its Supreme Court decided cases that impacted life on the edge of the frontier. Cases involving debt collection, land ownership, and family law were the constants in Lincoln's practice, and as an active appellate practitioner he kept his finger on the pulse of this developing jurisprudence through his appearances before the Illinois Supreme Court.

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[32] *Collected Works*, I, 305; Miers, *Lincoln Day By Day*, I, 194.

Appellate practice demands a heightened degree of preparation since the judges are knowledgeable about the state of the law, have read the attorneys briefs beforehand, and have had the opportunity to educate themselves on the nuances of the particular point of law on appeal before the oral argument commences. It was in this legal arena that Lincoln's third partner, William Herndon, claimed Lincoln was at his best. Herndon believed that "it was in the Supreme Court of the State of Illinois that he was truly a great lawyer, and nowhere else. The Supreme Court has its rules and gives time, ample time, to read the record and gather up the facts of the case, the issues and the law arising thereon, abstracts of the case and the lawyers briefs, stating the facts in a condensed form and the issues made thereby. No man can be caught by surprise here and thrown out of court. In this court there is except on special occasions, no oral evidence admitted. The written record as made up alone goes to the court. The lawyers see each others briefs, arguments, and the quoted law; they have ample time to hunt up the law and to argue the case, and in this court alone Lincoln was great truly and indeed."[33] This style of practice was suited to Lincoln's intellectual composition. Lincoln's claim that his mind—analogous to a piece of steel, hard to scratch, but almost impossible to erase when so marked—was particularly suited to the demands of appellate practice. The requisite time to adequately prepare for appellate argument combined with the inherent obligation to learn the particular area of law under consideration enhanced Lincoln's legal education enormously.

Typically, each appeal would have one or two central issues for the court's consideration. This procedure made Lincoln learn each area of the law in depth. For example, it was not enough to merely know your case. Effective appellate argument

[33] Herndon, *Life of Lincoln*, 272.

required the lawyer know the adversary's case, anticipate the arguments that would need to be refuted, and develop an understanding of the intricacies of the evolving jurisprudence. This type of practice allowed Lincoln the time to "dig up the question by the roots and hold it up and dry it before the fires of [his] mind."[34] The issues of each appeal were learned and stored in Lincoln's legal memory for use in not only other appeals, but in the cases he tried before the various circuit courts. This experience served as a formidable legal education. Consequently, Lincoln learned the nuances of Illinois law through his research and writing that combined to plant an indelible mark on his legal mind.

A review of the appeals Lincoln handled with Stephen Logan reveal a caseload that represented the basic areas of the law that would comprise Lincoln's law practice for the remainder of his career. Cases connected with property, debt, sales, mechanics liens, and family law were all litigated in the appellate practice of Logan & Lincoln. These appeals also provide a window into how the judicial branch of Illinois' state government confronted the issues posed by daily life on the urban frontier.

Land was the great natural resource during the nineteenth century and "[l]and law was the kernel and core of common law."[35] Real estate, reduced to a commodity, was traded on the open market and speculation in its value made some rich and others impoverished. How Americans used "their" natural resource was fodder for countless lawsuits. [36] Title to the land was one of the basic aspects of property law.

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[34] Donald, *Lincoln*, 99.
[35] Friedman, *History of American Law*, 230.
[36] The legitimacy of the Americans claim to the land was contested by the Native Americans. There is a body of scholarship that discusses who had the superior right to this land. The purpose of this chapter is not to settle that question, but to discuss routine land claims as they affected the litigants touched by Lincoln's law practice. For a sampling of the literature on the Native American question see: Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty*,

Lincoln's father left Kentucky in part due to issues that continually plagued the free alienation of land, clear title. Claims of superior right to land created uncertainty about an individual's right to possess the parcel in question. While certainty was a critical component of law in general, it was essential to real estate. Three cases Lincoln argued before the Illinois Supreme Court while partnered with Stephen Logan reveal the complex nature of land law as it intruded into the daily life of antebellum Illinois.[37]

In *Mason v. Park,* Benjamin Park commenced a lawsuit against Mason for cutting fourteen trees on his property.[38] On the trial level, Park prevailed and was awarded $48.33 in damages. Mason appealed to the Illinois Supreme Court and argued that Park failed to produce a deed to prove ownership. Instead of this documentary evidence, Park relied upon an admission by Mason that he cut the trees. On appeal Lincoln represented Park and argued that Mason's admission was sufficient for evidentiary purposes and was therefore excused from producing the deed to prove ownership. The court disagreed with Lincoln and found that Park should have been made to produce a deed to prove ownership. Even in the face of an admission, the court insisted upon a deed. Lincoln lost this appeal, but nonetheless had to learn the law "root and branch," and would, thereafter, know that as part of a prima facie case, ownership has to be established at the outset or the case would fail. It also revealed the importance of documentary evidence in establishing clear title to land. Unless there was a definitive system in place, the westward expansion of settlement could be retarded.

Berkeley, Los Angeles & London: University of Californis Press, Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics and Morality", *The Stanford Law Review*, vol.21., 500, February, 1969., John Ehle, *Trail of Tears: The Rise and Fall of the Cherokee Nation*, New York: Anchor Books, 1988; Michael Paul Rogin, *Fathers and Children: Andrew Jackson and the Subjugation of the American Indian*, New Brunswick: Transaction Publishers, 1991; Anthony F.C. Wallace, *The Long Bitter Trail, Andrew Jackson and the Indians,* New York: Hill & Wang, 1993.

[37] *Mason v. Park; Cook v. Hall; In Dorman et ux v. Lane, LPAL.*

The production of a deed may seem like a simple proposition to prove ownership. *Cook v. Hall*, however, illustrates the complexities of land law when it merges with the court's power to execute judgments by selling a judgment debtor's land.[39] The background facts of *Cook* indicate that on October 8, 1840, Edward Cook recovered a judgment of $590.25 against Jacob Slenz. The court executed the judgment by selling forty acres and thirteen lots to Cook, who took possession in August 1842 and recorded the deed in November 1842. This was standard operating procedure for antebellum courts. If you had a judgment against you, your land or other personal possessions could be sold. The *Cook* case, however, became complex because Slenz, the judgment debtor, had conveyed the same land, sold by the court to Cook to Anderson and Flanders in March 1840. Anderson and Flanders sent the deed to be recorded on October 5, 1840, but the clerk did not actually record the deed until sometime after October 8, 1840, the date Cook received his judgment. After Anderson and Flanders purchased the property from Slenz they sold it to Hall. Cook then had to sue Hall to regain possession of the land. To simplify the facts and clarify the legal issue, the court sold what they thought was Slenz's land to Cook. In reality the land had been transferred twice and now the court had to determine who held title to the land. This case illustrates just how quickly land changed hands and how easy it was for title issues to spin out of control.

The trial court held that Hall's deed was valid. Cook retained Lincoln to appeal to the Illinois Supreme Court. On appeal, the court affirmed Hall's right to the land. The case hinged on when the deed to Anderson and Flanders was effective. If effective when filed--October 5, 1840—it preceded the judgment and was a valid transfer. If effective

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[38] *Mason v. Park*, 4 Ill. 532 (1842).
[39] *Cook v. Hall*, 6 Ill. 575 (1844).

when recorded as Lincoln contended it should be, which was after the October 8, 1840 judgment, Cook had the right to possession. The court held that the deed was effective when filed. After examining the recording statute the court looked to the reality of the situation. The court reasoned that all a party can do is file the deed in the clerk's office. The clerk is supposed to record the deed in the appropriate register. Therefore it would be unfair to the party who filed the deed, which was all they could do, to suffer any legal consequences. Hence the court ruled that "[t]he grantee, who has actually presented his deed to the recorder for the purpose of having it registered, ought not to be prejudiced by the mere failure of the officer to make the proper entry. The recorder is to make the entry, and not the party interested in the conveyance. All the party can do in order to have his deed recorded is to take it to the office, and deliver it to the recorder. When he has done this, he can not be charged with any default or negligence."[40] Dates were important in this decision and served a legal utility as a definite point in time to measure ownership and provide certainty to land claims.

Dates had a flip side, however. What happened, however, if a litigant failed to act in a timely fashion? Property rights could be lost if one waited too long to assert them. In *Dorman et ux v. Lane*, the court considered the lapse of time in property cases.[41] In 1826 Lane, the administrator of Robinson's estate, was awarded $1,008.87 for a debt due him as the estate's administrator. The judgment went unsatisfied until 1841 when Lane sued William and Nancy Dorman, Robinson's heirs, to sell 200 acres of the estate's land to satisfy the 1826 judgment. The trial court ruled for Lane and the Dormans retained Lincoln to prosecute the appeal. Lincoln's first point of law before the court argued that

[40] Ibid. 580.
[41] *Dorman et ux v. Lane*, 6 Ill 143 (1844).

"[t]he power of the circuit courts to order sales of real estate, upon application of administrators, etc., for the payment of debts, was, in this case, barred and destroyed by lapse of time."[42] In short, fifteen years was too long to wait to assert your rights. The court agreed and reasoned that "[I]t would be extremely hazardous for this court to sanction such gross negligence, and particularly in a case where the same person was both administrator and creditor. He permitted the order to lie dormant for the space of fifteen years, to continue a lien upon real estate, and after such an extraordinary lapse of time, he applies to the circuit court, and without offering any excuse for this unreasonable delay, seems to expect, as a matter of course, that the court will enforce the lien, and direct a sale of the real estate to satisfy the debt."[43] Certainty was essential to real property and the failure to assert rights would not be excused by courts that had such a critical role in determining property rights.

In addition to land matters, Lincoln's appellate practice litigated cases impacting commercial relations. In antebellum commercial law before the rules of warranty and strict liability were created, a purchaser of goods needed to take every precaution before entering into a contract. Contracts were strictly construed. The purchaser had a duty to investigate and could not rely upon the law to save him from a bad bargain. In *England v. Clark,* the Illinois Supreme Court held that the doctrine of *caveat emptor* applied even to judicial sales. [44]

In the *England* case*,* Henry Clark was awarded a judgment against Marshall Ferguson and Lukins for $23.12. The court executed this judgment when they sold Ferguson's horse at a public auction to England for $39. The sheriff then paid the

[42] Ibid. 144.
[43] Ibid. 148.

amount due Clark after subtracting the sheriff's costs. England took possession of the horse that he thought was now his. A third party then came forward and successfully proved that the horse was his and neither Ferguson's nor Lukins' as the sheriff had originally thought. Consequently England had to surrender the horse to its rightful owner. The thrust of this scenario was to leave England with neither horse nor money. England retained Lincoln to prosecute the appeal. The Illinois Supreme Court held that the doctrine of *caveat emptor* applied to judicial sales and any purchaser, even in a judicial sale, purchases at their own risk. *Caveat emptor* was a harsh doctrine and is anachronistic when viewed from the twenty-first century's consumer protections. For Lincoln and other antebellum practitioners, however, *caveat emptor* was a fact of commercial life.

The commercial growth and development of the frontier was not only the story of capital. Labor was an important part of the expanding antebellum society. Workers were protected through the legal mechanism known as the mechanic's lien. This was a legal device in which an unpaid worker could file a lien against an owner's land to ensure their payment. In *Kimball v. Cook*, Kimball contracted with Cook to do millwright work on a flour mill.[45] The agreed upon price was $4,800, with half paid up front and the balance when the job was completed. Cook finished the job, but was never compensated. He then filed a mechanic's lien and at trial was awarded $2,400. The issue on appeal was whether or not the trial court should have admitted certain oral evidence. The Supreme Court ruled in favor of the admission and remanded the case. Thus workers began to receive important legal protection.

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[44] *England v. Clark*, 5 Ill 486 (1843).
[45] *Kimball v. Cook*, 6 Ill 423 (1844).

In addition to commercial lawsuits, Lincoln was developing a greater understanding of family law through Logan & Lincoln's Supreme Court practice. This branch of the law included not only actions for divorce, but also cases for seduction, bastardy, maintenance of illegitimate children, child custody, and the developing notion of the "best interests of the child."[46] While partnered with Logan, the Illinois Supreme Court decided one of Lincoln's seduction cases, *Grable v. Margrave.*[47] In this action, Thomas Margrave filed suit against William Grable for seducing his daughter and the damages in his loss of her services during her pregnancy and subsequent birth of her child. The circuit court found for Margrave and awarded $300 in damages. At issue on appeal was whether or not the circuit court should have considered the financial position of Grable in awarding damages. Lincoln argued that this was proper and the Illinois Supreme Court agreed stating that "[t]he pecuniary ability of the defendant is peculiarly the proper subject of inquiry. If the jury are permitted to awe others, by way of the example, and to punish the defendant, his wealth and standing in society will, in a considerable degree, determine the amount of damages."[48] The court reasoned that "a verdict which, as against one individual, would be sufficient for all purposes, would as against another, be scarcely felt, by reason of the difference in their ability to respond in damages."[49] Children were an integral part of the family's economic unit and the loss of a child's labor gave rise to a cause of action for seduction. The punishment factor in the

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[46] See Grossberg, *Governing the Hearth*, 237-253; Stowell, *In Tender Consideration.* This volume contains a number of very helpful articles on Lincoln's family law practice; particularly helpful on the issue of what was best for the child is Dennis E. Suttles, "For the Well-Being of the Child: The Law and Childhood," 46-68; For an excellent discussion of divorce see Stacy Pratt McDermott, "Dissolving the Bonds of Matrimony: Women and Divorce in Sagamon County, Illinois, 1837-1860," 71-103; The issue of dower rights is discussed by John A. Lupton, "Inheriting the Earth: The Law of Succession," 104-128; also see Christopher A. Schnell, "Wives, Widows, and Will Makers: Women and the Law of Property" 129-158.
[47] *Grable v. Margrave*, 4 Ill. 372 (1842).
[48] Ibid. 373.

court's decision in Grable was important since over time the punishment factor in seduction cases became the focus of primary concern.[50] At this time in Lincoln's law career custodial rights to children belonged to the father. Viewed as a form of property, the father as head of the house was entitled to the labor of his children. In 1846, however, just two years after Lincoln ended his partnership with Logan, the Illinois Supreme Court decided *Cowls v. Cowls* in which the court held that if a father acted abusively toward his children, the court was empowered to interfere and grant custodial rights to the mother. This decision began what would become the "best interests of the child" standard.[51]

Two other matters Lincoln litigated while partnered with Logan illustrate the community's concern about caring for children whose parents failed to meet their financial obligations. In *Patterson v. Winkler*, Anne Patterson gave birth to an illegitimate child. She accused Young E. Winkler, who was represented by Lincoln, of being the father and commenced an action for support of the child. Winkler admitted paternity and Lincoln wrote the bond in which the court ordered Winkler to pay $50 per year for the child's "maintenance." The community was reluctant to pay for the support of bastard children and prosecuted fathers who failed to meet their paternal obligations. [52]

In a second case, *People ex rel. Davidson v. Bennett*, the state's attorney indicted John Bennett on the complaint of Jane Davidson for bastardy.[53] Lincoln represented Bennett on the criminal charge as well as on a bond proceeding that was appealed to the

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[49] Ibid.
[50] Stowell, *In Tender Consideration*, Stowell, "*Femes* Un*Covert*: Women's Encounters with the Law," 31.
[51] *Cowls v. Cowls*, 3 Gilman 436 (1846); Stowell, *In Tender Consideration*, Suttles, "For the Well Being of the Child: The Law and Childhood," 46-68.
[52] *Patterson v. Winkler, LPAL.*
[53] *People ex rel Davidson v. Bennett, LPAL.*

Illinois Supreme Court under the caption *Asa D. Wright, Probate Justice of Menard County, for use etc. v. John Bennett et al.*[54] Under the statutory scheme the reputed father was to make quarterly payments to the Probate Judge who was then responsible for holding the putative father's child support monies and making the necessary payments to the mother of the child. In the criminal proceeding the jury found Bennett guilty and ordered him to pay $40 per year until the child was seven years old. As the Supreme Court pointed out, under that law "that upon conviction, the reputed father 'shall be condemned by the judgment of the said court, to pay such sum of money not exceeding fifty dollars, yearly, for seven years, as in the discretion of the said court may seem just and necessary for the support, maintenance and education of such child.'"[55] The courts took an active role in policing family relationships as the law enforced support provisions with the full force of the prosecutorial arm of the state government.[56] The Supreme Court in this case, however, was frustrated in their effort to provide for the young child's welfare. The bond for child support was posted as required, but John Bennett then demanded custody of his child as was his right under the statute, which included the following pertinent provision:

> …provided always that the said reputed father, after giving bond with approved security to the court of probate, in the said county, conditioned for the suitable maintenance of any such child, for the term aforesaid, shall be permitted to take charge and have control of said child. And from the time of said father taking charge of such child, or should the mother refuse to surrender the said child when so demanded by the said father, then, and from thenceforth the said father shall be released and discharged from the payment of all such sum or sums of money as may thereafter become due against the said father, for the support, maintenance and education of any such child.[57]

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[54] *Asa D. Wright , Probate Justice of Menard County, for use etc. v. John Bennett et al*., *LPAL.*
[55] Ibid.
[56] *People ex rel. Davidson v. Bennett, LPAL*
[57] *Asa D. Wright, Probate Justice of Menard County, for use etc. v. John Bennett et al*, *LPAL.*

A straightforward reading of the law indicated that all a father of a bastard child had to do was make a demand for the child from the mother, who would probably not want to part with her child, and if she refused, the father was no longer obligated to pay for the child's support. The Supreme Court read the plain words of the statute and reluctantly agreed with the father's position. Justice Norman H. Purple writing for the court stated that "I regret that, upon a careful and attentive consideration of the law…am reluctantly compelled to admit that, if the reputed father of an illegitimate child, under the law as it existed at the time of the commencement of this suit, will have the inhumanity, in its helpless and dependent infancy, to demand its surrender by the mother, the law, upon her refusal, imposes upon him no further obligation to aid in its maintenance and support, at least so long as she persists in her refusal."[58] This holding was soon addressed by the Illinois legislature to provide that a reputed father could not demand custody until the child was three years old.[59]

Lincoln's first appeal that raised issues relative to a divorce proceeding while associated with Logan & Lincoln was *Wren v. Moss*.[60] The facts on Wren indicate that in 1843 Aquilla Wren commenced divorce proceedings against his wife, Clarissa Wren, on the grounds of adultery. Clarissa countered that Aquilla was the adulterer, not she. The jury found for the husband and the court granted the divorce. An alimony hearing was abated due to the death of Aquilla. Clarissa retained Lincoln to petition the Supreme Court for an order revising the divorce decree on the grounds that Clarissa was denied her right to an alimony hearing. The motion was granted and all defendants who were

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[58] Ibid.
[59] Norman H. Purple, *A Compilation of the Statutes of the State of Illinois* (Chicago: Keen and Lee, 1856), pp.128-130, *LPAL*; Stowell, *In Tender Consideration*, Dennis E. Suttles "The Law and Childhood," 59-62.
[60] *Wren v. Moss*, 6 Ill. 560 (1844).

interested parties were summoned so the issues of alimony and dower could be resolved. This decision gave Clarissa Wren a significant legal victory, as without this decision she might not have been able to secure her right to dower. Thus Illinois was becoming a cauldron of change for family law.[61]

Lincoln was learning very specific areas of the law through the study of particular cases while working with Logan. This experience provided a legal education based on the case study method and tracks the formative years of Illinois jurisprudence. Cases involving mechanic's liens, the principle of *caveat emptor*, seduction, false arrest, sale of land to satisfy debts, *res judicata*, sureties and conversion were some of the areas of law that Lincoln learned in depth while practicing as an appellate attorney with Stephen Logan.[62] Armed with this legal knowledge, Lincoln became a more effective advocate for his clients while trying the various cases before the courts and juries of the circuit courts. The number of appeals combined with the professorial mentality of Stephen Logan provided Lincoln with a strong legal foundation that would continue to benefit him in his subsequent years at the bar.

The Jury Has Spoken

The legal education Lincoln received from Logan was vital to his development as a lawyer. Lincoln's partnership with Logan also provided an experience that became

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[61] Stowell, *In Tender Consideration*, "Her Day in Court: The Legal Odyssey of Clarissa Wren,"204-227. Stowell makes a convincing argument that this decision demonstrated the paternalistic nature of the Illinois courts since a "majority of justices in the state's highest court, wearing their paternalistic face, insisted that, though a jury had found Clarissa Wren guilty of adultery and of other offenses against her husband, she should have an opportunity to present her case for alimony or dower. Such a decision would hardly be expected from a patriarchal court intent on upholding male dominance of women." Ibid. 204.

[62] *Kimbal v. Cook*, 6 Ill. 423 (1844) (mechanics lien); *England v. Clarke*, 5 Ill. 486 (1843) (caveat emptor); *Grable v. Margrave*, 4 Ill. 372 (1842) (seduction); *Schlencher v. Risley*, 4 Ill. 483 (1842) (false arrest); *Ballentine v. Beall*, 4 Ill. 203 (1841) (sale of land to satisfy debts); *Abrams v. Camp*, 4 Ill. 372 (1841) (res

critical to success in both law and politics: the jury trial. Unlike Stuart, Logan had little interest in the demanding nature of circuit practice outside of Springfield. Logan left the itinerant aspects of frontier practice to Lincoln, which was the second major difference between Lincoln's first two partnerships. Although Lincoln traveled the circuit while associated with Stuart, the degree of circuit practice was significantly increased while he was associated with Logan.[63] Logan's reluctance to ride circuit accounts in part for this. In addition, Lincoln did not hold public office during his tenure with Logan. In fact, it was Logan who was elected to the legislature twice (1842 and 1844) while partnered with Lincoln with a third term (1846) after the partnership ended. This is not to suggest that since Lincoln did not hold public office, he stopped his involvement in politics. Lincoln continued to remain politically active while partnered with Stephen Logan serving as a member of the Whig State Central Committee. Lincoln's first year as the junior partner, however, witnessed a decline in political activity, which can be accounted for by several factors. Lincoln had a new position with Logan, which required more of Lincoln's time. Political life in 1840 ended badly with the miserable conclusion to the special session of the legislature in December 1840 with Lincoln jumping from the second floor window of the legislative chamber to prevent a vote on adjourning the session. Personally, Lincoln's failed attempt at matrimony with Mary Todd in January 1841 set the stage for a period of depression.[64] This lull in political activity continued until the early part of 1842, which was also an election year. On Washington's birthday, 1842, Lincoln delivered his

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judicata); *Elkin v. The People*, 4 Ill 208 (1841) (surities); *Johnson v. Weedman*, 5 Ill 495 (1843) (conversion).

[63] Meirs, *Lincoln Day By Day*.

[64] Speed, "Reminiscences," 39; Joshua Wolf Shenk, *Lincoln's Melancholy: How Depression Challenged a President and Fueled His Greatness*, Boston: Houghton Mifflin, 2005, 43-65; Strozier, *Lincoln's Quest for Union*, 45-60; Simon, *Lincoln's Preparation for Greatness*, 238-39.

Temperance Address, which was followed just days later by a letter to Joshua Speed reflecting great joy at Speed's recent nuptials.[65] The dark clouds of depression in 1841, were giving way to the restoration of Lincoln's spirits in 1842. By the end of 1842, Lincoln was actively engaged in both law and politics and was happily married to Mary Todd. During Lincoln's last two years of practice with Logan he also put in place the political process that would eventually place him in the U.S. House of Representatives. On the home front, Lincoln also become a father and purchased a house during these last years associated with Logan. Lincoln grew personally and politically while partnered with Logan. These were years of hard work and dedication to demands of his taskmaster/partner, Stephen Trigg Logan as the law assumed a more prominent place in Lincoln's professional life.

Since Logan chose to spend the bulk of his time in Springfield, Lincoln rode the circuit. Juries were the foundation of antebellum jurisprudence. Lincoln had to learn not only law, but also develop a refined insight into the community's expectation of fairness. Lincoln had already developed an understanding of the human condition from his days in New Salem, service in the Illinois legislature, and his trials before the Sangamon Circuit Court. With Logan, Lincoln would try cases across central Illinois and in the process develop a sense about the people who lived their lives in these communities. Thus law served Lincoln not only in the immediate application of the case, but the law also acted as a reflector of the Eighth Circuit's social customs. The time spent in front of Eighth Circuit juries helped Lincoln understand Tocqueville's observations about the deep connection between social and legal issues.

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[65] Strozier, *Lincoln's Quest for Union*, 61-65; Schenk, *Lincoln's Melancholy*, 43-65.

Tocqueville argued that American juries are more than just part of the legal system, but that "the jury is above all a political institution."[66] Moreover, "[l]aws are always unsteady when unsupported by mores; mores are the only tough and durable power in a nation."[67] In the legal arena local juries developed these tough and durable mores. Tocqueville makes a distinction between juries in criminal cases, where seldom do the jurors seem themselves as running afoul of the criminal law and civil juries where the identification with the litigants is more immediate since "anybody may have a lawsuit."[68] Tocqueville reasoned that "[j]uries teach men equity in practice. Each man, when judging his neighbor, thinks that he may be judged himself."[69] Moreover, juries "impinge on all interests and everyone serves on them; in that way the system infiltrates into the business of life, thought follows the pattern of its procedures, and it is hardly too much to say that the idea of justice becomes identified with it."[70] Circuit practice revealed a system where original arguments based on notions of common justice were more important than strict adherence to legal technicalities. Significantly, Lincoln's overall practice was civil, not criminal. A statistical portrait of Lincoln's law practice reveals that only six percent of his practice was devoted to criminal law, while the vast majority of his cases were in the civil arena.[71] Lincoln's practice comports with Tocqueville's claim that the civil jury is the place where the everyday notions of justice are learned, understood, and become part of the larger values of society. Success in law

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[66] Tocqueville, *Democracy In America*, 274.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] "A Statistical Portrait," Of the 4,564 cases that comprise the statistical analysis, only 277 are criminal law cases. Thus only about 6% of Lincoln's practice was in the criminal court. 3,060 of the cases or 67% were Common law cases, 1,178 were heard in the Chancery Court and 49 cases were Probate proceedings, *LPAL*.

and in politics required Lincoln to know the people and he got to know them when he traveled the circuit and stood before then in a court of law.

Illinois jurisprudence recognized the importance of juries in the judicial decision making process and, like other states, sought to check the power of the bench. Thus Illinois limited judges from commenting on the facts of the case in 1827 so as not to marshal the evidence in favor of one of the litigants thus usurping the power of the jury. In fact some judges were reluctant to proceed into their perceived province of the jury.[72] For example, one contemporary reported: "I knew one judge who when asked for instructions would rub his head and the side of his face with his hand as if perplexed and say to the lawyers 'Why, gentlemen, the jury understand the case; they need no instructions; no doubt they will do justice between the parties.'" [73] The 1827 law was amended in 1847 to require all jury instructions to be in writing, thus preserving a record for possible appeal should the bench exceed its authority and use its instructions to the jury to dictate a certain result.[74]

Lincoln understood the importance of convincing the jury, and advised his third partner, William Herndon: "Billy, don't shoot too high—aim lower and the common people will understand you. They are the ones you want to reach—at least they are the ones you ought to reach. The educated and refined people will understand you any way. If you aim too high your ideas will go over the heads of the masses, and only hit those who need no hitting."[75] Herndon claimed that what "Lincoln's adversaries in a lawsuit

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[72] Mark Steiner, "Lawyers and Legal Change in Antebellum America: Learning from Lincoln," *University of Mercy Law Review*, Vol. 74, 427.
[73] John W. McNulty, "Sidney Breese, the Illinois Circuit Judge, 1835-1841," 62 *Journal of the Illinois State Historical Society* 170 (1969).
[74] Steiner, "Lawyers and Legal Change in Antebellum America: Learning from Lincoln," 439-440.
[75] Herndon, *Life of Lincoln*, 262.

feared most of all was his apparent disregard of custom or professional propriety in managing a case before a jury."[76] In fact Stephen Logan was once the victim of such disregard. Lincoln addressed the jury in his own style. "Gentlemen, you must be careful and not permit yourself to be overcome by the eloquence of counsel for the defense. Judge Logan, I know, is an effective lawyer. I have met him too often to doubt that; but shrewd and careful though he be, still he is sometimes wrong. Since this trial has begun I have discovered that, with all his caution and fastidiousness, he hasn't knowledge enough to put his shirt on right."[77] Herndon stated that "Logan turned red as crimson, but sure enough, Lincoln was correct, for the former had donned a new shirt, and by mistake had drawn it over his head with the pleated bosom behind. The general laugh which followed destroyed the effect of Logan's eloquence over the jury—the very point at which Lincoln aimed."[78]

Lincoln was able to muster more than just quick turn of the phrase to make his point to a jury. Lincoln was a slow speaker and carefully considered the impact of his remarks to the jury. Herndon claimed to have "grow[n] restless at Lincoln's slow movements and speeches in court. 'Speak with more vim' I would frequently say, 'and arouse the jury—talk faster and keep them awake.'"[79] Lincoln replied by way of illustration. "Give me your little pen-knife, with its short blade, and hand me that old jack knife, lying on the table. Opening the blade of the pen-knife he said; You see, this blade at the point travels rapidly, but only through a small portion of space till it stops; while the long blade of the jack-knife moves no faster but through a much greater space than

[76] Ibid., 287.
[77] Ibid., 288.
[78] Ibid.
[79] Ibid., 273.

the small one. Just so with the long, labored movements of my mind. I may not emit ideas as rapidly as others, because I am compelled by nature to speak slowly, but when I do throw off a thought it seems to me, though it comes with some effort, it has force enough to cut its own way and travel a greater distance."[80] Lincoln used this deliberate logistical approach often in both his legal and political careers. Illustrating this technique was Lincoln's response to a jury in a case where he was representing the railroad. The plaintiff's attorney "tried to score a point by stating that the plaintiff was a flesh and blood man, with a soul like the jurymen had, while our client was a soulless corporation."[81] Using the skills he learned from the many jury trials in the backwoods courthouses of circuit practice, Lincoln replied: "Counsel avers that his client has a soul. This is possible, of course; but from the way he had testified under oath in this case, to gain, or hope to gain, a few paltry dollars he would sell; nay has already sold, his little soul very low. But our client is but a conventional name for thousands of widows and orphans whose husbands and parents' hard earnings are represented by this defendant, and who possess souls which they would not swear away as the plaintiff has done for ten million times as much as is at stake here."[82] This "jack-knife" quality of Lincoln's logic cut through the jury. Lincoln spoke the jury's language because he knew them well from spending so much time on the circuit.

The Solicitor in Bankruptcy

Federal practice was another major difference Lincoln encountered at Logan & Lincoln. The Bankruptcy Act of 1841 provided the impetus for Lincoln's admission and practice

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[80] Ibid.
[81] Whitney, *On the Circuit with Lincoln*, 259.
[82] Ibid.

before the U. S. Courts.[83] The United States Constitution grants Congress the power to enact bankruptcy legislation.[84] The tension between debtors and creditors has pervaded American history.[85] The difficulty in passing bankruptcy legislation was illustrated by Judge Joseph Story in an 1827 letter to a friend after a prior Bankruptcy Bill was defeated in Congress: "The Bankrupt Bill has been lost and under circumstances which will forbid any attempt to revive it for many years. It has had much of the best talent, eloquence, and influence of the Senate to support it; but it has failed from causes not likely to be overcome in future times. It interferes with State pride and prejudice, with the interests of some, with the political expectations of others, with the Antifederalism of others, and above all with that mass of public opinion which in different States of the Union floats in opposite directions, even when apparently impelled by the same common cause. I have always had some confidence that a Bankrupt Law would be passed, but I now begin to believe that the power will, in the National Government, forever remain a dead letter."[86] Given the tenor of this letter something extreme was necessary to change Story's prediction. The Panic of 1837 was such an event.

Wild speculation, abuse of individual credit and a contraction of the money supply have been offered as reasons for the economic collapse.[87] In the western states, such as Illinois, speculation in real estate combined with overly optimistic forecasts about internal improvements fueled the economic decline. Illinois was not spared from the economic consequences of the panic. In fact as the *Sangamon Journal* reported "One

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[83] "Lincoln Chronology," *LPAL*.
[84] U.S. Constitution, Article I, sec.8 [4].
[85] Charles Warren, *Bankruptcy In United States History*, New York: DaCapo Press edition, 1972; Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America*, Chapel Hill & London: The University of North Carolina Press, 2001.
[86] Warren, *Bankruptcy*, quoting Joseph Story, 49.

loud, deep, uninterrupted groan of hard times is echoed from one end of the country to the other."[88] Thomas Ford, who served as a Circuit Court Judge and eventually Governor of Illinois, stated that the land speculation in Chicago began in earnest in 1836 and then spread to the rest of the state. The prospects for overnight fortunes in real estate spread as "the story of sudden fortunes made there, excited at first wonder and amusement, next a gambling spirit of adventure, and lastly, an all-absorbing desire for sudden and splendid wealth." [89] It was time, however, for the speculative bubble to burst.

Inflation was another problem that exacerbated the economic decline. Ford described the pervasive nature of the inflationary cycle: "During the inflation of the bank currency…every one had got into debt. The merchants had purchased on a credit, and they had again sold on credit. This system brought a great many goods into the State; more then the people, according to their means, ought to have consumed. But the merchants were anxious to sell, and freely credited the people up to about the value of their property."[90] These expectations were shared by the Illinois legislature. Ultimately the state committed eight million dollars it did not have to internal improvements such as railroads and the Illinois-Michigan canal.

This "one loud groan" needed attention and the state and federal governments responded with a variety of debtor relief legislation. The Illinois legislature passed laws that made the forced sale of a judgment debtor's property more difficult by requiring a bid of two-thirds of the appraised price. Lincoln voted against this piece of legislation.[91]

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[87] George L. Priest, "Law and Economic Distress: Sangamon County, Illinois, 1837-1844," *The Journal of Legal Studies*, The University of Chicago Law School, Vol. II(2) June 1973.
[88] Paul M. Angle, *Here I Have Lived,* 71.
[89] Priest, "Law and Economic Distress," quoting Ford, 439.
[90] Ibid.
[91] Simon, *Lincoln's Preparation for Greatness*, 260.

The law of judgments and executions was an important statute for debtors. It is clear that land could be attached and sold at auction by the court. What would happen, however, if the sheriff's sale on a $100 judgment brought a grossly undervalued amount? The auction produced few bidders and a $100 property, enough to satisfy the judgment produced a bid of only ten dollars? Legally, the debtor now lost his asset and was only able to use a small portion of it to satisfy the debt. Technically still indebted for $90, a debtor might never be able to climb out of this economic hole. With this hypothetical in mind, the Illinois legislature passed an act concerning Judgments and Executions. The statute provided that "lands, tenements and real estate of every person against whom any judgment has been, or hereafter shall be obtained, in any court of record, either at law or in equity, for any debt, damages, costs, or other sum of money, shall be liable to be sold upon execution to be issued upon such judgment, and the said judgment shall be a lien on such lands, tenements and real estate, from the last day of the term of the court in which same may be rendered , for a period of seven years." [92]There were several important provisos to this law that benefited debtors. First an order of execution needed to be issued within one year. Second once the seven-year period ended, the judgment was no longer a lien, which meant that a judgment creditor could not sleep on his rights and wait forever to execute on the judgment. Finally, in relation to the above hypothetical, there must be a valuation made by a board of commissioners and the judgment debtor was required to bid at least two-thirds of the value of the property at auction. This meant that on a $100 property, the bidding would start at $66.67.

[92] Norman H. Purple, *A Compilation of the Statutes of the State of Illinois* (Chicago: Keen and Lee, 1856) pp. 642-653, *LPAL.*

In addition, the legislature exempted certain property from sale altogether. An 1825 law that exempted for the heads of households one cow and calf, clothing, beds, cooking utensils and household furniture, one spinning wheel and a pair of wool cards, and provisions for the family for three months.[93] In February 1840 the exemption was extended to include one horse or a yoke of oxen worth no more than sixty dollars for a farmer or sixty dollars worth of tools for a mechanic.[94] The law was again revised in 1841 and again in 1843.[95] The problem, however, was too large for the state to act alone. The U.S. Congress also addressed the growing concern of judgment debtors across the country.

On February 1, 1842, after vigorous debate in Congress, the nation's second Bankruptcy Law took effect.[96] This was good news for debtors and from the effective date of this legislation until the Bankruptcy Act was repealed in March 1843 more than 30,000 people took advantage of the opportunity to wipe their economic slates clean. In total over four hundred million in debt was canceled. Springfield had its share of bankrupcies and since bankruptcy proceedings were administered through the federal courts, Lincoln needed to gain admission to the federal courts to attract this business. On March 1, 1842, one month after the Bankruptcy Law went into effect, Lincoln was admitted to practice in the United States District Court.[97] Since Springfield was the Illinois state capitol, the United States District and Circuit Courts held their regular

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[93] Stephen F. Gale, *Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), pp.389-395, *LPAL.*
[94] Norman H. Purple, *A Compilation of the Statutes of the State of Illinois* (Chicago: Keen and Lee, 1856), pp. 642-653, *LPAL.*
[95] Ibid.
[96] Warren, *Bankruptcy*, 79; *Balleisen,* Navigating Failure, 1.
[97] "Lincoln Chronology," *LPAL.*

sessions there. During the Logan & Lincoln partnership, these U.S. Courts held sessions during June and December.[98]

The Lincoln Legal Papers reveal seventy-two bankruptcy petitions filed by Logan & Lincoln. Of the seventy-two cases, only thirteen have complete records that indicate the petitioners' assets and liabilities.[99] The total debt relieved of these bankruptcies was $133,728.45. The largest relief came in *In Re Wilmans* for $21,557.37 and the smallest *In Re Snider*, $556.79. Seeking protection from one's creditors in Bankruptcy Court entailed baring the petitioner's financial picture for all to see. Debts and liabilities had to be listed and notices were published in the local newspapers. This exposure could be painful since the entire community would be put on notice that you could not pay your bills. The typical notice, this one from the *Sangamon Journal*, March 18, 1842, read "In the matter of the Petition of HENRY DISHON of Union County to be declared a bankrupt and to be discharged of his debts. Notice is hereby given that Henry Dishon of Union County has filed his petition in this court to be declared a Bankrupt, and to be discharged from his debts under the act of Congress, in such case made and provided; and that an order has been entered in this court appointing the second day of April next at the District Court Room in the city of Springfield in this District, as the time and place for hearing of said petition; all persons interested may then and there appear and show cause, if any they have, why the prayer of said petition should not be granted."[100] Notices of this nature were regularly published throughout the bankruptcy proceedings. After listing the various creditors an inventory of assets was required. Mr.

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[98] Ibid.

[99] *In Re Arnold, LPAL; In Re Craw, LPAL; In Re Dishon, LPAL,; In Re Gaines, LPAL; In Re Hollenbuck, LPAL; In Re Hope, LPAL; In Re Legier, LPAL; In Re Paddock, LPAL; In Re Snider, LPAL; In Re West, LPAL; In Re Wilmans, LPAL.*

Dishon's creditors reflected a number of bills on account and promissory notes that had not been paid. A review of this petition indicates that credit was freely given to Mr. Dishon. He had fairly significant bills on account of $900, $800, $750, $480, $370, and the list goes on totaling $8,920.03. His meager assets totaled $1,223.68.[101] The list of assets reflects personal property of the most basic order. For example, one wash tub valued at seventy-five cents, one tea kettle valued at twenty-five cents, one set of spoons valued at fifty cents.[102] The minutiae of everyday existence was exposed to the community during this economic emasculation. Financial relief came, but a price was paid in privacy and shame. Mr. Dishon was ultimately relieved from his debts and given a second economic chance, which was something Lincoln could empathize with as a former judgment debtor.

Of Logan & Lincoln's seventy-two litigants who took advantage of the 1841 Bankruptcy Law, one petitioner went too far. Charles Chapman sought protection from his creditors in bankruptcy, but committed perjury in the process. Rather than truthfully list his assets, Chapman secreted them by omitting some from his petition and fraudulently transferring others to his mother.[103] The case created a great deal of interest in Springfield. Logan & Lincoln defended Chapman during a four-day trial. According to the *Alton Telegraph* they "did every thing on earth that men could do for him."[104] The efforts, however, were to no avail as the jury was "out but a few moments when they returned into court a verdict of GUILTY."[105] Chapman was sentenced to the maximum

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[100] *In Re Dishon, LPAL.*
[101] *In Re Dishon, Petition in Bankruptcy*, *LPAL.*
[102] Ibid.
[103] *U.S. v. Chapman, LPAL.*
[104] *Alton Telegraph*, December 28, 1844; *U.S. v. Chapman, LPAL.*
[105] *Alton Telegraph*, December 21, 1844; *U.S. v. Chapman, LPAL.*

term of incarceration under the law; "five years at hard labor in the Penitentiary at Alton."[106]

The Bankruptcy Act was repealed in 1843. In total "33,739 persons took advantage of its benefits…the amount of debt involved was $440,934,000 and the amount of property surrendered by the debtor $43,697,357."[107] The general consensus was that the law was successful and served its purpose despite some fraudulent attempts to defeat its intent. Creditors, however, growing wary of the degree to which debtors were being discharged of their arrears pressured the Congress for repeal.[108]

Continuities

Logan's demanding style of practice, Lincoln's appearances before the Illinois Supreme Court, increase in jury trials, and the development of a Bankruptcy practice separated Lincoln's first and second law partnerships. There were, however, some areas of Lincoln's legal life that remained constant. Debt collection continued to comprise a significant portion of Lincoln's practice with Logan as it did with Stuart. Attaching property, selling real estate to pay debts and actions for replevin were the main categories by which Lincoln petitioned the court to access property. The courts continued to keep the antebellum economy moving by executing judgments and functioning as a clearinghouse for the economic complaints of antebellum Illinois.[109] In fact debt

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[106] *Alton Telegraph*, December 28, 1844; *U.S. v. Chapman, LPAL.*
[107] Warren, *Bankruptcy*, 81.
[108] Ibid., 79-92.
[109] Logan & Lincoln handled thirteen attachment cases, sold real estate to pay debts on fourteen occasions and were involved in fifteen replevin actions, *LPAL.*

collection would remain a central component for Lincoln & Herndon, Lincoln's third and final law partnership as well.[110]

Divorce cases also continued to form part of Lincoln's legal cases. In divorce proceedings, Logan & Lincoln, like Stuart & Lincoln, represented both men and women. Of the twelve cases, Lincoln represented wives six times and husbands six times.[111] Desertion and adultery were the most often complained of marital digressions. The husband's complaints were for either desertion or adultery or both. In some instances their wives ran off with other men. This was the scenario that predicated the action *Goodman v. Goodman.*[112] In *Goodman*, Nancy Goodman deserted her husband Solomon and "committed adultery with one Jacob Baker, and that she has ever since remained apart from your orator and lived in an open state of adultery with said Baker."[113] The predominant complaints of men were the adulterous affairs of their wives. It was particularly upsetting to them that these sexual transgressions were open and ongoing.

For women, on the other hand, desertion, extreme cruelty, and drunkenness were again the grounds most often alleged to dissolve their marriages. Desertion continued to be a problem for women as their husband's self-help divorce left them legally unable to remarry until they were legally divorced. The bills for divorce that articulate the grounds for divorce usually also state that the complaining party fulfilled their part of the marriage contract. The implication that marriage was based on a set of promises based upon a shared understanding of society's expectations of men and women prevailed throughout

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[110] In 1859 alone Lincoln & Herndon handled over ninety debt collection cases, *LPAL.*
[111] *Alger v. Alger*, *LPAL*; *Bancom v. Bancom*, *LPAL*; *Clark v. Clark*, *LPAL*, *Gentry v. Gentry*, *LPAL*; *Goodman v. Goodman*, *LPAL*; *Hill v. Hill*, *LPAL*, *Jackson v. Jackson*, *LPAL*; *McDaniel v. McDaniel*, *LPAL*; *Miller v. Miller*, *LPAL*; *Wallace v. Wallace*, *LPAL*; *Wilson v. Wilson*, *LPAL*; *Wren v. Moss*, *LPAL.*
[112] *Goodman v. Goodman*, *LPAL.*
[113] Bill for Divorce, *Goodman v. Goodman*, *LPAL.*

Lincoln's first two partnerships. Family law would continue to occupy Lincoln's legal mind even as the events of the 1850s propelled the nation toward Civil War.[114]

The third aspect of Lincoln's law practice that remained somewhat constant during his tenure with Stephen Logan was riding the circuit. Although the difference between the two partnerships reveal Lincoln assuming much more responsibility for this aspect of the practice with Logan. As Illinois continued to grow and develop a market economy, the circuit courts expanded their caseloads. Although Logan & Lincoln had an active practice in Springfield, Lincoln still rode the circuit. [115] This meant that Lincoln would remain away from home for extended periods of time. While practicing with John Stuart, Lincoln was single. While working with Stephen Logan, Lincoln was a married man. Lincoln was married to Mary Todd on November 4, 1842, and circuit riding began to generate tension for Lincoln as the pull of the circuit conflicted with the demands of domestic life. Lincoln's absences from home remained a problem for Lincoln's marriage throughout his career as a lawyer.[116] Circuit practice as we will see in chapter six regularly drew Lincoln out of Springfield for the remainder of his years at the bar.

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[114] In 1859 Lincoln & Herndon handled five divorce cases. *Berry v. Berry*, LPAL (Sarah Berry retained Lincoln & Herndon to sue her husband Benjamin Berry after Mr. Berry pled guilty t forgery and was sentenced to three years in the state penitentiary. The divorce was granted); *Clark v. Clark*, LPAL (Jane Clark sued her husband Henry Clark for divorce on the grounds of drunkenness, and also made a claim for child custody. Lincoln & Herndon appeared for Henry Clark. The Court granted the divorce); *Dennis v. Dennis*, LPAL (Rachel Dennis sued her husband Frederick Dennis for divorce on the grounds of cruelty and drunkenness. Lincoln & Herndon appeared for Rachel Dennis and the divorce was granted on default.); *Dilard v. Dilard*, LPAL (Lincoln & Herndon represented Susannah Dilard in a divorce action claiming her husband William deserted her. The divorce was granted on default.); *Graham v. Graham*, LPAL (This case had elements of divorce, bastardy, and child custody all in one sordid tale of marital cruelty. Almira Graham retained Lincoln & Herndon to sue her husband James Graham for divorce on the grounds of cruelty and adultery. James Graham paramour in the adulterous affair was Amanda Kelly who claimed that James was the father of her bastard child. Almira Graham also sought the custody of her one child from the marriage. James Graham failed to appear in court and the divorce was granted on default.).

[115] On March 22, 1843 Logan & Lincoln had seventeen cases called on the Sangamon Circuit Court docket. On March 27, 1843, in Sangamon Circuit Court, Chancery division fifteen cases were continued and four dismissed. *Lincoln Day By Day*, vol. 1, 203-204.

[116] Strozier, *Lincoln's Quest for Union*, 45-65, 145-55.

Lincoln's life on the circuit also provided the energy that would fuse law and politics to Lincoln's professional life.

At the end of 1844, Logan decided to take his son David as a law partner. This meant it was time for Lincoln to move on. Logan and Lincoln's parting was amicable, but Lincoln once again found himself at a crossroads in his career. Lincoln was no longer serving as a state legislator, his son Robert was just over a year old, and he and Mary had recently bought a house. Lincoln was the head of a growing household and began to experience the benefits of eight years of hard work as an attorney. Lincoln decided it was time to assume senior status in a firm of his own and in December 1844, formed his third and final law partnership, which would last sixteen years: Lincoln & Herndon.[117]

[117] Chronology, *LPAL.*

CHAPTER FOUR

MR. LINCOLN AND BILLY

> Billy, I can trust you if you can trust me.
>
> Abraham Lincoln[1]

> It has always been a matter of pride with me that during our long partnership, continuing on until it was dissolved by the bullet of the assassin Booth, we never had any personal controversy or disagreement.
>
> William H. Herndon[2]

> I expect everyone to desert me except Billy.
>
> Abraham Lincoln[3]

A handshake and an expression of trust cemented the foundation of Lincoln's third and final law partnership. At sixteen years, it was also the longest of Lincoln's three law practices. In the last meeting in their law office, Lincoln spoke to "Billy," as he called William H. Herndon, about the future of their practice. '"How long have we been together?' Herndon answered 'over sixteen years.' 'We've never had a cross word during all that time, have we?' Lincoln queried. 'No, indeed we have not' replied

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[1] Herndon, *Life of Lincoln*, 211.
[2] Ibid.
[3] Wilson, *Herndon's Informants,* 622.

Billy."[4] In fact, Lincoln intended to continue his association with Billy after his tenure in the White House was over. Before Lincoln left for Washington as the President-elect he told Herndon to leave the Lincoln & Herndon sign "undisturbed" and "give our clients to understand that the election of a President makes no change in the firm of Lincoln & Herndon. If I live I'm coming back some time, and then we'll go right on practicing law as if nothing ever happened."[5] Of course neither man could know what the next four years would bring.

After practicing for eight years as a junior partner, first with John Stuart and then with Stephen Logan, Lincoln decided it was time to assume senior status in a firm of his own rather than sign on once again with a more established practitioner. This decision came with much more responsibility. Lincoln was now responsible for attracting the business necessary to sustain not only the firm, but his wife, year old son Robert, and the new home he recently purchased. Herndon, a novice at the bar, and "painfully aware" of his "want of ability and experience."[6] Herndon was "surprised" when Lincoln invited him to become his junior partner.[7] Various explanation have been proffered as to why Lincoln chose Herndon, but when asked Herndon said '"I don't know and no one else does.'"[8]

The Law Office

Herndon described a law office as "a dull, dry place so far as pleasurable or interesting incidents are concerned," but "if one is in search of stories of fraud, deceit, cruelty,

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[4] Herndon, *Life of Lincoln*, 390.
[5] Ibid.
[6] Ibid., 211.
[7] Ibid.
[8] Donald, *Lincoln's Herndon*, 20.

broken promises, blasted homes, there is no better place to learn them than a law office."[9] As Lincoln's partner Herndon learned much about these types of cases. He also discovered a lot about Lincoln in the process. The cases that comprised the Lincoln & Herndon association provided ample fodder for the vicissitudes of life that cause people to seek redress in a court of law. The records from the Law Practice of Abraham Lincoln indicate that Lincoln and Herndon were co-counsel in 1,428 cases.[10]

William H. Herndon, Lincoln's junior by nine years, was born on Christmas day, 1818. Like Lincoln, Herndon immigrated to Illinois from Kentucky. Thus all three of Lincoln's partners were native to the "Bluegrass State." In 1836 while Lincoln was preparing for admission to the bar Herndon was enrolled at Illinois College at Jacksonville. At college Herndon absorbed the influences of the faculty who were from New England, were highly critical of slavery, and openly embraced abolition. Herndon attended college for only a year and the reasons for his departure are conflicting. One theory has him leaving because his father disapproved of the abolitionist sentiments his son had acquired at college. Other reasons for Herndon's departure include poor academic performance, and the economic burden for his father in the aftermath of the 1837 economic panic.[11] In any case, Herndon came back to Springfield and clerked at Joshua Speed's store where he also roomed with Speed, Lincoln, and Charles R. Hurst. Herndon did not live in these bachelor's quarters long and was married on March 26, 1840, becoming a father the following year. As husband and father, this brought much responsibility and Herndon need some career direction.

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[9] Ibid., 268.
[10] "Statistical Portrait: Peers and Clients," *LPAL.*
[11] Donald, *Lincoln's Herndon*, 8-13.

Lincoln suggested that Herndon pursue a career as an attorney, and Herndon eventually studied law at the firm of Logan & Lincoln in 1842. Lincoln, therefore, had the chance to observe Herndon and apparently was impressed enough with his potential for a career in law to offer him a partnership shortly after Herndon's admission to the bar in 1844.[12] Lincoln also paid Herndon one half of the firm's fees, which was a generous arrangement as Herndon was a newly admitted attorney with little actual experience. It was also curious since Lincoln's previous partner, Stephen Logan, refused to share legal fees equally with Lincoln.[13] As Herndon reports, this monetary arrangement meant "if any one paid money to him which belonged to the firm, on arriving at the office he divided it with me. If I was not there, he would wrap up my share in a piece of paper and place it in my drawer—marking it with a pencil, Case of Roe v. Doe—Herndon's half."[14] One fellow who clerked for the firm observed Lincoln divide a $5000 fee with Herndon: "He came in and said: ' "Well Billy', addressing his partner, Mr. Herndon, 'here is our fee; sit down and let me divide.' He counted out $2,500 to his partner, and gave it to him with as much nonchalance as he would have given a few cents for a paper."[15]

Herndon as the "runt" of the firm was responsible for legal research and keeping the firms files and indexes up to date. For example, the firm possessed what was called a commonplace book, which contained legal research on a variety of legal topics.[16] This source served as a ready repository of cases and precedents on specific topics, which helped the courtroom lawyer more effectively present his case. Both partners drafted

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[12] "William H. Herndon," Biography, *LPAL*; See also David Donald, *Lincoln's Herndon*, 32-50; Donald, *Lincoln*, 100-103; Woldman, *Lawyer Lincoln*, 48-57; Duff*, Prairie Lawyer,* 97-118.
[13] "Narrative Overview,"*LPAL;* Duff, *Prairie Lawyer*, 116; Donald, *Lincoln*, 104.
[14] Herndon, *Life of Lincoln*, 268-69.
[15] Ibid., 256-57. This was the fee in the celebrated McClean County Tax case.
[16] Charles B. Strozier, "The Lives of William Herndon," 1-13; Donald, *Lincoln's Herndon*, 36-38; Duff, *Prairie Lawyer*, 105-108; Donald, *Lincoln*, 102.

legal documents and handled cases in court. For the most part Lincoln rode the circuit, but on occasion Herndon did as well. Herndon did not take to the '"rough—semi barbarous'" life of the circuit like Lincoln did, and for the most part stayed in Springfield manning the office.[17] After 1849 when Menard County was severed from the Eighth Judicial Circuit, Herndon assumed responsibility for traveling to that county since it conflicted with the Eighth Circuit where Lincoln was the circuit rider. Lincoln and Herndon worked together as a team and had one of the busiest practices in Springfield.[18]

Herndon also provided a snapshot into the workings of this antebellum law office. Initially, Lincoln & Herndon worked from an office on the third floor in the Tinsley Building. After moving to smaller quarters while Lincoln was in Washington serving in the Thirtieth Congress, the firm eventually moved to the second floor of 105 South Fifth Street, where they remained until Lincoln returned to Washington as President.[19] The office itself was modest with a long table in the center of the room and a shorter one at the end. There was also an old-fashioned secretary with pigeonholes and a drawer where Lincoln and Herndon kept their legal papers. A bookcase contained a number of legal books for reference and there was an old sofa where Lincoln would plant himself upon arrival at the office and read the morning newspaper. Lincoln always read aloud "much to [Herndon's] discomfort."[20] Annoyed almost beyond the point of endurance, Herndon demanded to know why his partner must read this way. Lincoln replied: "When I read

[17] Donald, *Lincoln's Herndon*, 46.
[18] Strozier, "The Lives of William Herndon," 1-13; Donald, *Lincoln's Herndon*, 36-38; Duff, *Prairie Lawyer*, 105-108; Donald, *Lincoln*, 102.
[19] Duff, *Prairie Lawyer*, 111-12.
[20] Herndon*, Life of Lincoln,* 268.

aloud two senses catch the idea: first, I see what I read; second, I hear it, and therefore can remember it better." [21]

Lincoln's filing system lacked any organizational scheme. A bundle of papers told you "when you can't find it anywhere else, look in this."[22] Perhaps Lincoln's "circular" file was the most noteworthy. Herndon described Lincoln's hat as "an extraordinary receptacle."[23] Lincoln carried letters, financial statements and ideas that came to his mind on scraps of paper all contained in the lining of his hat.[24] The potpourri of people who came in and out of the office only compounded this disorganization. There were the clients of course, but the locals also stopped by to talk about the affairs of the day. Lincoln and Herndon also generously opened their office up to law students. Herndon, however, was primarily responsible for the supervision of these eager aspirants to the bar since Lincoln spent so much time on the circuit. Finally there were Lincoln's children who ran roughshod over the office, much to Herndon's chagrin. Herndon described the scene when Lincoln would bring his boys to the office: "[t]he boys were absolutely unrestrained in their amusement. If they pulled down all the books from the shelves, bent the points on all the pens, overturned inkstands, scattered legal-papers over the floor, or threw the pencils into the spittoon, it never disturbed the serenity of their fathers good nature."[25] Herndon, the father of six was also devoted to his children, took an interest in their education, played pranks and practical jokes with them, but was not overindulgent as his children "had to know their place."[26]

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[21] Ibid.
[22] Ibid., 254.
[23] Ibid.
[24] Ibid.
[25] Herndon, *Life of Lincoln*, 344.
[26] Donald, *Lincoln's Herndon*, 15-16.

The two men did, however, have different styles of practicing law. Lincoln's deliberate approach, with a willingness to concede technical points, but unyielding in his defense of the "nub" of the case contrasts with Herndon's hard-edged determination to hold fast on all legal technicalities and not give way on any legal point no matter how minor. Well described by his biographer, Herndon "questioned witnesses briefly and humorlessly; he spoke rapidly and positively; he made short, impassioned gestures; when he became heated he might explode into profanity. He was a man under tension."[27] One of Lincoln and Herndon's more significant differences was their willingness to defend fugitive slaves. As the next chapter details, Lincoln was ready, willing, and able to represent a slave owner to earn a fee. Herndon, on the other hand, defended the interests of the fugitive slave for free. Two significant cases emerge from the Lincoln & Herndon files that illustrate Herndon's commitment to the interest of the slaves.

The first case, like the Civil War to follow, pitted brother against brother. In *McElroy v. Clements*, William Herndon represented the fugitive slave, Frederick Clements, while his brother Elliott Herndon represented the slave owner, Hiram McElroy, Jr.[28] Attorney E. L. Austin served as co-counsel to Elliott Herndon, while John E. Rosett appeared with William Herndon on behalf on Clements. The testimony adduced before Stephen A. Corneau, United States Commissioner of the United States Commissioner's Court found that Clements, an alleged slave, had fled from McElroy's Kentucky farm in July 1856. Clements was found in Logan County, Illinois, and legal proceedings under the fugitive slave law were commenced.[29] The *Illinois State Register* reported that "[c]onsiderable sparring, of an interesting nature, occurred at the outset,

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[27] Ibid., 41.
[28] *McElroy v. Clements, LPAL.*

between Col. W.H. Herndon and E.B. Herndon, in relation to the examination of a certain power of attorney in the possession of the claimant's counsel."[30] Elliott Herndon objected to his brother William even appearing on behalf of the alleged runaway slave and argued that "nobody in the world has a right to contest the owner's claim to the negro. The court may admit counsel as advisory to itself, but not as attorneys for the alleged slave."[31] In defense of Clements, William Herndon demanded a strict application of the law, and true to his description was prepared to use any legal technicality to defend his client. Herndon claimed that since the claimant "appeals to the law," "let him follow it."[32] The law required that the claimant produce a proper power of attorney, since "[t]he presumption, when a negro is arrested in a free State, is that he is free, and the arresting agent must show his authority."[33] Herndon continued along these lines and argued that "a man has no right to arrest a slave at common law. There is no authority for it, except what the constitution gives him, and the claimant must strictly follow the law made in pursuance thereof."[34] The Commissioner found that the power of attorney given to Hiram McElroy, Jr. by his father was valid for purposes of seeking the return of the runaway slave, and, in fact, McElroy was entitled to his requested relief. Even though defeated, the *Daily Register* found that "[t]he counsel for the negro proved themselves to be worthy of the reputation they now possess; and Col. Herndon especially displayed those powers of eloquence for which he is distinguished, and which he undoubtedly does possess. He labored with a zeal worthy of any cause."[35]

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[29] *Illinois State Journal*, August 1, 1857; *McElroy v. Clements, LPAL.*
[30] *Illinois State Register*, August 1, 1857; *McElroy v. Clements, LPAL.*
[31] *Illinois State Journal*, August 1, 1857; *McElroy v. Clements, LPAL.*
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] *Illinois State Register, August 1, 1857*; *McElroy v. Clements, LPAL.*

The second case in which Herndon appeared on behalf of an alleged fugitive slave was *Dickinson v. Canton*.[36] In *Dickinson*, Herndon again displayed his willingness to latch onto any legal argument that he possibly could. Edgar Canton was a fugitive slave who had escaped from George M. Dickinson of Missouri in the fall of 1857. Canton was arrested in Sangamon County and Herndon came to his defense. At the commencement of the legal proceedings before Commissioner Corneau, Herndon asked for a postponement. The proffered reason was that Herndon was waiting for papers to arrive that would prove that Edgar Canton was a free man of color. Herndon also submitted an affidavit from the defendant swearing to his freedom. The court rejected Herndon's application for an adjournment.[37] Herndon was left with very little to argue without proof that Canton was free, and argued that "no proof had been offered of the existence of slavery in Missouri and he thought the Commissioner had to right to *presume* from historical knowledge that Missouri was a slave State."[38] This creative argument was rejected and Canton was sent back to slavery in Missouri. Canton, however, had the last laugh. He escaped once again and even came back to Sangamon County to say goodbye to some of his friends before he moved on to Canada and freedom. The *Illinois State Journal* published the following under the heading "Fugitive Poetry":

> Messrs. Editors: I presume most of your daily readers have not forgotten the fugitive slave case of Edgar Canton. A few weeks ago, he was tried, convicted, and sentenced to slavery for life. He has recently made his escape from slavery, and passed through this city, and gave some of his friends a hearty shake hand.
>
> And now is on his way to Canada,
> That cold and dreary land;
> The dire effects of slavery
> He could no longer stand.

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[36] *Dickinson v. Canton, LPAL.*
[37] *Illinois State Journal*, February 13, 1860; *Dickinson v. Canton, LPAL.*
[38] Ibid.

The hounds is baying on his track,
And his master just behind;
Says he resolved to bring him back
Before he shall cross the line.

Good by, my sable Brother,
We will not weep for thee;
Go on your way to Canada,
Where colored men are free."[39]

Herndon, like Lincoln's two previous law partners, also drew politics into the life of the law, and played the dual role of lawyer and politician. Herndon, however, was not as ambitious for elected office as either Lincoln or his previous partners who both had their eyes on a seat in Congress. Herndon's politics were local, and he was involved in countless community-based activities from picnics and parades to the founding of the Young Men's Lyceum in Springfield.[40] Herndon also served as mayor of Springfield from 1854 to 1855—a decidedly local office—which reflected the pride he took in his hometown.[41] Herndon was also Lincoln's sounding board while Lincoln served in Congress, thus becoming more than a law partner. Herndon was an important political advisor as well. In the 1850s Herndon, like Lincoln, also joined the nascent Republican Party. In 1856 Herndon was appointed to the party's state executive committee, which carried on the firm's tradition of melding law and politics. This fusion bore fruit as Lincoln became the Republican Party's "first and only choice for United States Senator" in 1858.[42] The Lincoln & Herndon firm embodied the law/politics axis that was also evident in Lincoln's two earlier law partnerships, thus making this law office not only a place of business but a lyceum for the exchange of political ideas.

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[39] *Illinois State Journal*, March 16, 1860; *Dickinson v. Canton, LPAL.*
[40] Donald, *Lincoln's Herndon*, 60.
[41] Angle, *"Here I Have Lived,"* 162-183.
[42] Herndon, *Life of Lincoln*, 324.

There was also an intellectual complexity to Herndon that needs to be appreciated. Herndon came to '"hate the law,'" but loved the life of the mind.[43] Herndon's thirst for knowledge seemed to be boundless. From his return from Illinois College, Herndon read voraciously and acquired books by the dozen. Authors such as "Darwin, Kant, Spencer, Renan, Locke, Fichte, Buckle, [and] Froude" adorned Herndon's bookshelves, and periodicals such as the *Westminster Review* and the *Atlantic Monthly* were part of his regular subscriptions.[44] Herndon estimated that his library cost four thousand dollars, which was a significant expenditure in antebellum Illinois, and was considered "one of the best private libraries in the West."[45] Herndon carried on a correspondence with the Transcendentalist thinkers from New England, most prominent among them, Theodore Parker. Herndon's "free thinking" philosophy found expression in issues such as women's rights, temperance, and of course the plight of the slave.[46]

Part of Herndon's legacy involves his drinking. Herndon drank just about as much as anyone else did on the edge of the urban frontier. On occasion, he drank to excess, but seemed to understand the ill effects of alcohol on him and his family. Through his wife's prompting, he came to embrace temperance, and when he was elected Mayor in 1854, he pressed for the imposition of prohibition in Springfield.[47] The drink, however, did get Herndon into trouble on occasion. Lincoln had to come to Herndon's rescue when "Billy" and some friends drank too much, went on a bit of a rampage and broke some tavern windows. Lincoln paid for the property damage, which kept Herndon from going to jail.

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[43] Donald, *Lincoln's Herndon*, 49, Donald quoting correspondence between Herndon and Theodore Parker. Donald provides an excellent examination of the intellectual undercurrents that ran through the mind of William Herndon in chapter four of *Lincoln's Herndon* entitled "A Good Position in Society." This section of the present dissertation draws extensively from Donald's chapter.
[44] Ibid., 54.
[45] Ibid.
[46] Ibid., 57, 65, 66-67.

When Lincoln was advised to dismiss Herndon from the firm, Lincoln stuck up for his friend and said "I know my own business, I reckon. I know Billy Herndon better than anybody, and even if what you say is true I intend to stick by him."[48] Lincoln and Herndon were friends and thus they stuck up for each other.[49] For sixteen years these two men scratched out a livelihood from the countless problems that arose from people attempting to negotiate their way through daily life. Fate would hold a special place for William Henry Herndon; the man Lincoln called "Billy."

Herndon's place in Lincoln historiography, however, has been controversial, and "[a]nyone working on Lincoln has to deal with William Herndon."[50] Currently, scholars

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[47] Donald, *Lincoln's Herndon*, 67-71.
[48] Herndon, *Life of Lincoln*, 211; Donald, *Lincoln's Herndon*, 126.
[49] For a discussion of Lincoln and his friendship with Herndon see David Donald, *"We Are Lincoln Men;" Abraham Lincoln and His Friends,* New York: Simon & Schuster, 2003, 65-100.
[50] Strozier, *Lincoln's Quest for Union*, xvii; See Douglas L. Wilson *Lincoln Before Washington New Perspectives on the Illinois Years*, Urbana and Chicago: University of Illinois Press, 1997, 21-36. Wilson challenges the various historians who have sullied the reputation of William H. Herndon with respect to his knowledge of Lincoln as well as the truth and veracity of various recollections about Lincoln that Herndon spent twenty-five years collecting. Wilson begins his chapter on Herndon's Legacy by asking "Why is that the name William H. Herndon is Mudd? How does it happen that the man who interviewed and corresponded with scores of Abraham Lincoln's friends and acquaintances, who carefully preserved the resulting documents and information for posterity, who freely shared with all comers his personal knowledge of his law partner in hundreds of letters and interviews, who fearlessly challenged the hagiographers attempting to transform a mortal politician into a martyred saint, and who, in the face of strong opposition and popular derision, championed veracity in all matters and insisted that the greatness of Abraham Lincoln could not be diminished by the truth--how does it happened that such a man should be so mistrusted by the great Lincoln scholars, so belittled by his biographer, and so disparaged by others that we should find him, as we do today, in the doghouse of Lincoln scholarship?" Ibid., 21. Wilson examines the role historians such as Paul M. Angle, James G. Randall and David Donald had in creating the "unenviable reputation he (Herndon) presently enjoys." Ibid., 22. Paul Angle was the first to question Herndon's evidence in relation to the Ann Rutledge story. James G. Randall also uses the Ann Rutledge story to indict Herndon as a historian. The thrust of Wilson's criticism on this point is that this had the effect of calling into question the entire body of Herndon's research. Wilson, however, reserves the bulk of his criticism for David Donald. While praising Donald's book as an "extremely impressive piece work," Wilson nonetheless claims that Donald was unfair in his treatment of Herndon and due to the success of Donald's book, Herndon's place in Lincoln historiography was fixed. This historiographical viewpoint led others such as Ruth Painter Randall and John J. Duff to "go further and picture [Herndon] as a biographical assassin." Wilson takes issue with some of the charges usually levied against Herndon such as his drinking, his ability as an investigator, his relationship with Mary Todd Lincoln. He also questions the degree to which scholars have examined the entire body of evidence that Herndon collected and reestablishes the need to revisit the Herndon legacy and restore him to his rightful place in Lincoln historiography.

are recognizing Herndon's central place in the life of Lincoln. This is especially true regarding his law practice. There is no other individual who spent more time practicing law with Lincoln than Herndon. Their partnership was twice as long as Lincoln's two other law partnerships combined. Moreover, Herndon's association with Lincoln spanned Lincoln's first and only term in Congress, the passage of the Kansas/Nebraska Act, Lincoln's re-emergence to the public stage, the formation of the Republican party, Lincoln's two campaigns for the U.S. Senate, the fallout over the *Dred Scott* decision, the Lincoln–Douglas debates, and ultimately Lincoln's election to the presidency. Herndon has much to offer the historian on Lincoln the lawyer, especially during those turbulent times.

As the "runt" of the firm, Herndon had to prove his stripes. Just two years after Lincoln offered him the partnership, Herndon had to run the office on his own since Lincoln was off to serve in the Thirtieth Congress. Herndon found himself in the same place that Lincoln did when Lincoln first began practicing law with John Stuart, his first partner. In both situations, a novice at the bar was left to run the firm while the senior

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See also Charles B. Strozier, "The Lives of William Herndon", *Journal of the Abraham Lincoln Association,* Vol. 14, No. 1, 1993, pp.1-13. In this article Strozier points out that "Herndon knew Lincoln longer and saw him in more varied public, private, and work situations than did any other man or woman except for Mary who left a much less compete record." Ibid., 4. Strozier also points out in this article that Herndon was committed to telling "God's naked truth" about Lincoln. Ibid., Wilson, in his work on Herndon cites the end of David Donald's book in which Donald confirms Strozier's claim about Herndon's commitment to the truth. Citing Donald, Wilson claims that while Donald tried to give Herndon his due it was much to little and much too late in the book to do any good. Wilson cites Donald: "There is not, to the present writer's knowledge, a single letter or other manuscript of Herndon's that reveals a desire or willingness to tell an untruth about Lincoln…Herndon may have been in error, but he was not a liar." Wilson, *Herndon's Informants*, 25. See also, Wilson, *Honor's Voice*, 7-15.

Herndon should not be accepted blindly, but his evidence should be interrogated by the standard tests of evidence applied to historical documents. Some things Herndon could not know first-hand and had to rely on the testimony of others. A law partnership that lasted sixteen years, however, is another story. Here Herndon is on solid ground and the focus of this dissertation, Lincoln the lawyer, demands Herndon's attention.

man went off to Washington. Herndon rose to the occasion and not only kept Lincoln & Herndon afloat, but proved to be a trusted political advisor as well.

Lincoln the Lawyer in Congress

Since leaving the Illinois State legislature at the end of his fourth term in 1841, Lincoln set his ambition on a larger political prize. Once John Stuart, Lincoln's former law partner, announced he would not seek another term in Congress, the campaign for Illinois' seventh congressional seat began. Competing with Lincoln for the Whig party's nomination were Edward Baker and John Hardin. Lincoln worked hard as a party regular, but ironically was subjected to claims that he was the candidate of wealth given his marriage to Mary Todd.[51] Hardin ultimately received the nomination and was elected. Lincoln, however, was able to achieve a consensus among the delegates that Baker would be the most suitable candidate in the next election, which then committed the Whig party to a policy of rotation of candidates every two years. With this political strategy in place, Lincoln expected to be the Whig's choice after Baker. As the political calendar unfolded this is exactly what happened and Lincoln received the Whig party's nomination for the seventh congressional seat for the 1846 election.[52]

Lincoln faced a formidable candidate in the Democrat challenger Peter C. Cartwright. Cartwright was a circuit-riding Methodist minister, devout and committed to Jacksonian democracy. Thus the itinerant preacher competed with the itinerant lawyer for the congressional prize. While Lincoln needed patience to gain the Whig nomination, against Cartwright he had to face the indictment of infidel. As the election entered the

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[51] Herndon, *Life of Lincoln*, 214; Donald, *Lincoln*, 111; Beveridge *Abraham Lincoln*, I, 360.
[52] Herndon, *Life of Lincoln*, 215-218; Donald, *Lincoln*, 112-114; Oates, *With Malice Toward None*, 75-6; Thomas, *Abraham Lincoln*, 104-7.

final months, Cartwright began to publicly question Lincoln's religious beliefs and insinuated that Lincoln was a heretic.[53] This was a damning accusation and could not go unanswered. Lincoln responded with a published handbill, which stated that "It is true that in early life I was inclined to believe in what I understand is called the "Doctrine of Necessity'-that is, that the human mind is impelled to action, or held in rest by some power, over which the mind itself has no control; and I have sometimes (with one, two or three, but never publicly) tried to maintain this opinion in argument."[54] Lincoln continued in his response to the charges levied against him, "I do not think I could myself, be brought to support a man for office, whom I knew to be an open enemy of, and scoffer at, religion."[55] Lincoln's circular also expresses his belief in the freedom of the individual conscience to practice religion. "Leaving the higher matter of eternal consequences, between him and his Maker," Lincoln continued, "I still do not think any man has the right thus to insult the feelings, and injure the morals, of the community in which he may live. If, then I was guilty of such conduct, I should blame no man who should condemn me for it; but I do blame those, whoever they may be, who falsely put such a charge in circulation against me."[56] Lincoln's swift response and concise statement of his beliefs proved to be an effective rebuttal to Cartwright's negative campaign and Lincoln won the election with a clear majority.

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[53] Herndon, *Life of Lincoln*, 218; Donald, *Lincoln*, 114; Thomas, *Abraham Lincoln*, 108; Strozier, *Lincoln's Quest for Union*, 195-96.
[54] *Collected Works*, I, 382.
[55] Ibid.
[56] Ibid. For Lincoln's religious views see Elton Trueblood, *Abraham Lincoln: Theologian of American Anguish,* New York: Harper & Row Publishers, 1973; Wayne C. Temple, *Abraham Lincoln: From Skeptic to Prophet,* Mahomet, Il: Mayhaven Publishing, 1995; Edgar DeWitt Jones, *Lincoln and the Preachers*, New York: Harper & Brothers Publishers, 1948; Francis Grierson, *Abraham Lincoln the Practical Mystic,* London: John Lane, The Bodley Head, 1919; Oates, *With Malice Toward None*, 28-9; Fraysse, *Lincoln, Land, and Labor,* 37-8.

Once in Washington, the influence of his legal training was revealed in in the "Spot Resolutions" and in the letters he exchanged with William Herndon.[57] One of the lawyer's basic discovery devices is the interrogatory. Interrogatories are written questions that a lawyer is permitted to pose to his adversary to learn more about the case. The questions are usually narrowly drawn to seek specific information about an issue in a lawsuit. The Mexican War provided Lincoln with the opportunity to use this legal tool in the political arena. Lincoln sought to question President Polk about the exact spot where American blood was shed at the outset of the Mexican War. The first of his eight interrogatories queried "[w]hether the spot of soil on which the blood of our *citizens* was shed, as in the messages declared, was or was not, within the territories of Spain, at least from the treaty of 1819 until the Mexican revolution."[58] Lincoln's argument ran that since the first shot did not occur on American soil, the pretext of the war was in question. Using the precision that was required to litigate a land dispute, Lincoln was hoping to pinpoint the "particular spot of soil on which the blood of our *citizens* was so shed was, or was not, *our own soil*, at that time."[59] For Lincoln this spot was the critical fact that would determine the justification for war. This demand was followed up by an amendment to a supply bill proposed by George Ashmun of Massachusetts challenging the constitutionality of the Mexican War, which Lincoln supported. Lincoln followed up his "Spot Resolutions" and vote on the "Ashmun Amendment" with a speech on the floor of the House that further developed his constitutional critique of President Polk's actions

[57] *Collected Works*, I, 420-22 for "Spot Resolutions" and *Collected Works*, I, 446-48, 451-52, 476-77, 490-92, 497-98, 499, II, 18-19 for letters to Herndon.
[58] *Collected Works*, I, 421.
[59] Ibid.

and once again demanded a response to his "Spot Resolutions."[60] In this speech Lincoln again focused on the "nub" of the question and sought to find the ground where American blood was first spilled. Convinced that president Polk could not provide the proof and was afraid to admit of the "spot," Lincoln the lawyer claimed that "[m]y way of living leads me to be about the courts of justice; and there, I have sometimes seen a good lawyer, struggling for his clients' neck, in a desperate case, employing every artifice to work round, befog, and cover up, with many words, some point arising in the case, which he *dared* not admit, and yet *could* not deny.[61] Lincoln still demanding the "spot," argued that if President Polk "can not or will not do this—if on any pretence, or no pretence, he shall refuse or omit it, then I shall be fully convinced, of what I more than suspect already, that he is deeply conscious of being in the wrong—that he feels the blood of this war, like the blood of Abel, is crying to Heaven against him."[62] Polk ignored Lincoln. Lincoln's constituents, however, were paying close attention.

Back home in Springfield, Lincoln's speech aroused political concerns. Lincoln's constituents began to complain about his position on the war, especially to his law partner, Herndon. The congressman became known as "Spotty Lincoln" and Herndon began to realize that the seventh congressional district, normally a safe Whig seat, was in jeopardy.[63] Lincoln was castigated in democratic press: "[t]his gentleman has made his debut in Congress by the introduction of a preamble and resolutions on the subject of the precise "spot" where the first blood was shed in the present war. They…show conclusively that the littleness of the pettifogging lawyer has not merged into the

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[60] Ibid., 431-42.
[61] Ibid., 438.
[62] Ibid., 439.
[63] Herndon, *Life of Lincoln*, 226; Donald, *Lincoln*, 124-25.

greatness of the statesmen. We regret, as a citizen of Illinois, that a representative of our noble State should thus disgrace her, by offering such trash for the consideration of the grave and dignified legislature of this wide spread republic. Well may the patriotic people of the 7th distract lament that they have not a *Hardin* or *Baker* to represent them at this important crisis. Alas poor Spotty."[64]

Herndon, like Lincoln's other law partners, was also a political associate. Politically, Herndon was not only a sounding board for Lincoln's views, but also served as a conduit for Lincoln's congressional decisions back in Springfield. Writing Herndon from Washington after the "Spot Resolutions" Lincoln stated that "[t]he only thing I wish to talk to you about at once, is that, because of my vote for Mr. Ashmun's amendment, you fear that you and I disagree about the war. I regret this, not because of any fear we shall remain disagreed, after you shall have read this letter, but because, if *you* misunderstand, I fear other good friends will also."[65] Lincoln was doing more than trying to convince Herndon when he wrote "[t]hat the vote affirms that the war was unnecessary and unconstitutionally commenced by the President; and I will stake my life, that if you had been in my place, you would have voted just as I did."[66] Lincoln knew he could trust Billy and wanted to know what he thought. If Herndon could not be convinced about Lincoln's position on the war, then his "other good friends" surely could not. Honor and trustworthiness were prized attributes in Lincoln's day and he appealed to this sensibility as he wrote Herndon asking "[w]ould you have voted what you felt you knew to be a lie? I know you would not. Would you have gone out of the House--skulked the vote? I expect not. If you had skulked one vote, you would have had to skulk many more, before

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[64] Donald W. Riddle, *Congressman Abraham Lincoln*, Urbana: University of Illinois Press, 1957, 36.
[65] *Collected Works*, I, 446.

the end of the session. Richardson's resolutions, introduced before I made any move, or gave any vote upon the subject, make the direct question of the justice of the war; so that no man can be silent if he would. You are compelled to speak; and your only alternative is to tell the *truth* or tell a *lie*. I can not doubt which you would do."[67] The decision to go to war raised questions of patriotism that had the potential to sully the reputation of Lincoln if branded unpatriotic. In this letter Lincoln was careful to point out that "[t]his vote, has nothing to do, in determining my votes on the questions of supplies. I have always intended, and still intend, to vote supplies…"[68] Lincoln, however, was bucking public opinion and the military spirit ran high in Illinois. "The masses in Illinois have committed themselves to the war; 6,000 men enlisted. They cannot accept the politically motivated questions of the justness of the war. Mr. Lincoln and the faction to which he has pinned his faith at the outset of his congressional career may throw in the way of the administration as many obstacles to the prosecution of the war as their ingenuity can invent, but they will find that the masses-—the honest and patriotic citizens of Illinois—will mark their course and condemn them."[69] This prophesy proved correct.

Herndon's position on the war-making powers of the commander in chief was expansive and would give the president the authority to commence a pre-emptive strike if necessary. Herndon argued that "the President of the United States is Commander-In-Chief of the Army and Navy; that as such commander it was his duty, in the absence of Congress, if the country was about to be invaded and armies were organized in Mexico for that purpose, to go if necessary into the very heart of Mexico and prevent the

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[66] Ibid.
[67] Ibid, 446-47.
[68] Ibid., 447.
[69] Riddle, *Congressman Abraham Lincoln*, 36.

invasion."[70] Lincoln questioned this slippery constitutional slope and reviewed the war-making powers concluding that "[t]he provisions of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where Kings have always stood."[71] Again Lincoln found meaning in law as he took a principled stand against President Polk's unconstitutional use of executive power. The Constitution, in Lincoln's view, was clear on this point, and reverence for the law remained a cornerstone of Lincoln's jurisprudence ten years after his Lyceum Address. This judicial philosophy, however, was about to collide with the harsh realities of political life.

The political situation back in Springfield made Herndon anxious. He was concerned that his partner was about to commit "political suicide."[72] Herndon needed to alert Lincoln to the fact that so many supporters were upset over Lincoln's criticism of the Mexican War that there were "extensive defections from the party."[73] Herndon needed to be blunt with Lincoln about the "public disappointment over his course" (of

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[70] Herndon, *Life of Lincoln*, 224.
[71] *Collected Works*, I, 451-52.
[72] Herndon, *Life of Lincoln*, 226; For a refutation of the "political suicide" thesis see Gabor S. Borit, "Lincoln's Opposition to the Mexican War," *Journal of the Illinois State Historical Society*, Feb. 1974, 79-100. Borit challenges Herndon's claim that Lincoln committed "political suicide" claiming that "[t]o accept Herndon's interpretation is to deny that Lincoln in 1848 was the pragmatic politician he otherwise appeared to be throughout his life." Ibid., 80. See also, Paul Findley, *A. Lincoln: The Crucible of Congress, The Years Which Forged His Greatness*, Fairfield, California: James Stevenson Publisher, 2004, 209-19.
[73] Herndon, *Life of Lincoln*, 226.

action), but could not threaten Lincoln since "Lincoln was not a man who could be successfully threatened."[74] The Democratic Press, however, was having a field day.

> That as citizens of the seventh congressional district of Illinois we can but express the deep mortification inflicted upon us by our representative in Congress, in his base, and treasonable assault on President Polk, in his disgraceful speech upon the present war, and in the resolutions offered by him against his own government, in flagrant violation to the views of a majority of our congressional electors. That this district has often been afflicted with inefficient *per diem men*, or unfortunate representation, but never until now has it known disgrace so black, so mortifying , so unanswerable. Such insulting opprobrium cast upon our citizens and soldiers such black odium and infamy heaped upon the living brave and illustrious dead can but invite the indignation of every true Illinoian, the disgust of republicans and condemnation of men. Therefore henceforth will this Benedict Arnold of our district be known here only as Ranchero Spotty of one term.[75]

Thus Lincoln paid for his political principle in the press, and ultimately the Whig party would pay at the polls when Lincoln's former partner, Stephen T. Logan, lost the congressional race for a seat that was once considered a safe Whig seat.

Lincoln, after expressing how "heart-sickening" it was to read Herndon's letter, nonetheless, remained optimistic and was more concerned with the 1848 presidential campaign for Zachary Taylor. Lincoln campaigned actively for Zachary Taylor election in 1848. In developing strategy Lincoln enlisted the help of Herndon. Advising his partner from Washington, Lincoln did not want Herndon to wait for the older men to come and get him, but to pull together the young men of Springfield and take the initiative in the coming political season. Lincoln told Herndon "[y]ou young men get together and form a Rough & Ready club, and have regular meetings and speeches. Take in everybody that you can get, Harrison Grimsley, Z.A. Enos, Lee Kimball, and C.W. Matheny will do well to begin the thing, but as you go along, gather up all the shrewd wild boys about town. Whether just of age, or a little under age--Chris: Logan, Reddick

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[74] Ibid.

Ridgely, Lewis Zwizler, and hundreds such. Let everyone play the part he can play best--some speak, some sing, and all hollow. Your meetings will be of evenings; the older men and the women will go to hear you; so that it will not only contribute to the election of "old Zach" but will be an interesting pastime, and improving to the intellectual faculties of all engaged."[76] Lincoln underscored the importance of this endeavor when he warned Herndon: "Don't fail to do this."[77] Here the law partners were working together not in the legal arena, but as political partners with the senior partner developing strategy.

At this point it is worthwhile to examine the type of chief executive Lincoln envisioned. The philosophy of the Lyceum Address is once again evident as the laws—here the laws originating in Congress—must be obeyed save the exceptional circumstance. In a fragment of Lincoln's writings on what General Taylor should say in his campaign rhetoric, he concluded that "were I president, I should desire the legislation of the country to rest with Congress, uninfluenced by the executive in its origin or progress, and undisturbed by the veto unless in very special and clear cases."[78] This passive president in the political sphere is analogous to the attorney who sees no need to challenge the law. The law is presumed just because the people have passed it. Lincoln developed this theme in more detail in an address to the House of Representatives on July 28, 1848. Discussing the president's veto power, Lincoln cited Thomas Jefferson's views on the veto power and quotes the following: "It must be admitted, however, that, unless the President's mind, on a view of every thing, which is urged for and against this bill, is tolerably clear that it is unauthorized by the constitution; if *pro* and *con* hang so even as

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[75] Riddle, *Congressman Abraham Lincoln*, 38.
[76] *Collected Works*, I, 490-91.
[77] Ibid., 491.
[78] Ibid.

to balance his judgment, a just respect for the wisdom of the legislature, would naturally decide the balance in favor of their opinion: it is chiefly for cases, where they are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President. February 15—1791—Thomas Jefferson"[79] Lincoln envisioned a president that would be clearly subordinate and by implication indifferent to the will of the majority as expressed through law. Lincoln boiled the matter down to its "nub" and argued "In substance it is this: The people say to Gen. Taylor 'If you are elected, shall we have a national bank?' He answers 'Your will, gentlemen, not mine' 'What about the Tariff?' 'Say yourselves.' 'Shall our rivers and harbors be improved?' 'Just as you please' "If you have a bank, an alteration of the tariff, internal improvements, any, or all, I will not hinder you; if you do not desire them, I will not attempt to force them on you.'"[80] This is the political equivalent of the indifference the Lyceum mentality could produce. The majority's will be done. This also seems reflective of Tocqueville's commentary on respect for law in the United States where he claims that law originating from the people garners respect and claims that "[t]his popular origin, though often damaging to the wisdom and quality of legislation, gives it peculiar strength."[81] Lincoln expressed an almost religious faith in the people in this speech when he argued "[t]hat we are right, we can not doubt. We hold the true republican position. In leaving the people's business in their hands, we can not be wrong. We are willing, and even anxious, to go to the people, on this issue."[82] This supreme confidence in the "principle of allowing the people to do as they please with their business" would be belied by the Kansas/Nebraska

[79] Ibid., 502.
[80] Ibid., 503-4.
[81] Tocqueville, *Democracy In America*, 240.
[82] *Collected Works*, I, 506-7.

Act just six years later. Lincoln's blind faith in the people would be cast aside by his claim that the people "do not have the right to do wrong."[83] In both law and politics Lincoln of the 1840s practiced what he preached—reverence for the law. The consequences of this attitude caused him to defend a slaveholder that demonstrated indifference, which is described in the next chapter, take a principled position on the Mexican War, and argue for the election of a president that would passively accept the will of the majority. Taylor was elected, but the political fallout from the "Spot Resolutions" back home in Illinois hit Lincoln hard.

Herndon's concerns about Lincoln's views on the Mexican War proved to be legitimate. Stephen T. Logan, Lincoln's former law partner was in line to run for the seat Lincoln had agreed to rotate. Logan's endorsement of Lincoln's "Spot Resolutions" helped cost him the election. Logan's opponent used this position against him claiming Logan was unpatriotic.[84] The charge stuck was particularly effective since Logan's opponent was Thomas Harris, a veteran of the battle of Cerro Gordo. Logan lost by 106 votes. Lincoln had won the seat by a margin of 1,500 votes two years before. When Lincoln was asked about the election results he stated that "I would rather not be put upon explaining how Logan was defeated in my district. In the first place I have no particulars from there, my friends, supposing I am on the road home, not having written me. Whether or not there was a full turnout of the voters I have as yet not learned. The most I can now say is that a good many Whigs, without good cause, as I think, were unwilling to go for Logan and some of them so wrote me before the election. On the other hand Harris was a Major of the war, and fought at Cerro Gordo, where several

[83] Ibid., III, 315.
[84] Donald, *Lincoln*, 133.

Whigs of the district fought with him. These two facts and their effects, I presume tell the whole story."[85] It is hard to pin the entire blame for Logan's defeat on Lincoln. Logan has been described as a poor campaigner and when Logan lost the election for a seat on the Illinois Supreme Court in 1855, Lincoln claimed that "Logan is worse beaten than any other man ever was since elections were invented."[86] Had Logan prevailed in the Congressional race, however, Lincoln and his first two law partners would have shared not only a legal partnership, but also the same seat in the U.S. House of Representatives thus underscoring the confluence of law and politics in Lincoln's professional life.

Lincoln and Herndon had a special relationship that transcended the legal arena. They were political allies who respected each other, and Lincoln was fortunate to have a man like Herndon who was free to tell him what he thought. The best political advice is always free from the sugar coat. Although Lincoln served only one term in Congress, it revealed the twofold nature of the partners' professional relationship. The dual axis of Lincoln's professional life—law and politics—found free expression in the firm of Lincoln & Herndon.

Back in Springfield, however, Herndon was doing more than dispensing political advice to Lincoln. Herndon was working hard to make sure that Lincoln & Herndon continued to thrive as an important firm in Springfield's legal community. Lincoln had two extended absences from Springfield as a Member of Congress. The first was for about a year—from October 1847 through October 1848.[87] Lincoln's second session in Congress kept him away from Springfield for a shorter period of time—November 1848

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[85] *Collected Works*, I, 518.
[86] Ibid., II, 313.
[87] Miers, *Lincoln Day By Day*; "Lincoln Chronology," *LPAL*.

through March 1849.[88] During these two years the partnership caseload dipped to just over one hundred cases which was the lowest of any of Lincoln's three partnerships.[89] Herndon's caseload was litigated primarily in Sangamon and Menard County Circuit Courts. These matters, were routine, but important, nonetheless to Herndon who was still a novice and learning the application of law to daily life. Breach of contract, debt collection, and real property were the most common type cases Herndon litigated while Lincoln was in Washington.[90] *Bennett v. Bennett* was a typical debt collection in which the court sold a litigant's real estate to pay a debt.[91] In *Bennett*, Theodorick Bennett died with insufficient assets to pay the estate's $1,830.83 in debts. The administrator of the estate, John Bennett, retained Herndon to sue the estate's only heir, Lucy Bennett. Herndon petitioned the court to sell the estates 120 acres of land in Sangamon County to satisfy the debts. The court ruled in favor of Herndon's client.[92] *Heflin & Anno v. Browne* was a breach of contract action case in which Herndon was retained by Heflin & Anno to sue Browne for failing to honor a contract to cultivate, harvest, and deliver twenty five acres of hemp to Browne.[93] Herndon's client prevailed and was awarded seven dollars in damages.[94] The third main area of practice Herndon litigated while Lincoln was in Washington was mortgage foreclosure. In *Motter v. Motter et al,* Francis Motter gave Louis Motter a note for $1,682 and secured the note with a mortgage on 120 acres of land.[95] Francis Motter died without satisfying the note and Louis Motter sued the estate in an action to foreclose on the mortgage. Herndon's client was awarded a

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[88] Ibid.
[89] "A Statistical Portrait, Partnership Case Levels By Year," *LPAL.*
[90] *LPAL.*
[91] *Bennett v. Bennett, LPAL.*
[92] Ibid.
[93] *Heflin & Anno v. Browne, LPAL.*
[94] Ibid.

judgment for $1,985.32.[96] These cases, the bread and butter of antebellum practice, kept the firm in business while Lincoln was in Washington. Before leaving Washington, however, Lincoln argued his first case before the United States Supreme Court.

Lewis for use of Longworth v. Lewis appeared on the United States Supreme Court docket for oral argument on March 7, 1849, just days after Lincoln concluded his service in the Thirtieth Congress.[97] The case involved the interpretation of a statute of limitations. The facts reveal that in 1819 William Lewis bought 390 acres of land in Ohio from Broadwell for $9,500. Broadwell did not own one hundred of the acres when he sold the land to William Lewis. The true owner, Matthews, ejected William Lewis from the one hundred acres. After Broadwell died, William Lewis commenced suit in an action of covenant and claimed $3,000 in damages. Lincoln represented Thomas Lewis who was the public administrator of Broadwell's estate and defended the case on the grounds that the applicable period in which to start a lawsuit had passed. At issue was whether or not William Lewis commenced suit within the applicable period of time. There were two Illinois statutes that governed the case. An 1827 statute stated that a covenant action had to be commenced within sixteen years after the cause of action, but that non-Illinois residents were exempt. An 1837 statute repealed the exemption. Lincoln argued that the time period began to run from 1827 and thus the plaintiff waited too long and should have the case dismissed. Chief Justice Roger Taney ruled against Lincoln and held that the suit was timely commenced. This would not be the last time Lincoln disagreed with Taney.

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[95] *Motter et al v. Motter, LPAL.*
[96] Ibid.
[97] *Lewis for use of Longworth v. Lewis, LPAL.*

Washington, D.C., was not kind to Lincoln. He left town with the disparaging nickname, "Spotty Lincoln," lost his case before the nation's highest tribunal, and headed home to a political career that was at a dead end. It was time for Lincoln to rebuild his law practice. After serving his only term in Congress, Lincoln's professional prospects pointed him back to the law. Lincoln's political future seemed questionable at best. Lincoln's political influence in Washington was also at its nadir. Lincoln's hope to influence politics through political appointments was met with resistance from the newly elected Taylor administration. The best Lincoln could hope for in terms of a political assignment was the Governorship of the Oregon territory, which he rejected.

Lincoln & Herndon's caseload was significantly diminished as the new decade began. Attributed to Lincoln's absence from Springfield, the firm's caseload fell from approximately two hundred fifty cases when the partnership began to about one hundred fifty upon Lincoln's return from Washington.[98] Herndon had been doing an admirable job of keeping the practice afloat, but one man could only do so much. In fact, Lincoln offered Herndon the chance to withdraw from the partnership since Herndon was largely responsible for obtaining the paucity of the firm's clients during Lincoln's absence in Washington.[99] "Billy," of course, remained loyal to Lincoln. These were hardly the professional conditions that would produce a "prelude to greatness." A married man with a family and home to support needed an income. Lincoln had but one viable option, and that was practicing law. Grant Goodrich, a Chicago practitioner, offered Lincoln a partnership, but Lincoln declined the chance at a big city practice for the rigors of life on the circuit. Lincoln told Judge David Davis "[t]hat if he went to Chicago that he would

[98] "Statistical Portrait: Cases over Time," *LPAL.*
[99] Duff, *Prairie Lawyer*,163.

have to sit down and study hard" and "[t]hat would kill him."[100] Lincoln would "rather go around the Circuit, the 8 Judicial one than to sit down and die in Chicago."[101] There would be no Lincoln & Goodrich. Instead the annals of legal history would create a place of pride for Lincoln & Herndon. Herndon claimed that "[p]olitical defeat had a marked effect on him. It went below the skin and made a changed man of him."[102] "He was not soured at his seeming political decline, but still he determined to eschew politics from that time forward and devote himself entirely to the law."[103] Lincoln's own assessment of the situation was short and to the point: "I practiced law more assiduously than ever before."[104]

Once back in Springfield Lincoln applied himself to the law, and Lincoln & Herndon thrived. New clients came by the hundreds. In 1849, the year Lincoln returned to Springfield, the firm appeared in one hundred new cases alone. In 1850 one hundred sixty new suits were commenced, with over two hundred new matters in 1851. The firm's reputation grew and the hard work of both men paid off as two hundred fifty new filings came in 1852. In 1853, the year before the Kansas/Nebraska Act passed, over three hundred new cases were started.[105] On the eve of Lincoln's renewed quest for elected public office, Lincoln & Herndon were commanding a significant share of Springfield's legal business. These were busy men, and with Stephen Douglas proposing a repeal of the Missouri Compromise, they were about to get much busier.

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[100] Wilson, *Herndon's Informants*, 349.
[101] Ibid.
[102] Herndon, *Life of Lincoln*, 248.
[103] Ibid.
[104] *Collected Works,* III, 512.
[105] "A Statistical Portrait: Cases Over Time," *LPAL.*

In 1854, the Kansas/Nebraska Act burst onto the political landscape, and things would never be quite the same. By 1854 both Lincoln and Herndon were skilled attorneys. Politics, however, also defined the life of both men. Lincoln was keeping his finger on the pulse of public opinion as he traveled about the circuit, and Herndon, filled with civic pride was ready, willing, and able to help Springfield develop and prosper. The extension of slavery pulled Lincoln back onto the public stage, and in1854 Lincoln was once again elected to the Illinois legislature. That same year Herndon was elected Mayor of Springfield. For the first time since Lincoln's very first law practice with John Stuart—over twelve years before—both partners in a Lincoln law firm were elected to public office.

Lincoln's political ambition, however, sought more than a seat in the state legislature. Lincoln wanted to be a United States Senator. Unfortunately for Lincoln, the Illinois constitution prohibited a member of the legislature from being considered for the Senate. This meant that if Lincoln were serious about a return to Washington as Senator, he would have to decline his newly won seat in the legislature. This was a difficult decision since Lincoln polled the most votes of any Sangamon candidate. It also put Lincoln in a position where his personal ambition as Senator conflicted with the common efforts of the emerging anti-Nebraska coalition. Lincoln declined the will of the people, relinquishing his newly won place in the legislature, and competed for the seat in the U.S. Senate. A special election became necessary to fill Lincoln's vacated seat, and a Democrat was elected in his place. This was an omen of things to come. When the Illinois legislature convened in 1855 to select its next Senator, Lincoln competed with James Shields, Joel A. Matteson, and Lyman Trumbull. After ten ballots, Lyman

Trumbull emerged from the contentious proceedings as the legislature's choice for Senator. Lincoln would have to wait four more years for another chance at the Senate. Herndon, however, served as Mayor of Springfield. In this local office Herndon sought to improve the quality of life in the Illinois capitol; streets were improved, eyesores removed, the city council was required to meet more often, and a public school system was initiated.[106]

As the 1850s fueled Lincoln's "prelude to greatness," and the nation marched toward Civil War, Lincoln & Herndon became the legal and political hub of Springfield. The two men would not only try legal cases, but work against the extension of slavery. *Dred Scott*, the Lincoln–Douglas Debates, Cooper Union, and the election of a President placed both men at the center of this "gathering storm."

[106] Donald, *Lincoln's Herndon*, 68.

CHAPTER FIVE

LINCOLN DEFENDS A SLAVE OWNER

I have always hated slavery, I think as much as any Abolitionist.

Abraham Lincoln[1]

The Matson Slave Case

The cases Lincoln & Herndon argued were similar to the caseload Lincoln litigated while partnered with John Stuart and Stephen Logan. People on the edge on the frontier still sued for debt, divorce, slander, and foreclosed on mortgages. Lincoln continued to take the cases as they came with a willingness to represent either party to a lawsuit.[2] There was, however, one case that emerged from Lincoln's early years with Herndon that has generated controversy and confusion for Lincoln biographers.[3] *In re Bryant* or the

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[1] *Collected Works*, II, 492.

[2] *LPAL*; Donald, *Lincoln*, 103.

[3] See Beveridge, *Abraham Lincoln,* I, 396-97. Beveridge claimed that Lincoln "argued weakly" and cites other evidence that indicated "Mr. Lincoln was pitably weak and half-hearted." In the same vein, see also Benjamin P. Thomas, *Abraham Lincoln*, New York: Barnes & Noble edition,112. Thomas claims that Lincoln "showed no zeal in such a cause and lost the case." See also Albert A. Woldman*, Lawyer Lincoln,* 68. Woldman claims that Lincoln's "arguments in behalf of a cause his conscience detested were spiritless, half-hearted, and devoid of his usual wit, logic, and invective." Ibid. See also *Fraysse Lincoln, Land, and Labor 1809-1860*, 109. Fraysse claims that "Lincoln, embarrassed by the position he was forced to take, had apparently presented a mediocre defense." Ibid. See also Duncan T. McIntyre, "Lincoln and the Matson Slave Case" 1 *Illinois Law Review*, 386. cf. John J. Duff, *Prairie Lawyer*, 130-49. Duff takes issue with Beveridge's claim that Lincoln argued weakly and half-heartedly and cites Lincoln's allegiance to his profession and professional obligations to his client in support of this claim. He also states that there is no

"Matson Slave Case" as it is more commonly known, was a case in which Lincoln defended a slave owner who sought the return of his alleged runaway slaves.[4] This case raised the question how the "great emancipator" could have knowingly represented a slaver. The return to slavery meant the possible sale of the Bryants and the breakup of their family. Moreover, this case has generated debate over Lincoln's view on slavery and has prompted one writer to call Lincoln a racist.[5] Lincoln the lawyer swims at the center of this storm. The die was cast when Lincoln agreed to represent the slave owner Matson. It remains one of Lincoln's most controversial cases.

The Matson slave case begins almost two years prior to the initiation of legal proceedings. In 1845 Robert Matson brought a slave family consisting of Jane Bryant

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evidence in any case where Lincoln did not do his best once he decided to take a case. See also Stephen B. Oates*, With Malice Toward None: The Life of Abraham Lincoln,* New York: Harper & Row, Publishers, 1977, p.101. Oates states that "Lincoln, on the other hand, declared in the strongest possible terms that his client had brought the slaves to Illinois strictly on a temporary basis, that he planed to take them back to Kentucky after their work was done, and that Illinois law consequently did not apply to them. This was cold brutal logic, demonstrating how attorney Lincoln could set aside his personal convictions--for he claimed to hate slavery--and go all out to win for a client, even if it meant sending a family back to bondage." Ibid. See also Anton-Hermann Chroust, "Abraham Lincoln Argues a Pro-Slavery Case," *The American Journal of Legal History* Vol. 5, p. 299. The first to examine some of the law that actually applied to the case was Mark E. Steiner, "Abraham Lincoln and the Antebellum Legal Profession" (Ph.D. diss., University of Houston, 1993) from which this chapter draws, and builds upon. See also Mark E. Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln*, DeKalb, Illinois: Northern Illinois University Press, 2006, 103-136.

[4] *Matson v. Bryant et al*, *LPAL* was the title of the action at the Justice of the Peace level and *In re Bryant et al*., LPAL was the title of the action at the Circuit Court level.

[5] Lerone Bennett, *Forced Into Glory: Abraham Lincoln's White Dream*, Chicago: Johnson Publishing Company, 2000, This book has sparked controversy as did Bennett's earlier essay upon which it is based. Bennett argues that Lincoln was not the "great emancipator' but a racist. Bennett questions Lincoln's action at every juncture of his career claiming the Emancipation Proclamation was irrelevant to African-American freedom, and that Lincoln only acted reluctantly under Congressional pressure in the Second Confiscation Act in issuing the Emancipation Proclamation. Bennett cites Lincoln statements from the Lincoln-Douglas debates as well as comments on Lincoln's long held theory of colonization.

The import for the Matson slave case lies in Bennett's contention that Lincoln acted knowing that the slave family could be sent back to slavery and potentially sold. Bennett claims that slavery was analogous to the Nazi concentration camps. Had Lincoln won, the Bryants were doomed. Lincoln took the Matson case like other cases, without regard to ideology. A review of the database in the *LPAL* reveals that Lincoln's law practices handled over twenty cases involving African-Americans. For example, at issue in *Bailey v. Cromwell* was the legality of the sale of a Negro named Nance. On appeal, Lincoln argued for Nance's freedom based on the Illinois constitution that prohibited slavery. In another case, Lincoln defended Nancy Collier, a free woman of color, in a mortgage proceeding. He also prosecuted a

and her four children to Illinois from Kentucky and settled them on a farm in the northwest corner of Coles County. Anthony Bryant, Jane's husband who was a free man of color, also settled on the farm. In 1847 the Bryants heard rumors about Matson taking his slaves back to Kentucky for a possible sale to relieve his financial debts. Concerned about the possible breakup of the family unit, the Bryants began to investigate whether their residence in Illinois where slavery was prohibited changed their status from slave to free.[6] The issue of whether a slave became free upon entering the jurisdiction of a free state was a legal question that courts were beginning to address. This query also raised important debates about the nature of federalism.

Anthony Bryant needed to find out for sure about his wife and children's legal status since his family's future was at stake. Bryant consulted with Hiram Rutherford and Gideon M. Ashmore, two abolitionist leaders in nearby Charleston. After hearing the story of the Bryant family's predicament, Ashmore and Rutherford decided to help. Given the promise of their assistance, the Bryants fled from the Matson farm and were given safe haven by Ashmore and Rutherford.[7] Rutherford described the clandestine nature of their assistance:

> We told the frightened old negro…to return to the Matson place and bring his family down to us, spiriting them away, if necessary, during the night. Realizing the danger of such a proceeding both to us and to the slaves, we quietly invoked the aid of a few discreet and fair-minded friends. The time had now come for us to show our hands. We met at the home of Ashmore, and had our forces within hailing distance by nine o'clock that night. We waited till midnight, when the party, father, mother, and one child, on horseback, the rest on foot, arrived, all excited and panting from their hurried journey across the prairie.[8]

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foreclosure on behalf of another African-American known as "Billy the Barber". A review of these cases indicates no ideological stance with respect to Lincoln's litigation involving African-Americans.

[6] *Matson v. Bryant*, *LPAL*; *In re Bryant*, *LPAL*; Duff, *Prairie Lawyer*, 130-32; Donald, *Lincoln*, 103; Beveridge, *Abraham Lincoln*, I, 392-94.

[7] Ibid.

[8] *Arena Magazine*, 752, 754 (April, 1897).

The legal issue was joined when Robert Matson petitioned the court for the return of his slaves. In support of his application, Matson filed an affidavit alleging that "by the request of said Negroes he brought them to this state on a temporary sojourn with the intention to returning to the said last mentioned state of Kentucky, that said Negroes by the laws of Kentucky, are his slaves and owe to him labor and service in the state of Kentucky for and during their natural lives and that said slaves refuse to return to said lawful service in the said state of Kentucky and that they are now in the county of Coles and state of Illinois to the best of his knowledge and belief."[9] The Justice of the Peace, William Gilman, signed a writ of capias ad satisfaction instructing the Sheriff of Coles County to "take charge of Jane Catherine Mary June Sally Ann and Noah Colored persons which was brought before me on a charge of being runaway slaves and the property of Robert Matson of Bourbon County Kentucky and after hearing the evidence in the cause they are adjudged as runaway Slaves. According to the Law in Relation to the Runaway Law of the State of Illinois and keep them until discharged by a due course of Law."[10] A writ of capias ad satisfaction is a legal device that commands a sheriff to take a party into custody and keep them safely so that they can appear in court on a specific date.[11] The action of the Justice of the Peace was based on Illinois's so called "Black Laws."[12]

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[9] Writ of capias ad respondent, 17 August 1847, *Matson v. Bryant et al*, *LPAL.*
[10] Writ of capias ad satisfaction, 20 August 1847, *Matson v. Bryant et al*, *LPAL.*
[11] *Blacks Law Dictionary, 5th edition*, West Publishing Co.: St. Paul, Minn, 1979.
[12] Pease, *The Frontier State,* 47-50; Beveridge, *Abraham Lincoln*, I, 163, n. 4; Duff, *Prairie Lawyer*, 133.

Illinois, while legally a free state, "had a savage black code."[13] The initial legislature compelled all Negroes and mulattoes who settled in the state to produce a certificate of freedom. This certificate also had to be filed and recorded in the circuit court. If a person wanted to bring Negroes into the state who would then be emancipated he had to post a one thousand dollar bond to do so for each person. Evidence of the Negroes free status had to be registered with the county clerk and they could not work for anyone unless the certificate of freedom was produced. Runaway slaves were analogous to stolen property and harboring runaway slaves was a felony. Negroes without the proper credentials could be held for up to a year in a state of quasi-indentured servant status. The undocumented Negroes were advertised in the local newspapers and the sheriff was authorized to sell the labor of the colored person to reimburse the county for the cost of their keep. After a year the Negro was given a certificate of freedom. These laws reveal the underlying racial attitudes of the free state of Illinois that went so far as to prohibit interracial marriage under the penalty of fine and/or imprisonment. Thus, in

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[13] Pease, *Frontier State,* 47. The applicable provisions of the statute that comprised this "savage black code" stated in pertinent part: "Section I. No black or mulatto person shall be permitted to reside in this State, until such person shall produce to the county commissioners' court where he or she is desirous of settling, a certificate of his or her freedom; which certificate shall be duly authenticated in the same manner that is required to be done in cases arising under the acts and judicial proceedings of other States. And until such person shall have given bond, with sufficient security, to the people of this State, for the use of the proper county, in the penal sum of one thousand dollars, conditioned that such person will not, at any time, become a charge to said county, or any other county of this State, as a poor person, and that such person shall, at all times, demean himself or herself, in strict conformity with the laws of this State, that now are or hereafter may be enacted; the solvency of said security shall be approved by said clerk. The clerk shall file said bond , and if said bond shall in any condition thereof be broken, the whole penalty shall become forfeited, and the clerk, on being informed thereof, shall cause the said bond to be prosecuted to effect. And it shall be the duty of such clerk to make an entry of the certificate so produced, and indorse a certificate on the original certificate, stating the time the said bond was approved and filed; and the name and description of the person producing the same; after which it shall be lawful for such free negro or mulatto to reside in this State.
Section II. If any person shall harbor such negro or mulatto as aforesaid, not having such a certificate, and given bond, and taken a certificate thereof, or shall hire, or in anywise give sustenance to such negro or mulatto, not having such certificate of freedom, and of having given bond, shall be fined in the sum of five hundred dollars., Norman H. Purple, *A Compilation of the Statutes of the State of Illinois* (Chicago: Keen and Lee, 1856), pp.776-784, *LPAL.*

Lincoln's Illinois the abstract notion of freedom belied the *de facto* racism that pervaded daily life.[14]

With no ruling on the official status on the Bryants at the Justice of the Peace level, the case moved up to the Circuit Court where the Bryants petitioned for a writ of habeas corpus and their freedom.[15] This is the court where Lincoln first appeared in the case. Usher Linder represented Matson at the Justice of the Peace level and both Lincoln and Linder represented Matson as co-counsel before the Coles County Circuit Court. After Matson had retained Lincoln, the Bryants' representative Rutherford tried to hire the future president. Rutherford described his attempt to retain Lincoln's legal services on behalf of the Bryant family:

> As soon as the summons was served on me I rode down to Charleston to hire a lawyer. I had known Abraham Lincoln several years, and his views and mine on the wrong of slavery being in perfect accord, I determined to employ him; besides, everyone whom I consulted advised me to do so. I found him at the tavern sitting on the veranda, his chair tilted back against one of the wooden pillars, entertaining the bystanders and loungers gathered about the place with one of his irresistible and highly-flavored stories…
>
> I told him in detail the story of my troubles, reminded him that we had always agreed on the questions of the day, and asked him to represent me at the trial of my case at court. He listened attentively as I recited the facts leading up to the controversy with Matson, but I noticed a peculiarly troubled look came over his face now and then, his eyes appeared to be fixed in the distance beyond me, and he shook his head several times as if debating with himself some question of great import. At length, and with apparent reluctance, he answered that he could not defend me, because he had already counseled with in Matson's interest, and was therefore under professional obligations to represent the latter unless released. This was a grievous disappointment, and irritated me into expressions more or less bitter in tone. He seemed to feel this, and even though he endeavored in his plausible way to reconcile me to the proposition that, as a lawyer, he must represent and be faithful to those who counsel with and employ him, I appeared not to be convinced.[16]

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[14] Pease, *The Frontier State*, 47-50, 70-91.
[15] *In re Bryant et al., LPAL.*
[16] *Arena Magazine* 752, 755 (April 1897); Steiner, "Abraham Lincoln and the Antebellum Legal Profession," 237.

Later that day Lincoln sent word through a messenger to Rutherford that he would be able to free himself from his professional obligations to Matson and represent the interests of the Bryant family. Lincoln, however, had lost his opportunity to defend the slave family when Rutherford got his "pride up" and "plainly indicated a disinclination to avail myself of his offer," and hired another lawyer, Charles H. Constable.[17] Constable, a native of Maryland who studied law at the University of Virginia, moved to Illinois in 1840 with the intent to practice law. Constable was elected to the Illinois State Senate as a Whig in 1846 a year before he opposed Lincoln in the Matson case.[18] Constable's co-counsel was Orlando B. Ficklin who, like Lincoln, was born in Kentucky. He was admitted to the bar in 1830 and was also active in the political arena. Elected as a Democrat to the state legislature in 1840, he was re-elected in 1842, thus serving as a lawmaker at the same time as Lincoln.[19] Lincoln's co-counsel, Usher F. Linder, also a native of Kentucky, moved to Illinois in 1835 and was shortly thereafter admitted to the bar. Both Lincoln and Linder served in the Illinois legislature together where they clashed over the relocation of the state capitol to Springfield. A fervent anti-abolitionist, Linder opposed Lincoln's quest for the presidency in 1860.[20]

William Gilman, the Justice of the Peace for Coles County, handled the initial proceeding at the Justice of the Peace level. When the case moved up to the Circuit Court where the habeas corpus writ was decided, Judge William Wilson, Chief Justice of the Illinois Supreme Court, and Samuel H. Treat, Associate Justice of the Illinois Supreme Court, presided. This arrangement was unusual since only one judge usually

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[17] *Arena Magazine*, 752, 755 (April 1897); Beveridge, *Abraham Lincoln,* I, 395; Woldman, *Lawyer Lincoln*, 65-66; Duff, *Prairie Lawyer*, 135.
[18] "Charles H. Constable," Biography, *LPAL.*
[19] "Orlando B. Ficklin," Biography, *LPAL.*

presided over circuit court matters. Given the significance of the issue, however, Chief Justice Wilson asked Associate Justice Treat to hear the case with him. Wilson was first admitted to the Virginia bar in 1817 and moved to Illinois the next year. In 1819 he was appointed to the Illinois Supreme Court and became Chief Justice in 1824.[21] Samuel H. Treat, born in New York and admitted to that bar, moved to Illinois in 1834 where he settled in Springfield. In 1840 he became an Associate Justice of the Illinois Supreme Court, and eventually became Chief Justice.[22] This impressive cast of legal talent then negotiated their way through the thicket of facts and legal precedents that decided the fate of the Bryant family.

The facts admitted into evidence established the following: In 1836 Matson was a citizen of Kentucky and the owner of a farm and about twenty Negroes. That same year Matson came to Illinois, purchased a tract of land, and cultivated the land as a farm. The time Matson spent since coming to Illinois he had always claimed to be a citizen of Kentucky. In fact, Matson once became a candidate for the state senate for Bourbon County, Kentucky, and always voted there but on two occasions, when in 1840 and 1844 he voted for President and Vice President in the state of Illinois. Several times he brought some of his Negroes from Kentucky, and after having kept them at his farm a few months, took them back to Kentucky and replaced them with others. In 1845 he brought Jane Bryant and her children to Illinois where they until 1847, with Jane working as a housekeeper. Matson maintained that he kept his slaves in Illinois only a short time, until he could get ready to remove them to a farm in the western part of Kentucky.[23]

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[20] "Usher F. Linder," Biography, *LPAL.*
[21] "William Wilson," Biography, *LPAL.*
[22] "Samuel H. Treat," Biography, *LPAL.*
[23] Opinion, October 1847, *In re Bryant*, 5 *Western Law Journal* 202, *LPAL.*

Before discussing the arguments Lincoln advanced in defense of Matson, an understanding of the competing legal and constitutional theories at Lincoln's disposal is necessary.

The Legal Standards

Laws regarding slavery and its place in American history cut to the core of our national experience. Prior to *Matson* a number of state and federal courts had addressed the issue of slaves in transit from one state to another. These cases contain a variety of legal theories that were advanced by both slaves and slave owners as this body of case law was developing. Federal mandates such as the fugitive slave law, the privileges and immunities and full faith credit clauses of the Constitution as well the legal concept of comity were juxtaposed against state laws that either permitted or outlawed slavery.

As a threshold question, the *Matson* Court, like many others, asked whether the slaves at issue were runaways. If so, the fugitive slave law applied. Article four, section two of the U.S. Constitution contained the fugitive slave law. This provision mandated that "no person held to service or labour in one State, under the laws thereof escaping into another, shall, in consequence of any law or regulation thereof be discharged from such service or labour but shall be delivered up on claim of the party to whom such service or labour may be due."[24] This provision has its genesis at the Constitutional Convention of 1787. The southern states would not agree to surrender their "peculiar institution" and, in fact, sought constitutional protections that would help advance the cause of the slave interest. The federal nature of the new government expected

[24] U.S. Const., Art. IV, sec II, repealed.

interaction between the states and this caused concern among the southern delegates about the prospect of their slaves fleeing to freedom.

The Constitutional Convention addressed the fugitive slave issue on August 28, 1787. South Carolina delegates Pierce Butler and Charles Pinkney moved "to require fugitive slaves and servants to be delivered up like criminals."[25] James Wilson of Pennsylvania claimed that "[t]his would oblige the Executive of the State to do it, at the public expense."[26] Roger Sherman of Connecticut "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse."[27] Butler then "withdrew his proposition in order that some particular provision might be made apart from this article."[28] This provision significantly strengthened the protection afforded slaveholders under the Articles of Confederation. The next day Butler submitted the following proposition: "If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor."[29] The motion passed with eleven ayes and no recorded opposition. After editorial review by the Committee Of Style and a minor amendment, the final clause provided that: "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or

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[25] Max Farrand, ed., *The Records of the Federal Convention of 1787*, Yale University Press: New Haven and London, 1911 Vol. 2, p.443.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid., 446.

Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[30]

This provision was a significant victory for the southern delegates. The North Carolina delegation writing their governor stated that "[t]he Southern States have also a much better Security for the Return of Slaves who might Escape than they had under the original Confederation."[31] Likewise, Charles Pinkney informed the South Carolina House of Representatives that "[w]e have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before."[32] Finally, James Madison, while debating the merits of the new constitution underscored the significance of the fugitive slave provision. Madison argued that "[a]nother clause secures us the property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws. For the laws of the states are uncharitable to one another in this respect."[33] The fugitive slave provision, however, solves this potential loss of "property" for the southern slaveholders as "[t]his clause was expressly inserted to enable owners of slaves to reclaim them. This is a better security than any that now exists."[34] Thus the fugitive slave provision found its way into the Constitution and was used as an argument for southern support for the Constitution of 1787.

This federal mandate was later juxtaposed with states such as Illinois, that declared that all persons were presumed free, and Kentucky where slavery was pervasive. The legal status of people of color became increasingly important as America became

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[30] Ibid., 577.
[31] Ibid.
[32] Ibid.
[33] Ibid.

more mobile and slave masters traveled with their slaves. Transit from a free state to a slave state in certain circumstances could change the status of a slave to freedom. Just as the political arena was struggling to find solutions to the issues of slavery as the country began to expand westward, the legal structure sought ways to accommodate this increasingly difficult issue. *Bailey v. Cromwell & McNaughton,* a case discussed in chapter three, also illustrated the Illinois Supreme Court's commitment to freedom despite the "black laws: citing as precedent *Kinney v. Cook*, which stood for the proposition that the "presumption of law was, in this state, that every person was free, without regard to color"[35]

Slave states such as Kentucky, however, had no such presumption of freedom and their citizens expected that they would receive protection for their legal rights from their sister states. Thus the issues raised by slave cases touched upon not only issues of state and federal relations, but also the relationship of the various states to one another. The practical application of laws relating to slavery became problematic as American society became more mobile. Transit from one state to another was becoming routine, and travel with slaves, particularly where free and slave states intersected, presented legal and practical challenges to slavery. States that bordered slavery and freedom were most directly implicated by this legal issue. While the contiguous nature of the land led to the free movement of people across state lines, the chasm between slavery and freedom ran deep. Alexis de Tocqueville described the differences between the border states of Ohio and Kentucky where one "sails, so to say, between slavery and freedom."[36] Tocqueville found "[t]hese contrasting effects of slavery and of freedom easy to understand; they are

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[34] Ibid.
[35] *Bailey v. Cromwell* 4 Ill. 71 (1841).

enough to explain the differences between ancient civilization and modern."[37] Tocqueville described the competing banks of the Ohio River: "On the left bank of the Ohio work is connected with the idea of slavery, but on the right with well being-being and progress; on the one side is degrading, but on the other honorable; on the left bank no white laborers are to be found, for they are afraid of being like the slaves; for work people must rely on the Negroes; but one will never see a man of leisure on the right bank: the white man's intelligent activity is used for work of every sort."[38] The description might just as well be of two separate countries. Unlike national boundaries, however, the state boundaries were more porous. As the economy expanded and travel became easier, the question of slaves in transit was thrust into the judicial arena. Slaves now began to enter free territory, not as fugitives, but with their masters' consent. Slaves in transit raised different legal issues than those generated by the fugitive slave law. Once masters voluntarily brought their slaves into a free state, the slave's legal status could be challenged. The fugitive slave law provided no legal recourse since no escape had taken place. Antebellum jurisprudence thus began to grapple with this potentially explosive issue.

Courts searching for legal standards to be used to bridge the judicial divide began to focus on the concept of comity. In general, comity is a legal principle borrowed from the law of nations wherein the courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect.[39] An example of this legal concept at the federal

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[36] Tocqueville, *Democracy In America*, 345.
[37] Ibid., 346.
[38] Ibid.
[39] *Black's Law Dictionary, 5th edition*, West Publishing Co.: St. Paul, Minn., 1979.

level can be found in the U.S. Supreme Court decision, *The Antelope*. *The Vice-Consuls of Spain and Portugal, Libellants.*[40] The facts of *The Antelope* revolve around the international slave trade and claims made by two foreign countries, Spain and Portugal, for the return of African slaves taken from them by a privateer manned by United States citizens. The privateer, *Columbia*, clandestinely outfitted in the port of Baltimore set sail in search of booty. Once at sea the *Columbia* hoisted the Artegan flag and assumed the name *Arraganta*. Off the coast of Africa the *Arraganta* captured an American vessel from which she took twenty-five African slaves. She also captured a Portuguese ship from which she took more African slaves. Finally, the *Arrantaga* captured *The Antelope*, a Spanish ship from which the privateers took still more African slaves. The *Arraganta* and *The Antelope* then proceeded toward Brazil where the *Arraganta* was shipwrecked and a good number of the seamen were taken prisoner. The sailors who were not taken prisoner were transferred to *The Antelope* along with munitions and all the African slaves captured during the course of the voyage. John Smith assumed command of *The Antelope*, which was ultimately captured off the coast of Georgia and brought into the port of Savannah by the U.S. cutter, *Dallas*. At Savannah, the Vice-Consuls of Portugal and Spain made claim to the African slaves. John Smith also filed his claim to the slaves as lawfully captured property as did Captain Jackson of the *U.S. Dallas* under the bounty provisions of the law.[41]

This case pitted the United States ban on the international slave trade against Spain and Portugal's claim to the slaves as property. Spain and Portugal had not yet banned the international slave trade so the law of nations became an important legal

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[40] *The Antelope. The Vice-Consuls of Spain and Portugal, Libellants*, 23 (10 Wheaton) U.S., 67 (1825).
[41] Ibid.

consideration. Thus posed, the Supreme Court, in an opinion written by Chief Justice John Marshall, was confronted with "claims in which the sacred rights of liberty and of property come into conflict with one another."[42] The standard the Court looked to was the law of the country to which the vessel belonged, and argued that "[i]f that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize."[43] Marshall conceded that the slave trade is contrary to the law of nature and agreed that "every man has a natural right to the fruits of his own labour."[44]

Marshall cast the question of slavery and the slave trade, however, in legal, not moral terms. "Whatever might be the answer of a moralist to this question," Marshall pondered, "a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made."[45] Marshall certified that each country has the right to decide for themselves whether or not to outlaw the slave trade, but asked "can this renunciation affect others?"[46] The Court recognized that "[n]o principle of general law is more universally acknowledged, than the perfect equality of nations," and concluded, therefore, that [a]s no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it."[47] Thus comity was used as a legal justification to allow foreign nationals to engage in activity considered unlawful in the

[42] Ibid., 114.
[43] Ibid., 118.
[44] Ibid., 120.
[45] Ibid., 121.
[46] Ibid., 122.
[47] Ibid.

United States. This nation state deferential treatment was then co-opted by American State courts to decide the issue of "sacred right of liberty" as it related to slaves in transit. Comity was a particularly important legal notion for states such as Illinois and Kentucky that shared a common border. As a legal organizing device, comity was pliable and predicated upon judicial discretion, which does not, however, always produce uniform results.

The Illinois Supreme Court expressed the importance of maintaining good relations with the sister states on this divisive issue, and elaborated on the concept of comity in *Willard v. People*.[48] Julius Willard had been indicted for hiding Julia, a slave owned by Sarah W. Miles who was traveling from Kentucky to Louisiana via Illinois. While passing through Illinois, Julia escaped from the custody of Sarah Miles and was given sanctuary by Willard. The court in *Willard* confirmed the right of free passage through the state and held that:

> [i]t would be productive of great and irremediable evils, of discord, of heart burnings, and alienation of kind and fraternal feeling, which should characterize the American brotherhood, and tend greatly to weaken, if not to destroy the common bond of union among us, and our nationality of character, interest and feeling. Thousands from Kentucky, Virginia, Maryland, Tennessee and the Carolinas, and other southern states have sought and found free and safe passage with their slaves across our territory, to and from Missouri. It would be startling, indeed, if we should deny our neighbors and kindred that common right of free and safe passage, which foreign nations would hardly dare deny. The recognition of this right is no violation of our constitution. It is not an introduction of slavery into this state, as was contended in argument; and the slave does not become free by the constitution of Illinois by coming into the state for the mere passage through it.[49]

Location played a role for courts administering their judicial discretion through the concept of comity. Border states needed to maintain a modicum of civility toward each other's citizens and their "property" since they shared more than political

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[48] *Willard v. The People*, 5 Ill. 461, 472-73 (1843).

boundaries. Often economic activity as well as family relations crossed state lines. The inability of comity to produce uniform results was evident when state courts in the northeast far from the border interpreted this concept and applied it to cases where slaves were brought voluntarily within their sphere of judicial influence.

Comity found a far less receptive judicial audience in the Massachusetts Supreme Judicial Court than it did along the slave border. In *Commonwealth v. Aves,* the Massachusetts Supreme Judicial Court held that a six-year-old slave who was a resident of Louisiana and was temporarily in Massachusetts visiting relatives was free.[50] In framing the issue the court stated that "[t]he precise question presented by the claim of the respondent is whether a citizen of any one of the United States, where negro slavery is established by law, coming into this State for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicil here, who brings a slave with him as a personal attendant may restrain such slave of his liberty during his continuance here, and convey him out of the State on his return, against his consent."[51] In *Aves*, the court rejected the use of comity to justify and perpetuate the slave condition holding that "an owner of a slave in another State where slavery is warranted by law, voluntarily bringing slavery into this State, has no authority to detain him against his will, or to carry him out of the State against his consent, for the purpose of being held in slavery."[52] The court specifically stated that they were not giving an opinion on the slave in transit from one slave state to another because "our geographic position exempts us from the probable

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[49] Ibid.
[50] *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836).
[51] Ibid.
[52] Ibid.

necessity of considering such a case, and we give no opinion respecting it."[53] Thus, state courts that were far from the practical problems associated with slavery on the border were reluctant to allow anything other than a slaveholder in true transit to escape the reach of the state judiciary.

Federal courts were also deciding this issue and the two cases cited by the *Matson* court as precedent both originated from the federal bench. A review of the case law that was developing on the federal level is critical to understand the legal hurdles Lincoln faced in defending the Matson case. The *Matson* court cited two federal court cases as controlling the issues raised, *Ex Parte Simmons* and *Vaughn v. Williams*.[54]

In *Ex Parte Simmons*, a case originating in the U.S. Circuit Court for the Eastern District of Pennsylvania, the court held that the congressional fugitive slave law did not apply to slaves voluntarily brought by their masters from one state to another who afterwards either escaped or refused to return.[55] The court found that a person who brings a slave into Pennsylvania could not thereafter claim him or her as a slave after residence in the state for six months. Rather, the slave becomes free pursuant to a Pennsylvania law passed on March 1, 1780 abolishing slavery. The court did, however, recognize an exception for members of congress, foreign ministers and consuls, and sojourners who were passing through the state. Focusing on the time spent in the state, the court held that six months was more than just a temporary sojourn and the slave was, therefore, free.[56]

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[53] Ibid.
[54] Opinion, October 1847, *In Re Bryant et al, LPAL.*
[55] *Ex Parte Simmons*, 22 F.Cas. 151 (C.C.E.D. Pa 1823) (No 12, 863).
[56] Ibid.

Likewise in *Vaughn v. Williams*, a federal court case decided by the Circuit Court for the District of Indiana, the court first looked to whether the slave was a fugitive in deciding the applicable legal standard.[57] The court was careful to point out that it would not rule on the issue of slavery in the abstract and stated that "[i]t is argued that slavery had its origin in usurpation and injustice, and is continued in violation of the natural rights of man, as declared in our Declaration of Independence; but these are topics which this court will not discuss. We look to the law and only to the law."[58] This limitation, however, was only lip service to the law as the facts and the court's charge to the jury reveal.

The facts are worth discussing in detail as they reveal a vivid picture of the turmoil that was beginning to surround slavery on the edge of freedom. The plaintiff, Vaughn, purchased three slaves Sam, Mariah, and their child from Mr. Hendrick in Missouri on April 26, 1836. The slaves remained with the plaintiff for one year, after which they absconded. These three had formerly belonged to a Mr. Tipton a citizen of Kentucky who moved with them to Illinois in October1835. Tipton, cleared and settled his land, built a house, made other improvements to his property and declared to various members of the community his intention to become a citizen of Illinois. Sam and Mariah both labored in Tipton's fields and house until April 1836 when Tipton abruptly moved to Missouri. From the testimony adduced at trial, people in Illinois began to question whether Sam, Mariah, and their child were free given their six month residence in the state. Tipton must have been concerned as well since he fled with the "slaves" before daylight apparently worried that concerned citizens were intent on rescuing Sam and his

[57] *Vaughan v. Williams*, 28 F. Cas. 1115 (C.C.D. Ind. 1845) (No. 16, 903)
[58] Ibid.

family. Tipton relocated to Missouri where he promptly sold the family who were then sold again to the unsuspecting Vaughn before they fled to freedom in April 1837. In the spring of 1844 the plaintiff found out that his "slaves" were residing in Indiana where he went to recapture his "property." The plaintiff's attempts were met with a certain amount of community resistance, but to the plaintiff's credit he stated that "he had no desire to take the fugitives by force, that they should have a fair trial, and if held to be free, he should be content."[59] There was no court in town so it was decided, after some community debate, that the plaintiff and his claimed "slaves" should be taken to a Justice of the Peace in Noblesville, quite a distance away.

At this point in the proceedings, a crowd began to gather and accompany the interested parties. The company set out for Noblesville growing with each passing mile. After several hours, the group decided to stop at a farm for breakfast. With full stomachs and a newly procured wagon for the fugitives to travel in, the company of now about one hundred fifty set out once again for Noblesville. Soon the caravan came to a fork in the road. One path led to Noblesville and the Justice of the Peace, the other to Westfield and self-proclaimed freedom. The crowd was divided as to whether or not to "take the road less traveled" and one fellow urged submission to the law claiming that "[i]f the decision goes against us, under our statute, we have a right to an appeal."[60] This mollified most, but not the driver of the wagon containing the controversial cargo. The whip cracked, the horses galloped, the wagon sped off, and Sam and his family were not heard from again. The plaintiff Vaughn then sued Owen Williams, a concerned citizen who had taken an active role at the crossroads.

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[59] Ibid.
[60] Ibid.

These facts placed squarely in the lap of the federal court sitting in the Circuit Court for the District of Indiana raised not only Constitutional issues, but also fundamental questions about law and order. Since this was a jury trial, the court was responsible for instructing the jury on the law. At the conclusion of the proceedings, the court instructed the jury. In its charge, the court chastised the defendant for taking the law into his own hands and certified the cornerstone of American justice that "[t]here is no security for life or property, except in a faithful administration of the laws."[61] The court, however, recognized the importance of the larger question; "were not the colored persons entitled to their liberty?"[62] The court looked carefully at the facts and held that "[h]aving been brought to the state of Illinois, which prohibits slavery, by their master, from the state of Kentucky, and kept at labor for six months, under a declaration of the master that he intended to become a citizen of that state, and who actually exercised the rights of a citizen by voting, there can be no doubt that the slaves were, thereby entitled to their freedom."[63] This was more than a mere jury charge. In essence, the court usurped the jury's deliberating process and told the jury how to decide the case. It should not be a surprise, therefore, that "the jury in a few minutes returned a verdict for the defendant."[64] The facts of this case did not bode well for Lincoln and Linder as they tried to mount their legal defense on Matson's behalf.

Lincoln and Linder had a very limited legal arsenal at their disposal.[65] Reliance on the fugitive slave law was misplaced since the Bryants did not escape from Kentucky to

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[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Steiner, "Abraham Lincoln and the Antebellum Legal Profession," 224-287; Steiner, *An Honest Calling*, 114-123.

Illinois, but were brought there by Matson much like the "slaves" in *Simmons* and *Vaughn*. Thus the constitutional and congressional mandates were not applicable. The *Matson* court in its rationale stated that "[t]his constitutional provision, and the law in aid of it, define the rights of the master, and prescribe the only course by which he can reclaim a slave who has fled from his service into a State or Territory in which slavery is not recognized. So far as it relates to this case, repeated decisions have given a uniform construction to these laws. The master is entitled to the re-delivery of his servant only when the servant escaping has been legally held to service in one State, and has escaped to another. He must be a fugitive from the service of his master."[66] The court flatly rejected any contention that this was a fugitive situation and found that "[t]here can be no pretense that she is a fugitive from his service in Kentucky."[67]

Linder used a general argument contending that all United States citizens were entitled to the protection of their property and that Matson never intended to permanently settle his slaves in Illinois.[68] Lincoln's adversary, Orlando Ficklin, described Lincoln's argument as one of "trenchant blows and cold logic and subtle knitting together and presenting of facts favorable to his side of the case"[69] Thus Lincoln did not roll over and play dead for the plaintiffs as some have suggested. Lincoln's reasoning was also described by Ficklin as follows: "The fact that General Matson had at such time when he placed a slave on his Illinois farm, publicly declared that he was not placed there for permanent settlement, and that no counter statement had ever been made publicly or privately by him, constituted the web and woof of the argument of Mr. Lincoln, and these

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[66] Opinion, *In re Bryant et al*, *LPAL.*
[67] Ibid.
[68] Beveridge, *Abraham Lincoln*, I, 395; Duff, *Prairie Lawyer*, 137; Chroust, "Abraham Lincoln Argues a Pro-Slavery Case," 304; McIntyre, "Lincoln and the Matson Slave Case," 390.

facts were plausibly, ingeniously and forcibly presented to the court, so as to give them all the effect and significance to which they were entitled and more."[70] This was, in fact, the main issue upon which the case turned. The courts that had ruled on this issue had clearly looked at whether or not the stay was temporary in deciding the issue. Generally, six months was the most a slaveholder could hope to keep his slaves in a state and still have a legitimate chance of claiming that they were still in transit. Lincoln was correct to reduce the case to this one point. This also comported with Lincoln's style of argumentation in getting to the "nub" of the case. With such a narrow legal standard, Lincoln had little choice but to make an argument based on Matson's stated intent not to emancipate his slaves. Unfortunately for Matson, the court looked to his acts rather than his words. While Matson may have said that he intended the Bryant's stay to be temporary, his actions betrayed his words since as the Court pointed out Matson "voluntarily domiciled his servants here for two years or upwards."[71]

The *Matson* court then, in dicta, suggested that domicile even for a day would have been enough for Matson to forfeit all title to the services of the Bryants in stating that "[e]ven if, from some contingency, they had remained but a day, the circumstances of his transferring their domicil from Kentucky, and fixed it in Illinois, would have produced the same result."[72] Moreover, if federal courts such as the court in *Vaughn* were willing to sanction mobs taking the law into their own hands, simply put, Lincoln and the slave-owner Matson did not stand a chance. It should not have come as a surprise to Lincoln, Linder, and Matson that the court held: "In connection with the Constitution

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[69] Chroust, "Abraham Lincoln Argues a Pro-Slavery Case," 304.
[70] Ibid.
[71] Opinion, *In re Bryant et al, LPAL.*
[72] Ibid.

of Illinois, we are clearly of opinion that Matson, by bringing Jane and her children into the State of Illinois, and domiciling them here, has forfeited all claim to their services, and entitled them to be discharged therefrom."[73] To compound Lincoln's bad day in court, Matson did not pay his legal fee.[74]

Lincoln, Slavery, and Reverence for the Laws

Beyond the immediate holding of the *Matson* case, this episode in Lincoln's legal career forces the question about Lincoln's true beliefs about slavery. Lincoln the legislator twice went on record regarding slavery. Lincoln introduced legislation attacking slavery prior to the *Matson* case as a state legislator and then again as a member of Congress after the *Matson* case was over.[75] Are these positions reconcilable? Was Lincoln insensitive to the plight of the Matson slaves as Lerone Bennett argues? Did Lincoln's willingness to take any case that came his way blind him to the consequences of

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[73] Ibid.

[74] Donald, *Lincoln*, 103; Strozier, *Lincoln's Quest for Union*, 174; Duff, *Prairie Lawyer*, 143.

[75] *Collected Works*, I, 74-5, II, 20-22. The fact that Lincoln was on record early in his public life claiming that "the institution of slavery is founded on both injustice and bad policy" negates the claim that he supported slavery. CW: I, 75. His initial protest in the Illinois legislature also claimed that "the Congress of the United States has the power under the constitution to abolish slavery in the District of Columbia." CW: I, 75. When Lincoln served in Congress ten years later he sought to abolish slavery in the District of Columbia. CW: II, 20-22. This underscores Lincoln's belief that the law was the mechanism for change, not the moral condemnation as espoused by the abolitionists he criticized in his first protest in the Illinois legislature when he stated that "the promulgation of abolition doctrines tends rather to increase than to abate its (slavery) evils." For general background on Lincoln's relationship with African-Americans see LaWanda Cox, *Lincoln and Black Freedom: A Study in Presidential Leadership*, Urbana and Chicago: University of Illinois Press, 1985; Benjamin Quarles, *Lincoln and the Negro*, New York: Oxford University Press, 1962; Benjamin Quarles, *The Negro in the Civil War*, Boston, Little Brown, 1953; Allen C. Guelzo, *Lincoln's Emancipation Proclamation*, New York: Simon & Schuster, 2004; Fraysse, *Lincoln, Land, and Labor: 1809-60*; Bennett, *Forced Into Glory*. For Lincoln's critique of slavery on economic grounds see Gabor S. Boritt, *Lincoln and the Economics of the American Dream*, Urbana and Chicago: University of Illinois Press, 1978; see also, Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*, New York: Oxford University Press, 1970, 1995. For a recent discussion of the development of Lincoln's views on slavery and Lincoln's antislavery politics, see James Oakes, *The Radical and the Republican: Frederick Douglas, Abraham Lincoln, and the Triumph of Antislavery Politics*, New York: Norton, 2007.

successful advocacy, or was it a more fundamental issue of the law providing a shield to moral choice as it did for the Supreme Court in *The Antelope*?

The best way to understand Lincoln's actions in the *Matson* case is through the legalism of the Lyceum Address.[76] The address was about criticizing pro-slavery anti-abolitionists for violating the law, while the latter *Matson* case was about the need to uphold the law regardless of the slaves and their freedom. This view is grounded in Lincoln's deep "reverence for the constitution and laws" that came to define Lincoln's judicial outlook at this point in his career. This mentality acted as a restraint on radical action not only in the *Matson* case, but also in other situations where law and the morality of slavery clashed. For example Joshua Speed was perhaps the closest friend Lincoln ever had. Lincoln opened his heart and soul to this man like no other.[77] In August 1855 Lincoln wrote Speed a lengthy letter discussing the slavery issue. In response to a letter from Speed in which Speed claimed that the two friends differed on the political response to slavery, Lincoln supposed they differed but "not quite as much, however, as you may think."[78] While Lincoln claimed in the letter that "you know I dislike slavery; and you fully admit the abstract wrong of it. So far there is no cause of difference. But you say that sooner than yield your legal right to the slave—especially at the bidding of those who are not themselves interested, you would see the Union dissolved. I am not aware that any one is bidding you to yield that right; very certainly I am not. I leave that matter entirely to you yourself. I also acknowledge your rights and my obligations, under the constitution, in regard to your slaves. I confess I hate to see the poor creatures hunted

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[76] *Collected Works*, I, 108-115.
[77] Strozier, *Lincoln's Quest for Union,*36-65; David Donald, *We Are Lincoln Men: Abraham Lincoln and His Friends*, New York: Simon & Schuster, 2003, 29-65.
[78] *Collected Works*, II, 320.

down, and caught, and carried back to their stripes, and unrewarded toils; but I bite my lip and keep quiet."[79] This letter written about eight years after the Matson case, and one year after the Kansas-Nebraska Act, reveals Lincoln's strict constructionist philosophy. It is surprising that Lincoln's blind devotion to the law remained intact just five years before he became the nation's chief executive. Lincoln's reverence for the law checked his impulse to challenge the law on moral grounds. This conservative legal position dictated that legislative action was the remedy for unjust laws, not disobedience or resistance. Lincoln's life was not the life of a racist. Nor was it the life of a radical legal thinker claiming that an unjust law was not a law at all. Lincoln's legal philosophy in the Lyceum address helps explain his defense of a slave owner. The right to counsel allowed for Matson's defense. Lincoln the lawyer diagnosed Matson's legal position and made the best argument the law and facts of the case would allow. Lincoln was a law and order man, and his strict construction of the law prevented the embrace of radical legal ideas. For the Bryants this case meant everything. For Lincoln, this was just another day in court. Lincoln counted on the law to lead to justice. Justice prevailed, and Lincoln lost the case.

There are three possible grounds to critique Lincoln's participation in the Matson case. First, it can be argued that Lincoln was insensitive to the plight of this African-American family.[80] The second criticism involves Lincoln's lack of legal knowledge in accepting a case where the law was so clearly against him. Finally, as a member of the bar of the state of Illinois, Lincoln can be accused of permitting Illinois law to lie

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[79] Ibid.
[80] Bennett, *Forced Into Glory*, 278-82; See also Guelzo, *Redeemer President*, 126-27.

prostrate before the slave sanctioning laws of Kentucky, and undermine the Northwest Ordinance of 1787.

The first position has been argued by Lerone Bennett who claimed that Lincoln was "blinded by his own racism and the dissembling rhetoric he used to rationalize it" and that Lincoln was thus guilty of a gross insensitivity to the Negro's plight since Lincoln "had to know that he was asking the court to sentence Jane Bryant and her three daughters and son to cruel and unusual punishment and, possibly, death."[81] In support of his insensitivity thesis, Bennett cited whippings, torture, and a forced breakup of the Bryant family as the inevitable consequences should Lincoln prevail in court. While Lincoln was certainly antislavery, and the insensitivity argument should not be taken as proof of Lincoln's views on slavery, it does, nonetheless, demand an answer to the question why Lincoln would take such a case. Salmon Chase and other attorneys refused to defend slave owners, and routinely defended runaway slaves.[82] In fact, as the previous chapter reveals, Lincoln's partner William Herndon defended runaway slaves with "powers of eloquence" and a "zeal worthy of any cause."[83] Certainly the defense of apologists that Lincoln argued weakly cannot explain Lincoln's role in this litigation. The answer lies in Lincoln's romantic view of the law in the 1840s that still reflected the idealism of the Lyceum Address. Reverence for the law led to a naivete about the effect of legal decisions. Lincoln's willingness to take *either* side of the *Matson* case further underscores an indifference to the consequences of following the law.[84] After Lincoln

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[81] Bennett, *Forced Into Glory*, 281.
[82] Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln*, New York: Simon & Schuster, 2005, 108-115.
[83] *Illinois State Register*, August 1, 1857; *McElroy v. Clements, LPAL.*
[84] See Allen Guelzo, *Abraham Lincoln: Redeemer President*, 126. Guelzo argued that "Nothing underscores Lincoln's indifference to slavery as a injustice to blacks more than his decision , shortly before leaving Illinois to begin his congressional term in Washington, to act as counsel for a Kentucky slave

initially extracted himself from representing Matson, he was willing to represent the Bryants. Lawyers were free to represent anyone they wanted, and were not responsible for the morality of their clients. Lincoln took his cases as they came, as was the practice of most lawyers, but one was not *required* to take every case. Nonetheless Lincoln's willingness to take on either side of such a case reveals a reverence that fails to provide a moral critique of the law. Chief Justice Marshall also displayed this mentality in *The Antelope* case. Acting as a jurist and not a moralist, the consequences of sentencing hundreds of Africans to a life of slavery pitted law against morality in Marshall's mind. And the law won. Lincoln was not a racist as Bennett also argues, but he certainly revealed an insensitivity to the consequences of his presumed success in court. Lincoln's moral vision was obscured through blind adherence to the law and shows Lincoln before "the slavery issue…seared itself into his conscience to the point of inducing him to place the plight of a few hapless Negroes above the abstract legal aspects of the question."[85]

Lincoln's decision to represent Matson can also be criticized for taking a case he had little chance to win. Lincoln learned the law through the cases that he litigated. Lincoln's reading list was rather thin: Blackstone's *Commentaries*, Chitty's *Pleadings*, Greeleaf's *Evidence*, Story's *Equity*, and Story's *Equity Pleadings*.[86] Herndon described Lincoln as "in every respect a case lawyer, never cramming himself on any question till he had a case in which the question was involved."[87] Thus the bulk of Lincoln's legal education came case by case. In short, Lincoln was a lawyer who tended to learn the law

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owner, Robert Matson, when Matson's slave, Jane Bryant, filed a freedom suit for herself and her six children." Ibid.

[85] Thomas, *Abraham Lincoln*, 112.

[86] *Collected Works*, III, 344; IV, 121. In these two letters Lincoln advises others on the best way to prepare for the practice of law, and cites these texts as essential.

[87] Herndon, *Life of Lincoln*, 272.

as it came up rather than as a scholar with a deep theoretical grounding in legal philosophy. If Lincoln knew the state of the law, he would have been misguided to take a case where the law was so clearly against him. The body of law regarding the status of slaves had been developing since before Lincoln was admitted to the bar. The two cases cited by the court in the *Matson* decision were available since the judges were able to cite them as precedent. *Ex Parte Simmons* was decided in 1823. *Vaughn v. Williams*, an 1845 case was reported in the *Western Law Journal* and originated in the U.S. Circuit Court for the District of Indiana, the neighboring state. *Commonwealth v. Aves* was decided by the Massachusetts Supreme Court in 1836, and the Illinois Supreme Court addressed the issue of slaves in transit in *People v. Willard* four years before the Matson case. Moreover, *Willard* was decided at a time when Lincoln was actively practicing before the Illinois Supreme Court while partnered with Stephen T. Logan. As both a politician and lawyer, Lincoln should have known about these cases and the issues they raised, since they were becoming so important to the American political landscape. Consequently, Lincoln's legal education betrayed him into accepting a case he should have known was impossible to win.

Lincoln's self-proclaimed reverence for the law is also implicated in his decision to represent Matson. By arguing on behalf of Matson, Lincoln showed reverence not for the law of his home state Illinois, but the slave law of Kentucky. In essence Lincoln was calling for his own state's law to suspend their commitment to freedom and allow another state to infect and subvert the ideals of not just Illinois law, but the Ordinance of 1787 as well. Years later in a speech given in Cincinnati, Ohio, Lincoln queried:

> Pray what was it that made you free? What kept you free? Did you not find your country free when you came to decide that Ohio should be a Free State? It is

> important to inquire by what reason you found it so? Let us take an illustration between the states of Ohio and Kentucky. Kentucky is separated by this river Ohio, not a mile wide. A portion of Kentucky, by reason of the course of the Ohio is further north than this portion of the Ohio in which we now stand. Kentucky is entirely covered with slavery--Ohio is entirely free from it. What made that difference? Was it climate? No! A portion of Kentucky was further north than this portion of Ohio. Was it soil? No! here is nothing in the soil of the one more favorable to slave labor than the other. It was not climate or soil that caused one side of the line to be entirely covered with slavery and the other side free from it. What was it? Study over it. Tell us, if you can, in all the range of conjecture, if there be anything you can conceive of that made that difference, other than that there was no law of any sort keeping it out of Kentucky? while the Ordinance of '87 kept it out of Ohio. If there is any other reason than this, I confess that it is wholly beyond my power to conceive of it. This then I offer to combat the idea that that ordinance has never made any State free.[88]

Lincoln had been practicing for about ten years when he took the Matson case on, and should have known what he was doing. In *Matson*, Lincoln was, in fact, arguing that Illinois laws operate in such a way as to give full force and effect to the slave state of Kentucky and betray Illinois' commitment to freedom. This was not Lincoln's finest hour.

Lincoln's greatness stemmed in part from his capacity to learn life's lessons and change over time. In would be unfair to freeze Lincoln in the frame of this misguided effort to defend the slaver's interests. Ten years later Lincoln diametrically opposed the result he sought in the *Matson* case as he mounted a sustained attack on the *Dred Scott* decision. The facts and issues in *Dred Scott* and *Matson* are strikingly similar; freedom for a slave that once resided in Illinois. Looking back at *Matson* through the lens of *Dred Scott*, Lincoln stands a changed man. *Dred Scott* pried open Lincoln's reverence for the law, and forced him to look at the law's moral dimension. Lincoln realized how Chief Justice Roger B. Taney subverted not just the law, but the Declaration of Independence. This was Lincoln's line in the sand. While the Lincoln of the late 1840s, imbued with a

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[88] *Collected Works,* III, 455.

romantic ideal of the law, could defend Matson the slave owner because reverence for the law required it, the Lincoln of the late 1850s would never have taken sides against the interests of Dred Scott, the slave.

CHAPTER SIX

LINCOLN'S LIFE ON THE CIRCUIT

> Lincoln "was happy—as happy as he could be, when on the Circuit—and happy no other place. This was his place of Enjoyment."
>
> David Davis[1]

> Lincoln "was a sad-looking man; his melancholy dripped from him as he walked."
>
> William H. Herndon[2]

The Eighth Judicial Circuit

To succeed in law and earn a sustainable livelihood, Lincoln needed to reach beyond the boundaries of Springfield and ride the circuit. The caseload provided by the Springfield courts did not yield the required legal business to sustain a law practice on the edge of the frontier. To thrive in practice Lincoln needed to find cases outside Springfield. This search for business meant traveling the circuit where the legal needs of the surrounding counties could be addressed. Lincoln and his fellow traveling attorneys worked the Eighth Judicial Circuit. Circuit practice was tough both physically and mentally, but Lincoln loved it. As President, Lincoln waxed nostalgic on his years as a circuit practitioner. In fact, Judge David Davis opined that Lincoln "was happy—as happy as *he*

[1] Wilson, *Herndon's Informants,* 349.

could be, when on this Circuit—and happy no other place. This was his place of Enjoyment."[3] Circuit practice is a significant aspect of Lincoln's legal history. The scene is worth describing.

The natural landscape little touched by the hand of man was "desolate and almost as solitary as at Creation's dawn."[4] Intruding onto the still of the prairie came a band of twenty lawyers and an itinerant judge traversing the counties of central Illinois, drumming up business and dispensing justice. Lawyers rode circuit eight to ten weeks each autumn and spring. This nomadic life did not allow for a secretary, law clerk, or any other standard accessories of the typical law office. Only the bare necessities such as books, papers, and a change of clothes could be carried since the circuit bar traveled on horseback.[5]

Upon arrival in town, the locals greeted the sojourning attorneys and retained their services to address the community's legal concerns. Since the lawyers did not have offices, the initial interviews would take place near the courthouse, on a sidewalk, under a tree, or wherever people could talk with a modicum of privacy. With sessions lasting under two weeks, time was of the essence. Complaints and other legal documents had to be drafted, and witnesses prepared for trial; the lawyers learned to think and act quickly. The cases, however, could be quite ordinary. In fact one of Lincoln's circuit associates claimed that "[i]t is strange to contemplate that in these comparatively recent, but primitive days, Mr. Lincoln's whole attention should have been engrossed in petty controversies or acrimonious disputes between neighbors about trifles; that he should

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[2] Herndon, *Life of Lincoln*, 473.
[3] Wilson, *Herndon's Informants,* 349.
[4] Whitney, *Life On the Circuit with Lincoln*, 40.

have puzzled his great mind in attempting to decipher who was the owner of a litter of pigs, or which party was to blame for the loss of a flock of sheep, by foot rot; or whether some irascible spirit was justified in avowing that his enemy had committed perjury…"[6] Yet these were the petty problems of the people's court and Lincoln was the people's lawyer.

The accommodations on the circuit were rather primitive. Two to three men in a bed with sometimes twenty in a room, mean coffee, bedbugs, and bad food. Lincoln, however, never complained.[7] Circuit associate Major Henry C. Whitney provided a description on the convivial nature of the enterprise:

> …the way we traveled was thus: Lincoln, Davis, Sweet, O.L. Davis, Lamon, Drake and myself would ride from Urbana in livery rigs to Danville--take a day--36 miles; sing and tell stories all the way: stop at a farmhouse & wait for them to kill and cook chickens for our dinner: get to Danville at dark. Lamon would have whiskey in his office for the drinking ones: those who indulged in petty gambling would get by themselves & play till late in the night. Lincoln and Davis & a few local wits would spend the evening in Davis room talking politics, wisdom and fun.[8]

Furthermore, Whitney noted "we frequently talked philosophy, politics, political economy, metaphysics and men; in short, our subjects of conversation ranged through the universe of thought and experience."[9] This small close-knit group of lawyers came to know each other well. As each autumn session ended and a new spring term began, the years of practice passed as Lincoln and his associates becoming experienced men of the law in the process.

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[5] Whitney, *Life on the Circuit*, 39-72; Duff, *Prairie Lawyer*, 168-192; Donald, *Lincoln*,104-6; Herndon, *Life of Lincoln*, 248-51.
[6] Whitney, *Life on the Circuit*, 41.
[7] Donald, *Lincoln*, 105, 106.
[8] Wilson, *Herndon's Informants*, 648.
[9] Whitney, *Life on the Circuit*, 62.

The courthouses that Lincoln tried his circuit cases in were basic, crude, and lacked the trappings of such temples of justice like the Supreme Court. During court week, however, the sleepy judicial arena came alive. The arrival of the bar was met with great fanfare as "the wits and county statesmen contributed their stock of pleasantry and philosophy: the local belles came in to see and be seen: and the Court House, from 'early morn to dewey eve', and the tavern from dewey eve to early morn, were replete with bustle, business, energy, hilarity, novelty, irony, sarcasm, excitement and eloquence."[10] These courtrooms provided a small stage for Lincoln, but an important one. On the circuit law and politics often merged in this accommodating venue. The courtroom was more than a hall of justice, it was where Lincoln built his legal reputation, worked on his education, and laid the foundation for his eventual return to public life.

In 1848 Illinois revised the state constitution and prescribed new rules to govern the judicial branch of state government. The new charter specifically impacted circuit practice. Prior to the revisions, an Illinois Supreme Court Justice rode circuit. The revised constitution provided for a special judge elected to serve each circuit, which meant that whoever was elected would travel with the attorneys. David Davis was the first judge elected to preside over the Eighth Judicial Circuit, which comprised Lincoln's hometown of Springfield and its surrounding counties.[11] The Eighth Circuit encompassed an enormous area and the geographic hurdles were immense, especially in spring when the snow melted and the vast prairie turned to mud. Davis and Lincoln would remain friends for the rest of their lives. One episode described by fellow circuit rider Leonard Sweet provides insight to the hijinks of the circuit as well as the nature of

[10] Ibid., 42.
[11] "AStatistical Portrait: Circuit Court Cases by County," *LPAL.*

the Davis-Lincoln relationship. This was the first time Sweet met Lincoln and he was told that he could find him in Judge Davis' room. After a "timid knock" on the door Sweet was told by two voices to "Come in." [12] One must "imagine my (Sweet's) surprise when the door opened to find two men undressed, or rather dressed for bed, engaged in a lively battle with pillows, tossing them at each other's heads. One, a low heavy-set man who leaned against the foot of the bed and puffed like a lizard, answered to the description of Judge Davis. The other was a man of tremendous stature; compared to Davis he looked as if he were eight feet tall…My name is Lincoln, strode across the room to shake my trembling hand."[13] Lincoln would ultimately argue 1,257 cases before Judge Davis.[14] The Judge helped Lincoln receive the Republican Party's nomination for President in 1860, and Lincoln eventually appointed Davis to the U.S. Supreme Court in 1862.[15]

The demands of circuit practice were not just physical. Long absences from home placed increase stress on Lincoln's home life. For example, the greatest of family tragedies, the death of a child, befell the Lincolns when their son Eddie died on February 1, 1850.[16] Yet just a month later, the Eighth Circuit was in session and Lincoln was back in court. The term began in Sangamon County, which allowed Lincoln to remain close to home, but the Tazewell County Circuit Court began on April 3, 1850 and the circuit ride was once again in full swing.[17] These must have been difficult times at home for Mary dealing with the loss of her son alone, while her husband was on the road.

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[12] Wilson, *Herndon's Informants*, 732.
[13] Ibid.
[14] "A Statistical Portrait: Peers and Clients," *LPAL*
[15] Donald, *Lincoln*, 246-250, 381.
[16] "Lincoln Chronology," *LPAL.*
[17] Miers, *Lincoln Day by Day,* II, 31; "Lincoln Chronology," *LPAL.*

Lincoln, on the other hand, had the law and a close-knit group of men who provided companionship, friendship, and emotional support for one another. In fact, these men formed deep bonds of affection that would endure the years to come and the trials and tribulations of their respective lives. Some of the central practitioners, in addition to David Davis, were Ward Hill Lamon, Leonard Sweet, Edward Baker, Joseph Gillespie, and Henry C. Whitney. Ward Hill Lamon, a Danville practitioner, worked tirelessly for Lincoln's nomination as the Republican Party's candidate for President. Later, Lamon would escort Lincoln into Washington after Lincoln's election, armed with a small arsenal of weapons to protect the President-elect from the threat of assassination. Lincoln's appointment of Lamon as Marshall for the District of Columbia was one of his first. Lincoln selected Whitney United States Attorney for the Southern District of Illinois. Edward Baker was the namesake of Lincoln's son Eddie and when Baker was killed at the Battle of Balls Bluff, Lincoln was devastated:

> [It] smote upon him like a whirlwind from a desert. Lincoln deemed it the keenest blow he suffered in all the war. When he learned of Baker's fate, an expression of awe and grief solemnized the massive features of Lincoln. He emerged from the telegraph office with a bowed head, and tears rolling down his furrowed cheeks, his face pale and warn, his heart heaving with emotion and almost fell as he stepped into the street. With both hands pressed upon his heart he walked down the street, not returning the salute of the sentinel pacing his beat before the door. At the funeral, he wept like a child.[18]

Like any fraternity, circuit membership demanded certain norms of behavior; should breaches of decorum ensue, the group would "punish" the transgressor. "Deviant" behavior would incur the wrath of a mock tribunal, which became know as the Ogmathorial Court.[19] Illustrating this, Ward Hill Lamon claimed that "[o]ne of the first

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[18] Michael Burlingame, *The Inner World of Abraham Lincoln*, Urbana and Chicago: University of Illinois Press, 1994, 104.
[19] Whitney, *Life on the Circuit*, 46.

things I learned after getting fairly underway as a lawyer was to charge well for legal services,--a branch of the practice that Mr. Lincoln could never learn."[20] In fact, Lamon stated that "the lawyers of the circuit often complained that his fees were not at all commensurate with the service rendered."[21] One situation recollected by Lamon showed how Lincoln's compassionate side got him into trouble with the Ogmathorical Court. Lamon and Lincoln, acting as co-counsel, had been given a fee of two hundred fifty dollars to protect the interests of an estate. The primary beneficiary of this estate was a young girl with limited mental faculties. The girl's brother had been appointed conservator and Lincoln and Lamon were responsible for defeating a motion to have the conservator removed. The successful court appearance lasted about twenty minutes and Lincoln refused to accept half of the fee unless it was reduced.[22] Lamon protested that the fee was fixed in advance; that Scott was perfectly satisfied, and had so expressed himself. '"That may be,"' retorted Lincoln, with a look of distress and undisguised pleasure, 'but I am not satisfied. This is positively wrong. Go call him back and return half the money at least, or I will not receive one cent of it for my share.'" [23]

This episode got the attention of Judge Davis who could not help but overhear Lincoln and Lamon. Davis said, "Lincoln, I have been watching you and Lamon. You are impoverishing this bar by your picayune charges of fees, and the lawyers have reason to complain of you. You are now almost as poor as Lazarus, and if you don't make people pay you more for your services you will die as poor as Job's turkey." [24] But

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[20] Ward Hill Lamon, *Recollections of Abraham Lincoln, 1847-1865,* Lincoln and London: University of Nebraska Press,1895, 17.
[21] Ibid.
[22] Ibid., 17-19.
[23] Ibid.,18.
[24] Ibid.

Lincoln could not be swayed: "'That money,' said he 'comes out of the pocket of a poor, demented girl, and I would rather starve than swindle her in this manner.'"[25] Lincoln's plea to Judge Davis did not end the matter. That evening Davis and the other lawyers put Lincoln on trial in Davis' Ogmathorial Court. Lincoln was found guilty of impoverishing the bar by charging too low fees and after the verdict was rendered he "kept the crowd of lawyers in uproarious laughter until after midnight." [26]

On the circuit Lincoln found more than just new business for his firm. He found a band of brothers who knew each other well and lived a nomadic lifestyle that allowed for not only work and a livelihood but professional and emotional support. In Lincoln's case, the circuit also provided a unique opportunity for education.

Abraham Lincoln's Circuit Education

After court, with no domestic responsibilities, the attorneys were on their own time. Lincoln took this opportunity to read, study, and reflect. Lincoln's first law partner, John Stuart, described Lincoln's study habits on the circuit:

> In the evening Lincoln would strip off his coat and lay down on the bed--read--reflect and digest.--After supper he would strip--go to bed--get a candle--draw up a chair or table and read till late of night: he read hard works--was philosophical--logical--mathematical--never read generally--didn't know anything about history--had no faith in it nor biography--didn't know geography generally--knew it in spots. He had nothing Rhetorical in his nature--no belles letters--he read specially--dug out things--He never read poetry as a thing of pleasure, except Shakespeare--he read Poe because it was gloomy--So of Burns at Bottom. Lincoln was a scholar from 1835--rather a hard student to 1845--He was an educated man in 1860--more than is generally known.[27]

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[25] Ibid.
[26] Ibid., See also Whitney, *Life on the Circuit*, 46 for a discussion of other matters that came before the Ogmathorial Court.
[27] Wilson, *Herndon's Informants*, 519.

The circuit rider had to travel light, but Lincoln always found room for some books. Significantly, they were not law books but instead "Lincoln commenced carrying around with him on the circuit--to the various Courts, books such as Shakespeare--Euclid as early as 1844 and continued to do so as late as 1853: he loved Burns--Carried Poe around on the Circuit--read and loved the Raven--repeated it over and over."[28] Lincoln's focus amazed Herndon who questioned "how he could maintain his mental equilibrium or concentrate his thoughts on an abstract mathematical proposition, while Davis, Logan, Sweet, Edwards and I so industriously and volubly filled the air with our interminable snoring was a problem none of us could ever solve."[29] This dedication to learning would pay dividends when Lincoln returned to Washington as President.

A more "typical" law practice would not have allowed for this opportunity. For example, in the more established communities such as New York, Boston, or Philadelphia, lawyers would come home from the office each day to contend with the domestic sphere. Issues relating to home and family would predominate the evening leaving little time for the life of the mind. The demands of the circuit in terms of time away from home left Lincoln free from the concerns of domestic life and he used this opportunity to advance his education.

On the circuit, the courtroom was Lincoln's classroom. During the day, lawyers waiting for their cases to be called needed to stay in the courtroom. Thus situated, their attention was riveted on the combatants before the court. The contest could often turn into a joint effort as the sideline bar offered advice, guidance, and alternative theories to the prosecution or defense of a case. This scenario "furnished a fine schooling for the

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[28] Ibid.
[29] Herndon, *Herndon's Life of Lincoln*, 248.

lawyers."[30] In Springfield Lincoln was not able to take advantage of this opportunity to the extent he could on the circuit. Lincoln & Herndon was a thriving practice and once court was over, there was usually pressing business back at the office that demanded Lincoln's attention. On the circuit with nothing better to do the lawyers could watch and learn. This was a clinical legal education with great practical importance. Lincoln could sit and observe what arguments were most persuasive as the intricacies of human nature revealed themselves during the jury trials.

Lincoln not only learned and thrived in this legal environment, he taught others as well. Lincoln had a reputation among circuit practitioners for helping the younger attorneys. Whitney stated that he "did not feel the slightest delicacy in approaching him for assistance."[31] According to Whitney, "it seemed as if he invited me to familiarity if not close intimacy at once; and this from no selfish motive at all—nothing but pure philanthropy and goodness of heart to a young lawyer just beginning his career."[32] Lincoln's generosity extended back to Springfield where he allowed law students to work in his office. One student, John Littleton, commented that "one of Lincoln's striking characteristics was his simplicity, and nowhere was this trait more strikingly exhibited than in his willingness to receive instruction from anybody and everybody."[33] Lincoln's thirst for knowledge, legal and otherwise, was quenched on the circuit.

The lawyers provided more than legal counsel and an odd sort of entertainment to the various communities. Life on the circuit also nurtured Lincoln's political aspirations. Circuit practice was more than the administration of justice, it was a way of life that

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[30] Woldman, *Lawyer Lincoln*, 92.
[31] Wilson, *Herndon's Informants*, 734.
[32] Ibid., 735.
[33] Herndon, *Life of Lincoln*, 256.

fused law to politics in a unique way. The lawyers made political speeches and "before the introduction of railroads, telegraphs, telephones, and daily newspapers the itinerant lawyers were the chief instructors of the people regarding the political issues of the day."[34] For example, "on the first day of the term after court adjourned, some prominent member of the bar would make a speech defending his own party. The following noon or night, a lawyer of the opposite party would reply, and so the lawyer-orators would alternate to the end of the term of court. Three to four hours was the usual length of one of these addresses."[35] Henry C. Whitney provides as apt description of Lincoln's ability as an orator and certifies how law and politics converge for Lincoln through his public speaking skills.

> The power of oratory was never seen to better advantage or more impressively, than in Lincoln's evolution from a circuit lawyer, with an extremely attenuated political record, to the highest position in current history. It was achieved entirely by oratory. He held no office; had no position where he could act; had no publication in which to air his views; no way to reach the public except by speeches, made generally under circumstances of discomfort and disadvantage, unlike the efforts of public men in general, in a luxurious and stately deliberative hall, with an attendant library, and colleagues ready to give aid and comfort. Unless one has had experience he can never know the difference between speaking under such favorable circumstances and speaking as Lincoln generally had to—from improvised stands in the grove, or in illy ventilated halls, or, as I have seen him, in a rude court house, with so dim a light that he could not see to read an extract. Yet his speeches, generally made under such adverse circumstances, constituted his sole "stock in trade" with which to enter the Chicago convention to compete with the statesmen of international fame, and also to bear off the coveted prize. [36]

Circuit practice gave Lincoln not only a chance to observe and reflect on the political opinions of others, but also the chance to develop his own skills in public speaking on political issues. It was as if each new county provided an opportunity for Lincoln to hone his skills. The demands of the circuit provided sound training for the

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[34] Woldman, *Lawyer Lincoln*, 91.
[35] Ibid., 92.

Lincoln–Douglas debates that would thrust Lincoln into the national political arena. Lincoln loved the circuit as he was able to play the dual part of lawyer/politician even though he did not hold any public office. The circuit also kept Lincoln close to public opinion, which in American politics is an essential place to be.

Traveling the Eighth Circuit enabled Lincoln to keep his finger on the political pulse of rapidly expanding community. Here Lincoln found the opportunity to combine law with politics and make political connections with others throughout central Illinois. From this vantage point, Lincoln could do more than litigate. He could also survey a broad sample of public opinion. Since the Eighth Circuit occupied the central part of the state and also included the state capitol at Springfield, Lincoln was able to contrast the political positions of both northern and southern Illinois. This prospect made it easier for Lincoln to stretch his political antenna to search north and south in the state and sharpen his grasp over the political and economic concerns of the day. For example, "Lincoln's acute sense of the mood, potentialities, and prejudices of ordinary citizens in Central Illinois came from a long immersion in the ways. He came to grasp what they wanted—and needed—which helped him consolidate his political career. A lot of votes were at stake. Circuit work in some ways gave Lincoln the chance to campaign half of every year for most of his adult life." [37] It can be added that this is where Lincoln learned a great deal about human nature. By interacting with these people legally, socially, and politically, Lincoln developed a deep understanding of the human condition and the importance of public opinion. In order to mold public opinion Lincoln first needed to know what the people thought. The circuit facilitated this endeavor. "With the farmers he

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[36] Whitney, *Life on the Circuit*, 203.
[37] Strozier, *Lincoln's Quest for Union,* 144.

discusses crops and farm stock; with the businessmen he talked of the necessity of more railroads and transportation facilities. He would reason upon the tariff, land values, and general industrial, agricultural conditions to the great edification of the scores of listeners, who would be sure to throng around him at every store and tavern he visited. His wit and humor made him a universal favorite and an ever-welcome guest in every county seat. Here the common people learned to know and love him and he in turn to understand and love them. Their problems became his problems. Their aspirations became his aspirations."[38] Thus when the time was ripe for Lincoln's return to the politics, he was armed with more than just the legal skills he developed through circuit practice. Lincoln's years on the circuit were crucial to his growth and development. Lincoln & Herndon was thriving, growing from a low of about one hundred fifty cases when Lincoln returned from Congress to over three hundred in 1850. The firm grew to almost four hundred cases by 1851. The practice peaked at close to five hundred cases in 1852. Lincoln had been working hard since returning from Washington. Lincoln & Herndon was busy and the circuit provided much of their workload. Lincoln, practicing "more assiduously than ever before" developed his legal mind, and on the circuit learned to think beyond the strict parameters of legal precedent.

Lincoln, Tocqueville, and the "turn of the lawyer's mind"

Circuit practice led to creative thinking in the courtroom. The lonely courthouses on the circuit were bereft of the basic tools of the lawyer's trade. There was no law library to consult for precedent. Armed with nothing more than the little they could carry and their understanding of human nature, the lawyers had to make law. Original

[38] Woldman, *Lawyer Lincoln*, 97.

arguments were critical to success on the circuit and this environment forced Lincoln to construct creative legal arguments that addressed the equitable nature of the case before the court. Circuit law provided a rough frontier justice that was for the most part predicated on principles of equity. Consequently basic notions of justice were used to decide a case.[39] This is where Lincoln excelled. Whitney claimed that "in case of sufficient magnitude, and especially involving new principles, he would cast authorities to the winds, and sound the depths of his own mind for original arguments to meet the requirements of his case, and in that sort of law practice he was probably without a peer at our bar."[40] A system of justice predicated on precedent, however, does not foster creative judicial thinking. The American judicial system, like the English, is based on the law of precedents. Alexis de Tocqueville noted this when he observed the following:

> [English and American lawyers] still derive their opinions in legal matters and the judgments they should pronounce from the opinions and legal judgments of their fathers. An English or American lawyer almost always combines a taste and respect for what is old with a liking for regularity and legality. This influences in yet another way the turn of the lawyer's minds, and so the course of society. The first thing an English or American lawyer looks for is what has been done, whereas a French one inquires what one should wish to do; one looks for judgments and the other for reasons. If you listen to and English or American lawyer, you are surprised to hear him quoting the opinions of others so often and saying so little about his own, whereas the opposite is the case with us. A French lawyer will deal with no matter, however trivial, without bringing in his whole system of ideas, and he will carry the argument right back to the constituent principles of the laws in order to persuade the court to move the boundary of the contested inheritance back a couple of yards.[41]

Thus constrained by precedent, the American lawyer was generally less creative in the application of jurisprudence. Lincoln and his circuit practitioners, while not completely excused from the principles of precedent, nonetheless had a unique opportunity to engage

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[39] Whitney, *Life on the Circuit*, 255; Donald, *Lincoln,* 149; Beveridge, *Abraham Lincoln*, I, 518; Fraysee, *Lincoln, Land and Labor*, 95; Duff, *Prairie Lawyer*, 168.
[40] Whitney, *Life on the Circuit*, 255.

the French style of argumentation. Three factors allowed for this. First, the physical environment of the circuit where law books were few and far between created a void that original arguments could fill. Second, once the circuit court system was reformed to provide for separate judgeships, the Supreme Court Justices who previously rode circuit were replaced by elected judges like David Davis who might not be so concerned with a strictly technical legal argument. For example, a sitting Supreme Court Justice would be interested in an argument based on precedent since as a member of the state's highest legal tribunal, they would be more familiar and insistent on this style of practice. Davis, on the other hand, was not a Supreme Court Justice. Thus, Davis not institutionally bound to the prison of precedents developed a much more pliant legal mind capable of filtering out the unfair elements of the law in developing an equitable jurisprudence. Significantly, Davis hated legal technicalities and was much more likely to cast precedent aside when principles of justice were at stake. In fact, Whitney described Davis as "a good Circuit Judge:-he disdained technicalities, sharp practice, 'the law's delay and the insolence of office:' and aimed at practical and just results in the shortest mode: and his common sense and good judgment led to a general habit of submitting cases to him with no intervention of a jury: and his adjudications gave as a general satisfaction as and evoked fewer appeals than those of any other Judge in the State."[42]

The third factor that led the circuit attorney toward original legal thought was that cases not tried before Judge Davis were tried to a jury. Lincoln connected to the jury and spoke their language. Fairness can be a powerful ally when the law offers no relief. For example, while litigating a patent suit with Grant Goodrich in Chicago, Lincoln relayed a

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[41] Tocqueville, *Democracy In America*, 267.
[42] Whitney, *Life on the Circuit*, 61-2.

story of a Tazewell County juror in a divorce action. Lincoln's client was a "pretty, refined and interesting little woman."[43] The defendant husband was "a gross, morose, querulous, fault-finding and uncomfortable man."[44] While the defendant husband was vulgar and offensive toward his wife, there was no evidence of physical violence, which was required under the law to prove divorce. Lincoln raised the equitable argument and directed the jury as to why they should move the contested area of the law back a few yards by appealing "to the jury to have compassion on the woman, and not bind her to such a man and such a life as awaited her if required to live longer with him."[45] While sympathetic to the woman's plight, all but one of the jurors followed the law. The one holdout, however, said "gentlemen, I am going to lie down to sleep, and when you get ready to give a verdict for that little woman, then wake me up and not until then; for before I will give a verdict against her I will lie here till I rot, and the pismires carry me through the key-hole."[46] This illustrates the jury's willingness to disregard the law in favor of an argument that appealed to their sense of fundamental fairness.

The original argumentation of circuit practice served Lincoln particularly well when important questions of first impression came before the court. Lincoln's argumentation style on the circuit was logical and fact specific, which juries could certainly relate to. His advice to Herndon about speaking the jury's language was something Lincoln practiced. Circuit practice and the rigors of trial practice paid off for Lincoln in what some consider his greatest legal victory.[47] In *Hurd v. The Rock Island Bridge Co.*, popularly known the *Effie Afton* case, Lincoln participated in a trial that had

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[43] Wilson, *Herndon's Informants*, 510.
[44] Ibid.
[45] Ibid.
[46] Ibid.

significant implications for the economic growth and development of not just Illinois and the mid-west, but the changing nature of transportation and economic development.[48] This case pitted the river interests against the railroads as they both competed for the market share of commerce that required a transportation network to succeed. In this matter an economic sectionalism was in operation. The river ran north and south, while the rail ran east and west. According to Lincoln, the river represented the past and the rail represented progress. In his argument to the jury, Lincoln looked to the future for a resolution as Tocqueville claimed was the French style.

The state of Illinois granted a charter to the Rock Island Bridge Co. to build a bridge across the Mississippi River from Illinois to Iowa in order to expedite rail travel across the river. There were actually two separate bridges involved. The first was a short bridge from the Illinois shore to Rock Island in the river. Then there were railroad tracks across Rock Island that connected with a longer bridge that joined Rock Island to the Iowa shoreline.[49] This was the first bridge that spanned the Mississippi and the competing transportation interests of river and rail collided when the steamboat *Effie Afton*, owned by John Hurd, crashed into the bridge and burned. The flames from the burning boat eventually engulfed the bridge as well. The plaintiffs claimed that the bridge was an impediment to free navigation and thus responsible for damages to the boat. The defense argued that the bridge did not constitute an obstacle to river transit, and moreover, the pilot of the *Effie Afton* failed to exercise due care in navigating his vessel through the currents surrounding the bridge.

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[47] Duff, *Prairie Lawyer*, 332.
[48] Donald, *Lincoln*, 157; Duff, *Prairie Lawyer*, 332-345; Woldman, *Lawyer Lincoln*, 182-85.
[49] Duff, *Prairie Lawyer*, 333.

The case generated great attention and was tried in the United States District Court for the Northern District of Illinois. Lincoln's co-counsel in the case were Norman B. Judd and Joseph Knox. Upon the conclusion of testimony, Lincoln addressed the jury in closing argument. At the outset of his summation Lincoln planted the seed of progress, the importance of the railroad, and its ability to cross rivers for growth and development. The efficacy of the rail and bridge system was one of the two key elements of the case for Lincoln as he alerted the jury to the undeniable fact that the river freezes and this was a fact of nature. This natural fact, however, impeded progress. Lincoln pointed out that "there is a travel from East to West, whose demands are not less important than that of the river. It is growing larger and larger, building up new countries with a rapidity never before seen in the history of the world."[50] The implication was clear for the jury: stop the bridge and you stop progress. To underscore his point, Lincoln cited the "astonishing growth of Illinois" as well as the growth of "Iowa and other young and rising communities of the Northwest."[51] The jury certainly understood that more than the facts of the case were in their hands. The river, especially the "Mighty Mississippi" created a powerful symbol for those who border its banks as well as the larger country since it formed a vital natural border between east and west in antebellum America. The river is part nature, part transportation, but also part legend to those who have allowed the image of this current to infuse their imagination. Lincoln himself as a young man was captured with this spirit on his first riverboat trip to New Orleans. Nostalgia was a strong adversary, but progress was stronger. Lincoln cited the need for the bridge as "[t]his particular line has a great importance, and the statement of its

[50] *Collected Works*, II, 415.
[51] Ibid.,416.

business during little less than a year shows this importance. It is in evidence that from September 8, 1856 to August 8, 1857, 12,586 freight cars and 74,179 passengers passed over this bridge."[52] This was a significant amount of traffic. Could the river handle this load? Lincoln countered that "[n]avigation was closed four days short of four months last year, and during this time, while the river was of no use, this road and bridge were equally valuable. There is, too, a considerable portion of time, when floating or thin ice makes the river useless, while the bridge is as useful as ever."[53] The bridge could do what the river could not: keep economic development churning throughout the year. The contribution in terms of product and people transported was significant. Here Lincoln helped check the respect for the river through an argument about the future based on the efficiency and efficacy of the bridge and tells the jury "that this bridge must be treated with respect in this court and is not to be kicked about with contempt."[54] The contention between the river interests and supporters of the bridge was reaching a fever pitch. Lincoln cooled the flames and countered the inflammatory rhetoric of his adversary who "alluded to the stripe [strife?] of the contending interests, and even a dissolution of the Union." Lincoln argued that "the proper mood for all parties in this affair, is to 'live and let live' and then we will find a cessation of this trouble about the bridge."[55] The stakes at the outset were clear to the jury; the bridge represented the future and this advance should not be feared.

Significantly, Lincoln said very little about the law to the jury. During the course of the summation, which lasted several hours, all Lincoln said was, "I am not now going

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[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

to discuss the question what is a material obstruction? We do not differ very greatly differ about the law. The cases produced here, are, I suppose, proper to be taken into consideration by the Court in instructing the jury. Some of them I think are not exactly in point, but I am still willing to trust his honor, Judge McLean, and take his instructions as law."[56] The fact of the matter, however, is that if the jury found that the bridge was a material obstruction, the river interests would have prevailed and Lincoln would have lost the case. Lincoln opted, however, for the more original and forward- looking argument in his effort to convince the jury. The mood thus set, and the notion of what should be done planted in the juror's minds, Lincoln then argued the facts.

Lincoln's task was to demonstrate to the jury that the *Effie Afton's* captain did not exercise reasonable skill and care as he negotiated his craft around the bridge. Lincoln's years of fact-specific jury trials while riding circuit provided a crucial tool in his efforts to sway the jury. Lincoln, in this instance, however, had more than legal experience to guide him. He was familiar with the river. In fact, Lincoln was granted a patent by the United States Patent Office on May 22, 1849 for "a new and improved manner of combining adjustable buoyant air chambers with a steamboat or other vessel for the purpose of enabling their draught of water to be readily lessened to enable them to pass over bars, or through shallow water, without discharging their cargoes."[57] Lincoln had spent considerable time contemplating the navigation of rivers and the problems this posed. Armed with this knowledge, Lincoln was able to explain the complicated concepts of engineering as well as the flow of the currents that a steamboat captain should understand. Getting to the "nub" of the question, Lincoln asked the jury, "What is

[56] Ibid., 417.
[57] Ibid., II, 32-35.

reasonable skill and care?"[58] Lincoln suggested the answer. Marshalling the facts, he argued that "[t]he Afton came thereon the 5th, and lay at Rock Island on the 5th, and lay at Rock Island until next morning. When the boat lies up, the pilot has a holiday, and would not any of these jurors have then gone around there, and got acquainted with the place? Parker has shown here that he does not understand the draw. I heard him say that the fall from the head to the foot of that pier was four feet! He needs information. He could have gone there that day and have seen that there was no such fall. He should have discarded passion, and the chances are that he would have no disaster at all. He was bound to make himself acquainted with it."[59] Later in the summation Lincoln reduced the question to its essence. Claiming that the vessel was off course, Lincoln asked, "[w]as it not her own fault that she entered wrong? so far, wrong that she never got right. Is the defense to blame for that?"[60] In sum, it was the fault of the captain, not the bridge nor the railroad.

While both parties lost property in this unfortunate incident, neither party won the lawsuit as the jury was hung at nine for the Rock Island Bridge and three for the *Effie Afton*. Although neither side prevailed in the suit, the bridge interests emerged in a superior position since the jury never found that the bridge was an obstacle to navigation and damages were never assessed against the Rock Island Bridge Co., all of which would have affected future bridge development. The significance this case holds for Lincoln the lawyer is that it not only showcased Lincoln in one of his finest hours as an attorney, but it also illustrated Lincoln's ability to present a case to the jury as an agent for economic

[58] Ibid., 417.
[59] Ibid., 418.
[60] Ibid., 421.

change. More importantly, however, this case reveals the effect of circuit practice on the development of Lincoln's powers of persuasion and original thinking.

Railroad litigation provided Lincoln with other opportunities to create arguments based on first impression. For example, Railroad litigation comprised a fair portion of not only Lincoln's appellate practice, but also the Supreme Court's docket. As the railroads expanded during the 1850s so too did the number of legal issues that needed adjudication in this nascent field of the law.[61] In *Illinois Central v. Morrison et al.*, for example, Lincoln appeared on behalf of the Illinois Central in an appeal involving the right of the railroads to limit their liability as a common carrier.[62] In *Morrison*, the plaintiffs had contracted with the Illinois Central to transport about four hundred cattle. The transport of the cattle was delayed when one of the locomotives broke down. As a result of the delay the cattle were damaged. As part of a special contract, the Illinois Central agreed to offer Morrison the freight rate rather than the first-class rate in return for Morrison's agreement that the Illinois Central would only be liable for damages resulting from gross negligence. This limitation of liability was a new legal theory that had not yet been tested before the Illinois Supreme Court. As the court pointed out, "[u]ntil the establishment and use of railroads for the conveyance of property, it was not generally considered that common carriers could, by special contract, limit their liability."[63] Lincoln successfully defended the Illinois Central and the Court in adopting Lincoln's arguments held that the railroad could limit their liability to "gross negligence

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[61] Sandra K. Lueckenhoff, "A. Lincoln, a Corporate Attorney and the Illinois Central Railroad," *Missouri Law Review*, Vol. 61, 393-428, 1996.
[62] *Illinois Central v. Morrison et al,* 17 Ill. 291 (1854), *LPAL*; Lueckenhoff, "A. Lincoln, a Corporate Attorney and the Illinois Central Railroad"; Duff, *Prairie Lawyer*, 265-67.
[63] *Illinois Central v. Morrison et al*, 19 Ill. 136, 138 (1857).

or willful malfeasance."[64] This was a significant victory for the Illinois Central in terms of railroad liability and Lincoln was in the forefront of these new legal ideas.[65]

In perhaps the most notable of Lincoln's railroad cases, *Illinois Central R.R. Co. v. County of McLean*, Lincoln was also able to muster his original powers of reasoning to avert the railroad's being taxed out of existence.[66] Once the railroads began to traverse the various counties of central Illinois, they became vulnerable to local municipality's power to tax. The railroads were already subject to state taxation and if the various counties through which the railroads passed could also tax them; the iron horse could be taxed, and taxed, and taxed. Lincoln represented the Illinois Central against the taxing authority of McLean County and was ultimately successful. In this case of first impression, Lincoln persuaded the Illinois Supreme Court to find for the railroad and limit their tax liability to State taxes thus denying McLean County taxing authority and thereby saving the Illinois Central untold thousands of dollars.[67]

Reputation, Manliness and Circuit Practice

"[I]n America,' Tocqueville observed, "there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore, the lawyers form the political upper class and

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[64] Ibid.,141.

[65] Lincoln's law partnerships handled 133 railroad cases. Most of these cases were with William Herndon as his partner, but most of those cases were handled by Lincoln himself. Lincoln did not only represent the railroads, but often sued them as well. For example of the 133 cases, Lincoln represented the railroad in 71 of those cases, and sued the railroad in 62 cases. It must be noted, however, that Lincoln represented the Illinois Central Railroad 47 times and only sued them on 5 occasions. In addition, Lincoln represented the Alton and Sangamon Railroad 12 times and only sued that entity 3 times. The Northern Cross Railroad was sued by Lincoln many more time than he represented them; 17 suits against and only 6 times representing that Railroad. With the Northern Cross Railroad, Lincoln sued 27 times, but only represented them once. Thus when discussing Lincoln's railroad cases it is important to break down that part of his practice into specific railroads to get an accurate picture of his relationship to this area of practice. "A Statistical portrait, Lincoln and the Railroads-Table 14-Lincoln and partner's Railroad Clients," *LPAL.*

[66] *Illinois Central R.R. Co. v. County of McLean*, 17 Ill. 291 (1854).

[67] Lincoln had to sue the Illinois Central Railroad in order to recover his $5,000 fee.

the most intellectual section of the society."[68] The lawyers were the leaders and their dominance of legislative bodies lends credence to Tocqueville's claim that "[t]here is hardly a political question in the United States which sooner or later turns into a judicial one."[69] In fact, Tocqueville argued that "[l]awyers, forming the only enlightened class not distrusted by the people, are naturally called on to fill most public functions. The legislatures are full of them, and they head administrations; in this way they greatly influence both the shaping of the law and its execution." [70] This fusion of law and politics that Tocqueville so aptly described was illustrated in the life of Lincoln as a lawyer who developed a seamless connection between these complementary professional worlds. Membership in the bar, however, did not guarantee success in politics. The necessary element that fused law to public service was reputation.

Reputation, "the light by which the world looks for and finds merit," was critical to success in antebellum Illinois.[71] Sangamon County, the land of Lincoln, had been populated by a large number of settlers from Kentucky, Tennessee, Virginia, and North Carolina who carried with them notions about the traits of manliness.[72] Physical courage, a hearty constitution to confront the challenges of a frontier society, and the importance of standing up to all challengers were prerequisites for a sound reputation. Since many of the early settlers to Sangamon County were from southern states, honor also commanded a central place in community life.[73]

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[68] Tocqueville, *Democracy in America*, 268.
[69] Ibid. 270.
[70] Ibid. 269.
[71] *Webster's New World Dictionary of Quotable Definitions*, Prentice Hall: Englewood Cliffs, New Jersey 1970, 489.
[72] Nicole Etcheson, "Manliness and the Political Culture of the Old Northwest, 1790-1860," *Journal of the Early Republic*, 15 Spring 1995, 59.
[73] Ibid.

As previously mentioned in chapter one, when Lincoln arrived at New Salem in 1831 the Clary Grove boys and their leader, Jack Armstrong, promptly challenged him to a wrestling match.[74] What mattered most was that Lincoln accepted the challenge and did not back down. It also helped his reputation in that at minimum, Lincoln held his own. Physical strength was important since New Salem "was rough, the young men were all wild, and full of fun and frolic. All the manly sports that pertained to a frontier life were in vogue there. Running, wrestling, jumping, gander-pulling, and horse racing."[75] Lincoln would continue, throughout his professional career to accept the challenges of a variety of arenas that helped further his reputation and thus his political ambitions in the process. Lincoln's friend Joshua Speed claimed that "I heard him spoken of by those who knew him as a wonderful character. They boasted that he could outwrestle any man in the county, and that he could beat any lawyer in Springfield speaking." [76]

Before he practiced law, however, Lincoln served in the Black Hawk War. Courage was expected and wartime service has always enhanced the reputations of our would-be political leaders. Custom dictated the election of their own officers and when William Kirkpatrick announced his candidacy for captain, the Clary Grove boys nominated Lincoln and with their support Lincoln won. As Lincoln moved from young man to maturity and the middle class, reputation was no longer defined by the violence of youth, but by the validity of your word. Significantly, Lincoln's ability to remain true to his word helped him obtain and retain the esteem of his fellow attorneys. This reputation would eventually propel Lincoln in and out of public service as he moved through the legal and political spheres that defined his professional life. The courtroom was one of

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[74] Wilson, *Honor's Voice,* 19-53.
[75] Speed, "Reminiscences," 20.

Lincoln's main proving grounds. Lincoln demonstrated not only courage and physical strength when those attributes were called for as a young man, but upon entering the political and legal arena developed a reputation for integrity, honesty, and ability that led to success in both the courtroom and in the larger political sphere.

The circuit was a small and intimate, but, nonetheless an important world. The circuit provided the venue for Lincoln to emerge as one of antebellum Illinois' leading lawyers. This is also where Lincoln made his reputation and over the course of time also gained the esteem of the new communities that were developing along the edge of the frontier. Lincoln found an accommodating ground on the Eighth Circuit as the use of physical strength gave way to mental toughness as the signifier of reputation. Some have claimed that these legal contests were more than just ways for the community to resolve disputes. They were "the equivalent of sporting events" and that the locals "rooted for their favorite champions—among them Lincoln." [77] Like the boxing ring, the courtroom leaves no means of escape. The locals were all watching, and Lincoln was in the center of the ring. The people trusted Lincoln and nothing endeared him to the people of central Illinois more than his reputation for honesty. Lincoln's reputation preceded him, and this helped attract not only clients for his law practice, but voters during the 1850s as he sought first a seat in the U.S. Senate and ultimately the presidency.

Lincoln's reputation for sincerity was established in his law practice and certified through his circuit travels. Trustworthiness went hand in hand with honesty and this was yet another key Lincoln character trait that helped advance his reputation across the circuit. Juries trusted Lincoln and this bond helped him win cases, which in turn brought

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[76] Ibid., 17.
[77] Fraysse, *Lincoln, Land and Labor,* 95.

more business. For example, one newspaper report claimed that "[s]uch has become the established integrity of Lincoln with us that let a jury be empanelled from any part of our populous county, to try a cause, and they will take his exposition of the law and the facts of a case without a scruple; for they know that as Lincoln has never misconstrued the law, nor perverted the evidence, they can follow him and do no wrong. And when a man brings that kind of reputation on the hustlings, his power with the people is almost omnipotent." [78] From this evidence it seems as if Lincoln's word was law.

Lincoln's reputation was not limited to jury trials. Samuel Parks, a fellow circuit practitioner, stated that "for a man who was for the quarter of a century *both a lawyer & a politician* he was the most honest man I ever knew." [79] In fact Parks claimed that Lincoln "was not only morally honest but intellectually so—he could not reason falsely—if he attempted it he failed." [80] In support of his claim, Parks relates the story of a criminal case in which Lincoln refused to give a summation to the jury since he believed the client guilty and that the jury would see right through him and convict. Consequently Lincoln's co-counsel submitted the case to the jury.[81] Another circuit rider, Joseph Gillespie, claimed that "[h]e was a marvel of fairness in debate both in the courts & the political and he never desired to obtain an unfair advantage."[82] Gillespie went on to state that "[n]o man ever commanded greater respect from or inspired more confidence in an audience than Mr. Lincoln did."[83]

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[78] Beveridge, *Abraham Lincoln,* 542 quoting *Chicago Tribune*, September 27, 1858.
[79] Wilson, *Herndon's Informants*, 238.
[80] Ibid.
[81] Ibid.
[82] Ibid., 507.
[83] Ibid., 508.

Judges whom Lincoln practiced before shared this consensus on his reputation. Judge William Thomas, stated that "[f]rom the beginning of his practice, Lincoln was distinguished, for fairness and candor in conducting or defending suits as well as for clear, Logical Statements & deductions, It was next to impossible for a judge to detect an error in any grounds that he assumed in argument. Admitting his conclusions were irresistible."[84] Judge Thomas was not alone in his assessment of Lincoln's character. Judge Drummond said that Lincoln "always tried a case fairly and honestly. He never intentionally misrepresented the evidence of a witness or the argument of an opponent. He met both squarely, and if he could not explain the one or answer the other, substantially admitted it. He never mis-stated the law, according to his own intelligent view of it."[85] Finally Judge Breeze said that "[f]or my single self, I have for a quarter of a century regarded Mr. Lincoln as the finest lawyer I ever knew, and of a professional bearing so high-toned and honorable as justly, and without derogating from the claims of others, entitling him to be presented to the profession as a model worthy of the closest imitation." [86] If imitation is the highest form of flattery, Lincoln's reputation "is the light by which the world looks for and finds merit."[87] Perhaps the best indication as to how esteemed Lincoln was would be to compare his reputation with Stephen Douglas, another "giant" of his age. "Douglas was idolized by his followers. Lincoln was loved by his. Douglas was the representative of his partisans. Lincoln was the representative man of the unsophisticated People. Douglas was great in the estimation of his followers.

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[84] Ibid., 392.
[85] Whitney, *Life on the Circuit*, 257.
[86] Ibid.
[87] *Webster's Dictionary of Quotable Definitions*, 489.

Lincoln was good in the opinion of his supporters. Douglas headed a party. Lincoln stood on a principle." [88]

After his return from Congress in 1849 Lincoln submerged himself in the practice of law, and life on the circuit. Lincoln & Herndon had a thriving practice that comprised almost on third of the docket in Sangamon County by 1853.[89] During this period Lincoln's family life changed as well. His son Eddie had died, but a third son William was born in December 1850. The following month Lincoln's father died. In April 1853 Lincoln's fourth son, Thomas, was born. Professionally, Lincoln was rising to the top of his profession as an attorney and using his time on the circuit to improve his education and discuss and debate the issues of the day. These were years of hard work, spending months at a time away from home with his circuit practice.[90] The Lincoln & Herndon firm expanded and moved from the smaller space in the Tinsley Building to larger space that occupies the present corner of Washington and Fifth Streets in Springfield.[91]

Before the decade ended, Lincoln would become a member of the new Republican party, lead the nascent political organization in Illinois, deliver orations that still reverberate in the American historical imagination, and be elected to our nation's highest office. Biding his time on the circuit bode well for Lincoln and helped prepare

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[88] Wilson, *Herndon's Informants*,184-85.
[89] Donald*, Lincoln*, 145.
[90] The 1850s found Lincoln on the circuit for a considerable amount of time each year. In 1850 Lincoln rode circuit for 113 days. The following year, Lincoln was on the road for 143 days. In 1852 Lincoln served circuit clients for 110 days. In 1853 Lincoln was away on the circuit for 121 days. Finally in 1854 Lincoln rode the circuit for 116 days. In 1855 Lincoln spent 104 riding circuit and another 12 days traveling to and from Cincinnati for the McCormick Reaper case. In 1856 Lincoln was away from Springfield for 144 days of circuit travel, while the following year he spent 123 days on the circuit with an additional 23 days in Chicago on the "Effie Afton" case. In 1858, the year Lincoln debated Stephen Douglas, he rode circuit only 53 days, but the summer and fall were devoted entirely to the Senate campaign. In 1859, the year before his election to the presidency, Lincoln was on the circuit 73 days, which does not include his time away from Springfield lecturing in Ohio and Wisconsin. Source: Miers, *Lincoln Day by Day.*
[91] "Chronology," LPAL.

him for the role he was soon to play. In short, when his "prelude to greatness" came, Lincoln was ready. Never fully drained from the blood of Lincoln's professional ambition, politics would now overtake law as Lincoln's driving force one again. But Lincoln continued to practice law; after all, he still needed to earn a living. There was, however, a decisive shift back to Lincoln's true mistress, politics. As the 1850s propelled the nation toward political crisis, Lincoln was part of the great national debate. His speeches, particularly the "House Divided" address, aroused the populace to fever pitch. The re-emergence of Lincoln ultimately placed him on the debate platform with Stephen Douglas as "Popular Sovereignty" competed with a "House Divided" for the soul of America.

CHAPTER SEVEN

THE PRAIRIES ARE ON FIRE

> A house divided against itself cannot stand
>
> Abraham Lincoln[1]

> He cannot logically say that anybody has a right to do wrong.
>
> Abraham Lincoln[2]

> And then, the negro being doomed, and damned, and forgotten, to everlasting bondage, is the white man quite certain that the tyrant demon will not turn upon him too?
>
> Abraham Lincoln[3]

Lincoln's reverence for the law was pushed to the brink in the aftermath *of Dred Scott v. Sandford*.[4] This Supreme Court decision created a "hydraulic pressure" on Lincoln's legal mind and produced an important shift in Lincoln's legal philosophy.[5] The *Dred*

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[1] *Collected Works,* II, 461.
[2] Ibid., III, 226.
[3] Ibid., II, 553.
[4] *Dred Scott v. Sandford*, 19 How. 393 (1857).
[5] Bernard Schwartz, *A History of the Supreme Court*, New York: Oxford University Press, 1993. In this book Schwartz uses the term "hydraulic pressure" to describe the effects that watershed cases have had on American society. *Dred Scott v. Sandford* was one of those cases. The term is borrowed here, however, to describe the effect of the case not only on American society, but also on the legal mind of Lincoln. Schwartz takes this term from Oliver Wendell Holmes' dissenting opinion in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) in which Holmes described these important cases as having the effect of exercising "'a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.'" Schwartz ,105, quoting *Northern Securities v. United States.* I will argue in this chapter and in the next chapter that after the *Dred Scott* case, Lincoln's

Scott case contained issues that were, ironically, similar to the *Matson* slave case Lincoln argued ten years before. Both *Dred Scott* and *Matson* centered on the status of slaves in transit from one state to another. These cases also pitted laws of free states against those of slave states. Although Lincoln did not participate in the *Dred Scott* litigation, it nonetheless rocked his reverence for the law to its foundational core.

Dred Scott v. Sandford was commenced in Missouri state court in 1846 alleging that since Dred Scott had worked for Dr. Emerson in the state of Illinois and the territory of present-day Wisconsin he was, therefore, a free man. Scott originally sued Dr. Emerson's wife for his freedom as Dr. Emerson had since passed away. The jury found for Scott, but the Missouri Supreme Court reversed the decision, claiming that under Missouri law Scott was still a slave. The attorneys for Scott then moved the case to the federal court where Scott sued John Sanford, Mrs. Emerson's brother, claiming assault and false imprisonment. John Sanford, a New York resident and abolitionist, intended to test the facts of this case in federal court. Since Scott was deemed to be a resident of Missouri, he could sue in federal court on the grounds of diversity of citizenship. After losing the jury trial, Scott appealed and the case eventually made the docket of the U.S. Supreme Court. The Court's decision was announced on March 6, 1857 just two days after James Buchanan was inaugurated President.[6]

Writing for the Supreme Court, Chief Justice Roger Taney ruled that Scott was not free by reason of his stay in Illinois because the law of Missouri governed his status

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reverence for the law, once so strong, was weakened after *Dred Scott*, and as President, Lincoln will use the law to shape the Northern response to secession and principles of constitutional law such as habeas corpus will bend before Lincoln's vigorous use of his Commander-in-Chief powers.

[6] For an excellent illustration of the complex procedural history of the *Dred Scott* decision see chart in Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, New York: Oxford University Pres, 1978, 266.

once he returned to Missouri. The Court could have ended the case with this narrow ruling, which decided the primary issue of the case. The decision, however, also held that Scott had not become a free man by virtue of residence in a territory from which slavery had been excluded by the Missouri Compromise because the provisions of the Missouri Compromise excluding slavery were unconstitutional. Going even further, Taney found that Negroes, even those who were free could not become citizens of the United States. Most objectionable for Lincoln, however, was the claim by Chief Justice Taney that "negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States."[7] Lincoln weighed in on the *Dred Scott* decision from Springfield on June 26, 1857:

> We believe as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only in particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.[8]

Lincoln's remarks here first offered respect and obedience to the law while claiming that any change must come from lawful means. This mentality seems to reveal a legal mind still fully wedded to a reverence for the law. Significantly, however, in this speech Lincoln also articulates a more active role in constitutional interpretation. Rebutting Stephen Douglas's contention that to criticize the Supreme Court is dangerous, Lincoln contended that the *Dred Scott* decision lacked unanimity, demonstrated a partisan bias, and was not grounded in historical truth. Consequently, to challenge this decision was not factious or disrespectful. Then Lincoln introduced a new strain in his judicial

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[7] *Collected Works*, II, 403.

philosophy. Relying upon *Andrew Jackson*, Lincoln agreed that a president can interpret the Constitution "*as he understands it*."[9] This statement revealed a much more active role for the president in constitutional lawmaking. This view represented a shift from the notion of judicial review as first articulated by the Supreme Court in *Marbury v. Madison* where the court through Chief Justice John Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So is a law to be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conforambly to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case. This is the very essence of judicial duty."[10] Thus placed, the Supreme Court became the final arbiter of constitutional questions, and carved out for that branch of government the power of judicial review.

This constitutional power, however, was contested in the antebellum era most notably by President Andrew Jackson in the aftermath of the Supreme Court decision *Worcester v. Georgia*.[11] The Cherokee removal formed the backdrop to this case.[12] At issue in *Worcester* was whether the state of Georgia could enact laws for the territory of Georgia in which the Cherokee people resided. Samuel Worcester, a missionary, had entered Cherokee land to preach without first obtaining the required license to do so from

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[8] Ibid., II, 401.
[9] Ibid., 402.
[10] *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803).
[11] *Worcester v. Georgia*, 6 Pet. 515 (1832).
[12] Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," 21 *Stanford Law Review* 500, 1969.

the state of Georgia. Worcester was arrested for violating Georgia law and jailed. The constitutional issue pitted the State of Georgia against the Federal government for the right to legislate over Native American lands. The Constitution grants the power to regulate Indian affairs to Congress, not the states.[13] The Constitution is clear on this point. Chief Justice Marshall, writing for the majority, held the Georgia laws unconstitutional and ordered the release of Worcester. President Jackson reputedly said, Marshall has made his decision now let him enforce it.[14] Lincoln was not so bold; not yet anyway.

In the Springfield speech, Lincoln agreed with the proposition that "If the opinion of the Supreme Court covered the whole ground of this act, it aught not to control the co-ordinate authorities of this Government. The Congress, the executive and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."[15] Significantly this "as he understands it" language would form the dramatic conclusion to the Cooper Union Address where

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[13] US Const. Art. I sec. 8.

[14] Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality." In this Law Review article, Burke examines the aftermath of the Worcester decision in which the Supreme Court held the Georgia laws requiring missionaries to obtain a license from the state of Georgia before entering Cherokee Lands unconstitutional. At the time President Jackson was developing a theory of constitutional law that allowed each independent branch of government to decide matters of constitutional interpretation. This theory was expressed in his veto message on the Bank bill in which Jackson stated that '"the Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution.'" Burke, 528. This constitutional view was illustrated in the Cherokee cases where Jackson was accused of not enforcing the will of the Supreme Court. Whether or not Jackson used the words "Marshall has made his decision now let him enforce it" can be proved, his actions revealed his intent on enforcement. In fact, the issue was also debated in the Press. Burke cites a parody of Jackson's position in the National Gazette : "There is a constitution of the United States. But every man has a right to judge of its provisions and no one is bound to obey or enforce it if he believes it to be unconstitutional. Ministers of the Gospel are under the protections of the laws. But when falsely imprisoned the President is not bound to enforce a decision declaring them so—if it will in his opinion injure his re-election to office." Burke, 529. While the actors will be different in 1861, the constitutional issues will be similar as Lincoln and Chief Justice Roger Taney's constitutional visions clash over habeas corpus. Going further than Jackson, Lincoln will ignore Taney, which is hardly reverence for the law and illustrative of a transformed legal mentality.

Lincoln states "LET US HAVE FAITH THAT RIGHT MAKES MIGHT, AND IN THAT FAITH, LET US TO THE END DO OUR DUTY AS WE UNDERSTAND IT."[16] The attitude contained in that expression would also inform Lincoln's decision making during the early days of the constitutional crisis posed by secession, particularly with respect to habeas corpus, which is addressed in the next chapter. This post–*Dred Scott* view is not the romantic faith in the law that characterized Lincoln's early years at the bar. In the Springfield speech Lincoln began to demonstrate the genesis of an evolving legal mind that was more active in constitutional analysis. No longer was Lincoln the passive recipient of legal dogma. Lincoln claimed his place to not just criticize constitutional interpretation, but to offer his own. Lincoln honed his constitutional views during the years leading up to his presidency so that when the South seceded, Lincoln's legal mind was ready for the constitutional challenge. The vehicle for this continuing evolution in constitutional thought was the Lincoln–Douglas debates. This change is charted initially during their seven joint appearances. The debates then continued in a different arena as each continued to debate constitution issues through campaign appearances in Ohio in 1859 where Douglas' article in *Harper's Magazine* was hotly debated. The culmination of Lincoln's change in judicial philosophy was revealed as Lincoln gave his most thorough examination of the founders' intent on the future of slavery at the Cooper Union Institute in New York City.

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[15] *Collected Works,* III, 402.
[16] Ibid., III, 550.

Lincoln, a "House Divided," and the Public Mind

"The Prairies are on Fire"[17] the newspapers claimed and indeed they were. The extension of slavery into the territories fueled by the Kansas-Nebraska Act ignited a conflagration that would soon burn out of control as a divided nation was propelled toward civil war. Abraham Lincoln's "House Divided" speech launched his candidacy for the United States Senate in 1858, and as the decade came to a close, Lincoln's life as a lawyer and politician converged, and the fusion helped propel him toward the national spotlight, and ultimately the Presidency.

1858 began for Lincoln as most years did, with a court appearance. The United States District and Circuit courts as well as the Illinois Supreme Court were in session during the months of January and February. Lincoln was a very busy lawyer as the records from his law practice indicate he had cases before the federal courts most days that court was in session. Often Lincoln would have more than one case on the docket. In fact on January 8, 1858 Lincoln had seven cases come up for trial.[18] Sometime trials were short and could be heard in one day. Other times a trial could last days or weeks.

The arrival of March 1858 meant Lincoln once again had to ride circuit.[19] During this term Lincoln would not only attend to his customary caseload, but would also sit as a substitute judge for David Davis for three days in April during the Champaign County Circuit Court term and make notations in more than 140 cases.[20] Judge Davis' decision to appoint Lincoln as his substitute was further evidence of the esteem Lincoln commanded

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[17] Harold Holzer, ed., *The Lincoln–Douglas Debates*, New York: Harper Collins, 1993, 1.
[18] Miers, *Lincoln Day By Day,* 207-8.
[19] "Lincoln Chronology," *LPAL*. The Eighth Judicial Circuit was in session during March and April 1858, *LPAL* The *LPAL* indicates that Lincoln had seventeen cases in the Circuit Courts in March and April 1858.
[20] "Lincoln Chronology," *LPAL*

in the legal profession. Lincoln was thriving as an attorney as the spring circuit term neared its close in May 1858, just one month before he was nominated as the Republican Party's candidate for the Senate.

Before the term was over, however, Lincoln tried one of his most famous cases. Although criminal cases only comprised a small portion of Lincoln's caseload, the Armstrong murder trial, or as it is referred to the "Almanac Trial" has received more than its fair share of attention.[21] The facts of the Almanac Trial reveal that in August 1857 at a religious camp revival meeting, William "Duff" Armstrong, Preston Metzker, and James W. Norris were drinking on the outskirts of the meeting grounds when a fight broke out. At the end of the encounter, Preston Metzker was fatally wounded and died three days later. Both Armstrong and Norris would be tried separately for Metzer's death. Norris was tried first, found guilty, and sentenced to eight years in the state penitentiary. Armstrong's initial attorneys successfully sought a change of venue from Mason County where he was indicted to Cass County where presumably an unbiased jury could be assembled. Lincoln appeared in the Cass County proceeding and took the case as a favor to Armstrong's mother, Hannah, who was a friend from Lincoln's days in New Salem. Lincoln represented Armstrong and successfully cross-examined the prosecution's star witness, Charles Allen, who testified that he saw Armstrong strike Metzner with a slung shot. Even though it was about eleven at night and Allen was 150 feet away, Allen was certain that it was Armstrong because the moon was directly overhead and the sky was lit by the bright moon allowing a clear line of vision. Using an almanac, Lincoln confronted Allen on cross-examination and through this respected source was able to show that the moon was low in the sky and close to setting at eleven p.m., not directly overhead as

Allen had claimed. The clear inference was that Allen could not have witnessed the crime since the moon could not have provided the necessary light to aid Allen's vision from so far away. This was all the jury needed to cast doubt upon the witness' credibility. The jury acquitted Armstrong and Lincoln has been famous for this performance ever since.[22]

The Republican nominating convention for the U.S. Senate seat was fast approaching and Lincoln was the party favorite. In a brief autobiography made just before the opening of the nominating convention Lincoln listed the following: "Born, February 12, 1809, in Hardin County, Kentucky. Education defective. Profession, a lawyer. Have been a captain of volunteers in Black Hawk war. Postmaster at a very small office. Four times a member of the Illinois legislature, and was a member of the lower house of Congress."[23] Ultimately Lincoln became the Republican Party's choice to run against Stephen Douglas, and with his acceptance speech the race was on.

Lincoln's opening salvo in the 1858 Illinois senatorial race asserted that "A house divided against itself cannot stand. I believe this government cannot endure, permanently half slave and half free. I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing, or all the other."[24] With this speech Lincoln accepted the Republican Party's nomination as their U. S. Senate candidate to challenge the Democrat, Stephen Douglas. This address, the opening statement of the "case" *Lincoln vs. Douglas,* was an appeal to the "public mind" to check the advance of slavery into the territories. Lincoln hoping to unseat Douglas also sought to do more in this effort. He also intended to win over the jury of

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[21] *People v. Armstrong, LPAL.*
[22] Duff, *Prairie Lawyer*, 353-59; Woldman, *Lawyer Lincoln*, 120-26; Donald, *Lincoln*, 150-51.
[23] *Collected Works*, II, 459.
[24] Ibid*.,* 461.

public opinion and expose the concept of popular sovereignty as antithetical to the true intent of the founding fathers. The idea of a "house divided" was controversial, as it created the image of a country rent by slavery and lunging toward civil war. The power of this notion was the power to incite. Lincoln, however, did not intend to ignite passion and unrestrained invective, but rather to reinvigorate public opinion. The American house that Lincoln saw contained a torpid public mind that needed to be aroused from the lulling effects of popular sovereignty. [25] It is important to place Lincoln in the context of his times in order to understand why these issues are becoming so central to the political discourse of the times as well as to understand why Lincoln frames the arguments the

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[25] There is a significant body of literature on the Lincoln-Douglas debates. As a general framework for understanding the historiography, the debates can be viewed through the prism of their particular place in Illinois politics, and how that state debate related to the larger national debate over the extension of slavery into the territories. The leading proponent of this view is Robert W. Johannsen. This view can be compared with Harry V. Jaffa who argues for a more universal understanding of the debates and their relation to the fundamental ideals expressed in the Declaration of Independence, as well as the central role the repeal of the Missouri Compromise played in framing the debate.

A good place to begin for an understanding of the Johannsen approach is "The Lincoln-Douglas Campaign of 1858: Background and Perspective," *Journal of the Illinois State Historical Society* 73 (Winter 1980): 242-62. Also helpful is the introduction to *The Lincoln-Douglas Debates of 1858*, edited by Johannsen, New York: Oxford University Press, 1965. Johannsen's biography of Stephen A. Douglas is also an important source. *Stephen A. Douglas*, Urbana: University of Illinois Press, 1993, 664-66, 668-77. For a continuation of the debates that began in the Illinois senatorial contest which became part of the 1859 Ohio Campaign see Harry Jaffa and Robert Johannsen, *In the Name of the People: Speeches and Writings of Lincoln and Douglas in the Ohio Campaign of 1859*, Columbus: The Ohio State University Press, 1959. A particularly valuable introduction is provided in this volume in which Johannsen writes part of the introduction entitled "The Setting," Ibid., 1-33 and Jaffa writes part of the Introduction entitled "The Issues," Ibid., 34-57. Also included in this volume is Douglas' *Harper's Magazine* article, "The Dividing Line Between Federal and Local Authority."

Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates, Chicago: The University of Chicago Press, 1959 provided Harry V. Jaffa's major contribution to the scholarship. In framing the discussion, Jaffa argues that "The Lincoln-Douglas debates are concerned, in the main, with one great practical and one great theoretical question. The practical question was resolved into the constitutional issue of whether federal authority may, and the political issue of whether it should, be employed to keep slavery out of the organized federal territories. The theoretical question was whether slavery was or was not inconsistent with the nature of republican government; that is, whether it was or was not destructive of their own rights for any people to vote in favor of establishing slavery as one of their domestic institutions." Ibid., 9. Also helpful is Harry V. Jaffa, "'Value Consensus' in Democracy: The Issue in the Lincoln-Douglas Debates," *American Political Science Review* 52 (September 1958): 745-53.

See also Don E. Fehrenbacher, *Prelude to Greatness: Lincoln in the 1850's*, Stanford: Stanford University Press, 1961. More recently David Zarefsky, *Lincoln Douglas and Slavery In the Crucible of Public Debate*, Chicago: The University of Chicago Press, 1990; David Zarefsky, " '"Public Sentiment Is

way that he does. It is essential, however, to view Lincoln as a political philosopher who is speaking in universal terms about the viability of the American experiment in democracy, and the ideals of the Declaration of Independence.

The notion of a house divided was politically problematic. Lincoln has previously used this biblical image in a political speech in the fall of 1856 in Bloomington. T. Lyle Dickey noted:

> [i]n that speech Mr. Lincoln distinctly proclaimed it as his opinion that our Government Could not last—part slave & part free--:that either Slavery must be abolished everywhere—or made equally lawful in all the states or the Union would be dismembered. I Can not be mistaken about this—for I was very sorry to hear him express an opinion which I regarded as erroneous & very dangerous—After the meeting was over—Mr Lincoln & I returned to Pike House—where we occupied the Same room—Immediately on reaching the room I said to Mr Lincoln –'What in God's name could induce you to promulgate such an opinion' Mr Lincoln replied familiarly—'Upon my soul Dickey I think it is true'—I reasoned to show it was not a correct opinion—He argued strenuously that the opinion was a sound one—At length I said to Mr Lincoln—'Suppose you are right in this opinion, & that our Government Can not last part free & part slave—What good is to be accomplished by inculcating that opinion (or truth if you please) in the minds of the People?—After a moment of silence & apparent reflection Mr Lincoln Said—'I do not see as there is any good to be accomplished the dissemination of the doctrine." To which replied—"I can see much harm which it may do." "You convince the whole people of this--& you necessarily make Abolitionists of all the People of the North & Slavery proponents of all South--& you precipitate a struggle which may end in disunion—The teaching of the opinion it seems to me tends to hasten the calamity' After some minutes of reflection Mr Lincoln rose and approached me extending his right hand to take mine & Said—
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> I don't see any necessity for teaching this doctrine--& I don't Know but it might do harm"—At all events from respect for your judgment, Dickey, Ill promise you I wont say so again during this Campaign"—We shook hands upon it & the subject was dropped—I heard no more of this time of thought from Mr Lincoln until the year 1858—when he proclaimed it in his famous Speech at Springfield—at the opening of that years Canvass.[26]

Everything': Lincoln's View of Political Persuasion," *Journal of the Abraham Lincoln Association*, Vol. 15, No. 2, Summer 1994, 23-40.

[26] Wilson, *Herndon's Informants*, 504-5.

The political landscape had changed significantly between 1856 and the 1858 contest with Stephen Douglas. James Buchanan had been elected President, the Supreme Court decided the *Dred Scott*, case and President Buchanan approved the Lecompton constitution. The notion of a "House Divided," however, remained contentious. The Supreme Court announced its decision in the *Dred Scott* case just two days after James Buchanan was inaugurated President. Buchanan had asserted in his inaugural address that he would abide by the Supreme Court's decision regarding slavery in the territories. When the *Dred Scott* decision was announced, a firestorm of criticism broke out. As Buchanan's first year in office wore on he would side with the Southern wing of the Democratic Party and urge Congress to approve the Lecompton Convention in the early months of 1858. This caused a split between the Democratic President and the Democratic Senator from Illinois, Stephen Douglas. These politically charged times seemed ripe for Lincoln to alert the American people to the fractured nature of American political life and he used the "House Divided" image to once again sound the alarm. [27]

According to his law partner William Herndon, Lincoln pieced the "House Divided" speech together from scraps of paper he stored in the lining of his hat.[28] These clippings provided Lincoln with the outline he needed to begin writing in earnest. Upon completion he read the speech to Herndon paragraph by paragraph. Herndon expressed concern about the first paragraph and whether it was "wise or politic" to proceed with the "house divided" idea.[29] Lincoln argued:

> That expression is a truth of all human experience, 'a house divided against itself cannot stand,' and 'he that runs may read.' The proposition also is true, and has been for six thousand years. I want to use some universally known figure expressed

[27] Kenneth Stampp, *America in 1857: A Nation on the Brink*, New York: Oxford University Press, 1990.
[28] Herndon, *Herndon's Life of Lincoln*, 324.
[29] Ibid., 325.

> in simple language as universally well-known, that may strike home to the minds of men in order to raise them up to the perils of the times. I do not believe I would be right in changing or omitting it. I would rather be defeated with this expression in the speech, and uphold and discuss it before the people, than be victorious without it.[30]

Lincoln understood the power of a simply constructed metaphor and how this could be used in persuasive speech. Lincoln used simple metaphors to great success in the courtroom and was hoping for the same illustrative effect from the "House Divided" image. In the political arena, if nothing else, Lincoln's speech captured the public imagination.

Before he asserted this controversial symbol, Lincoln convened a group of advisors and colleagues, including Herndon, for a discussion of the speech. At first no one endorsed the speech. One man called it a '"d—d fool utterance,"' another "said the doctrine was 'ahead of its time'" and a third focused on the political fallout from Democrats who had recently entered the Republican fold.[31] Herndon, however, had softened and said that while "the doctrine announced was rather rank, yet it suited my views, and I said, 'Lincoln, deliver that speech as read and it will make you President.'"[32] Lincoln delivered the speech as planned and his quest to sway the public mind was underway.

Viewed from the perspective of an effort to convince the "public mind," the speech reveals the dangers posed by majoritarian rule. Throughout this speech Lincoln focused on the importance of public opinion and the danger of a political system that supplanted morality with the will of the majority. This is something Tocqueville readily recognized about American society as the way to effect change. Tocqueville argued that

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[30] Ibid.
[31] Ibid., 326.

"the majority in the United States has immense actual power and a power of opinion which is almost as great. When once its mind is made up on any question, there are, so to say, no obstacles which can retard, much less halt, its progress and give it time to hear the wails of those it crushes as it passes."[33] Lincoln saw the danger in a majority that sanctioned slavery and using the image of a house divided claimed that "Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike in *all* the States, *old* as well as *new—North* as well as *South*."[34]

Traveling Jacksonian America in the 1830s, Alexis de Tocqueville made astute observations about the power of public opinion. Lincoln understood this power as he argued to the many juries in central Illinois, and developed a deep understanding of these people "from a long immersion in their ways."[35] "In America," Tocqueville claimed, "the majority has enclosed thought within a formidable fence. A writer is free inside that area, but woe to the man who goes beyond it. Not that he stands in fear of an auto-da-fe', but he must face all kinds of unpleasantness and everyday persecution. A career in politics is closed to him, for he has offended the only power that holds the keys. He is denied everything, including renown."[36] Lincoln had already gone "outside the fence" of public opinion earlier in his political career when as a first-term Congressman he challenged President Polk on the Mexican War in his "Spot Resolutions." Lincoln paid a high political price for this unpopular critique of the President and learned what

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[32] Ibid.
[33] Tocqueville, *Democracy In America*, 248.
[34] *Collected Works*, II, 461-62.
[35] Strozier, *Lincoln's Quest for Union,* 179.

Tocqueville observed: "In antiquity the most difficult thing was to change the law; in the modern world the hard thing is to alter mores, and our difficulty begins where theirs ends." Lincoln was trying to do just that: change the way people think.

Lincoln pushed the limits of public opinion in the "House Divided" speech and now had to explain why this proclamation was not an incitement to civil war. Walking the tightrope of public opinion, Lincoln carved out a position on slavery that avoided the extremes of a slaveocracy on the one side and abolition on the other. In Illinois this was a difficult and dangerous proposition since the label abolitionist still carried political consequences. Douglas pressed Lincoln in debate and tried to brand him a "Black Republican," which would have sealed Lincoln's political fate. Lincoln recognized that "[i]n this age, and this country, public sentiment is everything. *With it* nothing can fail; *against* it, nothing can succeed. Whoever moulds public sentiment, goes deeper than he who enacts statutes, or pronounces judicial decisions. He makes possible the inforcement of these, else impossible."[37] Preparing for the debates with the Douglas, Lincoln recognized how dangerous the Senator was to the ideals of the Declaration of Independence:

> Judge Douglas is a man of large influence. His bare opinion goes far to fix the opinions of others. Besides this, thousands hang their hopes upon forcing their opinions to agree with his. It is a party necessity with them to say they agree with him; and there is a danger they will repeat the saying till they really come to believe it. Others dread and shrink from his denunciations, his sarcasms, and his ingenious misrepresentations. The susceptible young hear lessons from him, such as their fathers never heared [sic] when they were young.[38]

This was power—the most dangerous type of power. A power that could transform the nation. This was the power of public opinion. Lincoln knew that the

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[36] Tocqueville, *Democracy In America*, 255.
[37] *Collected Works*, II, 552-53.

country was on the brink. Perhaps not the brink of civil war, but the public mind, infected with the idea of popular sovereignty, was ripe for change. This was Lincoln's target in the "House Divided" speech. Lincoln knew the stakes were high:

> If, by all these means, he shall succeed in moulding public sentiment to a perfect accordance with his own—in bringing all men to indorse all court decisions, without caring to know whether they are right or wrong—in bringing all tongues to as perfect a silence as his own, as to there being any wrong in slavery—in bringing all to declare, with him, that they care not whether slavery be voted down or voted up—that if any people want slaves they have a right to have them—that negroes are not men—have no part in the declaration of Independence—that there is no moral question about slavery—that liberty and slavery are perfectly consistent—indeed, necessary accompaniaments—that for a strong man to declare himself the superior of a weak one, and thereupon enslave the weak one, is the very essence of liberty—the most sacred right of self government—when I say public sentiment shall be brought to all this, in the name of heaven, what barrier will be left against slavery being made lawful every where? Can you find one word of his opposed to it? Can you not find many strongly favoring it? If for his life –for his eternal salvation—he was solely striving for that end, could he find any means so well adapted to reach the end?
>
> If our Presidential election, by a mere plurality, and of doubtful significance, brought one Supreme Court decision, that no power can exclude slavery from a Territory; how much much [sic] more shall a public sentiment, in exact accordance with the sentiments of Judge Douglas bring another that no power can exclude it from a State?
>
> An then, the negro being doomed, and damned, and forgotten, to everlasting bondage, is the white man quite certain that the tyrant demon will not turn upon him too?[39]

This was a battle for the hearts and minds of the people. Whoever was able to capture the "public mind" was positioned to direct the future course of freedom in America. Douglas and Lincoln both sought to shape public opinion, the former through a political prism that argued the right to vote on slavery through popular sovereignty, the

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[38] Ibid., 553.
[39] Ibid.

latter through an appeal to morality and the claim that the people did not "have a right to do wrong."[40]

Lincoln was deeply concerned that public would be fooled into believing that popular sovereignty was the answer. Fearing a complacent "public mind," Lincoln used the "House Divided" image to recapture the American imagination and redirect it toward the ideals of the Declaration of Independence. Lincoln found it hard to comprehend how Douglas could be so cavalier about this great moral injustice. He claimed that "I do not understand his declaration that he cares not whether slavery be voted down or voted up, to be intended by him other than as an apt definition of the policy he would impress upon the public mind—the principle for which he declares he had suffered much, and is ready to suffer to the end."[41] Lincoln warned that Douglas was dangerous precisely because his intent "is to *educate* and *mould* public opinion, at least *Northern* public opinion, to not *care* whether slavery is voted *down* or voted *up*."[42] The public mind, thus indoctrinated, posed a real danger to the ideals of the founders and should public opinion become complacent about the morality of slavery, the "tyranny of the majority" would steer American democracy toward despotism.[43]

Once accepted, the idea that a majority can sanction slavery would be hard to reverse. "And this may especially be expected if the doctrine of 'care not whether slavery be voted *down* or voted *up*' shall gain upon the public mind sufficiently to give promise that such a decision can be maintained when made."[44] In short, this would be a vote for all time. "How can he oppose the advances of slavery? He don't *care* anything

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[40] Ibid., III, 315.
[41] Ibid., II, 463-64.
[42] Ibid., 465.
[43] Tocqueville, *Democracy in America*, 246-261.

about it. His avowed *mission is impressing* the 'public heart' to *care* nothing about it."[45] If people did not care about slavery, then the ideals of freedom and equality would be replaced by a popular sovereignty that was "as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had starved to death."[46] Lincoln believed that if slavery were not put on the road to elimination, it would come to define the American experience for decades to come.

The "House Divided" speech was so controversial that within a week after the speech Lincoln needed to clarify what he meant in a letter to John L. Scripps, editor of the *Chicago Daily Democratic Press*, which was soon to merge with the *Chicago Tribune*. Scripps was an important voice. Lincoln needed the press to help sway the public mind. Lincoln wrote Scripps that he "was much flattered by the estimate you place on my late speech; and yet I am much mortified that any part of it should be construed so differently from any thing intended by me. The language, 'place it where the public mind shall rest in the belief that it is in course of public extinction,' I used deliberately, not dreaming then, nor believing now, that it asserts, or intimates, any power or purpose, to interfere with slavery in the states where it exists."[47] Lincoln wanted Scripps to pass this clarification on and stated in the letter that "I do not intend this for publication; but still you may show it to any one you think fit. I think I shall, as you suggest, take some early occasion to publicly repeat the declaration I have already so often made as before stated."[48] In fact Lincoln would have to spend considerable effort in the debates with Douglas to quash the "House Divided" inference that he was an

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[44] *Collected Works*, II, 467.
[45] Ibid.
[46] Ibid, III, 279.
[47] Ibid.,II, 471.

abolitionist wanting to end slavery throughout the South and was willing to incite civil war to achieve that aim.

Lincoln then began setting the stage for the Lincoln–Douglas debates that were to follow. Prior to the formal debates, Douglas attacked the "House Divided" speech when he spoke in Chicago on July 9, 1858 in an effort to justify his idea of popular sovereignty. Lincoln sat silently in the audience that evening. The following day, however, Lincoln rose from the same stage and rebutted Douglas' charges. Significantly Lincoln addressed what he meant by the implication of a house divided. He stated that:

> I am not, in the first place, unaware that this Government has endured eighty-two years, half slave and half free. I know that. I am tolerably well acquainted with the history of the country, and I know it has endured eighty-two years, half slave and half free. I believe—and that is what I meant to allude to there—I believe it has endured because, during all that time, until the introduction of the Nebraska Bill, the public mind did rest, all the time, in the belief that slavery was in the course of ultimate extinction…That was what gave us the rest that we had through that period of eighty-two years; at least so I believe. I have always hated slavery, I think as much as any Abolitionist. I have been an Old Line Whig. I have always hated it, but I have been quiet about it until this new era of the introduction of the Nebraska Bill began. I always believed that everybody was against it, and that it was in course of ultimate extinction. (Pointing to Mr. Browning, who stood near by.) Browning thought so; the great mass of the nation have rested in the belief that slavery was in course of ultimate extinction. They had reason so to believe.
>
> The adoption of the Constitution and its attendant history led the people to believe so; and that such was the belief of the framers of the Constitution itself….And now, when I say, as I said in my speech that Judge Douglas has quoted from, when I say that I think the opponents of slavery will resist the farther spread of it, and place it where the public mind shall rest with the belief that it is in course of ultimate extinction, I only mean to say, that they will place it where the founders of this Government originally placed it.[49]

Thus Lincoln looked back to America's foundations and used history as his justification for placing slavery where he believed the framers of the Constitution thought it belonged: one the road to ultimate extinction.

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[48] Ibid.
[49] Ibid., 491-92.

Lincoln spent the next several weeks following Douglas around the State and speaking either the same evening or the next day as he had done in Chicago. This allowed Lincoln to take advantage of the crowds Douglas generated and rebut the charges Douglas was levying against him. The preferred approach would have been for the candidates to debate each other on the same stage. In fact "[a]n editorial in the *Chicago Press and Tribune* broached the subject on July 22: 'We have a suggestion to make…Let Mr. Douglas and Mr. Lincoln agree to canvass the State together, in the usual western style…If Mr. Douglas shall refuse to be a party to such arrangement, it will be because he is a coward."[50] Douglas had nothing to gain from debating Lincoln since this would give Lincoln legitimacy as the opponent of the Senate leader. Douglas, however, had been challenged and to maintain his reputation, he could not back down and risk being branded "a coward." Douglas proposed nine debates, one for each of the congressional districts. Since both men spoke at Chicago and Springfield, the number of debates was reduced to seven. Lincoln agreed even though Douglas would give the opening statement and summation in four of the debates, which as Lincoln knew gave Douglas an advantage. Lincoln correctly pointed out that "by the terms as you propose you take four openings and closes to my three."[51] Lincoln the lawyer knew the importance setting the agenda in the opening statement and getting the last word in on summation. This was, however, a small price to pay for Lincoln. The exposure from sharing the stage with the "Little Giant" helped propel Lincoln to national recognition. These debates fused elements of law and politics. The combatants traveled a circuit quite similar to the ones Lincoln had

[50] Fehrenbacher, *Prelude to Greatness,* 99; Holzer, *The Lincoln-Douglas Debates*, 3.
[51] *Collected Works*, II, 531.

traversed for the past twenty-two years and debated the “great and durable question of the age” before the jury of public opinion.

Lincoln vs. Douglas

The Lincoln–Douglas debates took place over the course of two months, the rough equivalent of a circuit term. The venues changed as debates were held in seven cities. Both Lincoln and Douglas were trained attorneys. Skill in debate and other courtroom tactics such as cross-examination were critical to success, and used throughout the debates. Both men had honed their craft for years. Douglas debated in the majestic halls of the U.S. Senate while Lincoln argued in the backwoods of the Eighth Judicial Circuit. Both hopefuls had their supporters who came out in full force to back their candidate. Pageantry filled the air and the press closely monitored the charged atmosphere. The rigors of the circuit prepared Lincoln for this “special term” as his political future hung in the balance.

Lincoln was still very popular on the circuit and connected with the people of central Illinois. Lincoln was at the top of his profession when he rose to challenge Stephen Douglas in 1858. The countless cases Lincoln tried on the circuit and argued on appeal before the Illinois Supreme Court gave him some renown. Douglas, however, had national name recognition. As the senior senator from Illinois, Douglas helped engineer the passage of the Compromise of 1850 as well as the Kansas-Nebraska Act. Ostensibly, a Senate seat was at stake, but the slavery issue had larger national implications. Lincoln would have to stand toe to toe with the “Little Giant” and debate him on the burning issue of slavery. Lincoln was now wrestling with a different adversary in a different arena, but

one as vital to Lincoln's reputation as Armstrong's challenge was over a quarter century before. The rough-and-tumble world of circuit practice was sound preparation for Lincoln, and it served him well as the two lawyers slugged it out during the summer and fall of 1858 when "Popular Sovereignty" and the "House Divided" competed for the nation's attention.

The first of seven debates began on August 21, 1858 in Ottawa, Illinois. Freeport was the second debate stop on August 27; then Jonesboro, September 15; Charleston, September 18; Galesburg October 7; Quincy, October 13; and finally, Alton on October 15. The format, loosely based on legal procedure, provided for an opening speech of one hour with an hour and a half rebuttal followed by a thirty-minute summation.[52] The pageantry that typically surrounded law week on the circuit was evident during the great debates as well. The fanfare on this circuit, however, was immense. The carnival atmosphere brought horses and buggies filled with eager partisans of all ages armed with their picnic lunches. Political banners, hawkers and hucksters lined the dusty roads that were clogged with the throngs who came to see the political event of the year.[53] The crowds were enormous. At Ottawa, ten thousand turned out, followed by another fifteen thousand at Freeport. This third debate at Jonesboro was the least attended at about fifteen hundred. The fourth debate at Charleston attendance picked up to about ten thousand with double that amount at Galesburg for the fifth debate. The sixth encounter at Quincy found twelve thousand people in attendance and five thousand turned out at

[52] Fehrenbacher, *Prelude to Greatness*, 100; Donald, *Lincoln*, 211.
[53] Donald, *Lincoln*, 215-16; Allan Nevins, *The Emergence of Lincoln*, Vol. I, New York: Scribner's, 1950, 376-77.

Alton to witness the climax to this political event. In addition to the multitudes, the press were present to record the debates for the larger public consumption.[54]

Henry C. Whitney traveled with Lincoln to the first debate at Ottawa, and described his traveling companion:

> …[t]he humblest commercial traveler" who "did not travel unostentatiously; he was entirely alone, and carried his little baggage in his hand. He did not have a director's car, with a great retinue of flunkeys and parasites and a platform car, with a cannon on it, as his distinguished competitor did. He sat with me throughout the journey; and I am thus enabled to know for myself that this remarkable man exhibited not the slightest trace of excitement or nervousness at the threshold of one of the fiercest political contests in this or any other country. We talked about matters other than the impending debate. I merely alluded to that as we approached the goal for the contest to which he calmly and indifferently replied, that he was fully prepared.[55]

Lincoln needed to be prepared because the "Little Giant" went on the offensive. Douglas took advantage of his opportunity to speak first at Ottawa and demanded that Lincoln answer seven questions. This set the terms of the first debate and also had the effect of putting Lincoln on the defensive. Specifically, Douglas' theory of prosecution sought to paint Lincoln as a "Black Republican" by asking:

> I desire to know whether Mr. Lincoln to-day stands as he did in 1854, in favor of the unconditional repeal of the fugitive slave law. I desire him to answer whether he stands pledged to-day, as he did in 1854, against the admission of any more slave States into the Union, even if the people want them. I want to know whether he stands pledged against the admission of a new State into the Union with such a constitution as the people of that State may see fit to make. I want to know whether he stands to-day pledged to the abolition of slavery in the District of Columbia. I desire him to answer whether he stands pledged to the prohibition of the slave trade between the different States. I desire to know whether he stands pledged to prohibit slavery in all the territories of the United States, North as well as South of the Missouri Compromise line. I desire him to answer whether he is opposed to the acquisition of any more territory unless slavery is first prohibited therein. I want his answers to these questions.[56]

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[54] Thomas, *Abraham Lincoln*, 185-86.
[55] Henry C. Whitney, *Life on the Circuit*, 463.
[56] *Collected Works*, III, 5.

Rather than give specific answers to each question, Lincoln chose to make it clear that he did not favor abolition. If Douglas were successful in tagging Lincoln an abolitionist, Lincoln would have lost the battle for the public mind. Lincoln stated that "I have no purpose either directly or indirectly, to interfere with the institution of slavery where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."[57] Ironically, Lincoln would repeat these lines two years later in his First Inaugural address.[58] Lincoln then argued that the Negro was equal "in the right to eat the bread, without the leave of anyone else, which his own hand earns, he is my equal, and the equal of Judge Douglas, and the equal of every living man."[59] Thus stated Lincoln was prepared to honor both the Constitution and the free labor ideology of the nascent Republican Party. In addition to honoring the labor of Black America, Lincoln began his sustained refutation of the *Dred Scott* decision. Lincoln also began his refutation on the idea of popular sovereignty and the moral indifference of his adversary in this first debate. These three themes would resonate for Lincoln throughout the debates. Nonetheless, Lincoln had to proceed with caution as Douglas continually sought to place him beyond the pale of public opinion as a "Black Republican."

In the first debate Lincoln also reinforced the changing nature of his legal philosophy when he criticized Douglas for blindly adhering to the law of *Dred Scott*.

> This man sticks to a decision which forbids the people of a Territory from excluding slavery, and he does so not because he says it is right in itself—he does not give any opinion on that—but because it has *been decided by the court*, and being decided by the court, he is, and you are bound to take it in your political action as *law*—not that he judges at all of its merits, but because a decision of the court is to him *a 'Thus saith the Lord.'* He places it on that ground alone, and you

[57] Ibid., 16.
[58] Ibid., IV, 263.
[59] Ibid., III, 16.

> will bear in mind that thus committing himself unreservedly to this decision, *commits him to the next one* just as firmly as to this.[60]

In this statement Lincoln warned of the danger in blindly adhering to the law, which is a much different attitude than the one he expressed in the Lyceum Address.

The second debate was at Freeport. Lincoln opened and immediately went on the attack. First he gave specific answers to Douglas's seven interrogatories and then lashed into four questions of his own. The thrust of Lincoln's second question has become famous for creating what has been called the "Freeport Doctrine."[61] The four questions Lincoln posed to Douglas were:

> If the people of Kansas shall, by means entirely unobjectionable in all other respects, adopt a State Constitution, and ask admission into the Union under it, before they have the requisite number of inhabitants according to the English Bill-some ninety-three thousand-will you vote to admit them? Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State Constitution? If the Supreme Court of the United States shall decide that States can not exclude slavery from their limits, are you in favor of acquiescing in adopting and following such decision as a rule of political action? Are you in favor of acquiring additional territory, in disregard of how such acquisition may affect the nation on the slavery question?[62]

Like a good lawyer on cross-examination, Lincoln knew how Douglas would answer the famous second question. As predicted, Douglas answered:

> …as Mr. Lincoln has heard me answer a hundred times from every stump in Illinois, that in my opinion the people of a territory can, by lawful means, exclude slavery from their limits prior to the formation of a State Constitution….It matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a territory under the constitution, the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere unless it is supported by local police regulations.[63]

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[60] Ibid., 27-28.
[61] See Fehrenbacher, *Prelude to Greatness* ,121-142 for a discussion of the myth that has developed over the "Freeport Question."
[62] *Collected Works*, III, 43.
[63] Ibid., 51.

Lincoln in propounding the second interrogatory sought to place Douglas squarely on the record on this point and to use this response to illustrate the tension between Douglas and the Buchanan administration who had sided with the pro-slavery southern wing of the democratic party.[64] Moreover, Lincoln also began to use this response to show the legal inconsistencies between Douglas' position and the Supreme Court's *Dred Scott* decision, which he developed in detail in the following debate at Jonesboro.

Located in the southern part of Illinois, Jonesboro was Douglas territory. On friendly ground, Douglas again tried to tar Lincoln as a "Black Republican." Lincoln, however, developed a sophisticated legal analysis using the "Freeport Doctrine" and exposing the inconsistencies between Douglas' position and the Supreme Court in *Dred Scott*. In *Dred Scott*, the Supreme Court held "that any Congressional prohibition of slavery in the Territories is unconstitutional."[65] Douglas was on record supporting the Supreme Court's decision. In fact, Douglas claimed that this issue was one for the Supreme Court to decide. After Freeport, Douglas claimed that the people could withhold legislation to protect slavery. Lincoln argued that now Douglas "when he says, after the Supreme Court have decided the question, that the people may yet exclude slavery by any means whatever, he does virtually say, that it is not a question for the Supreme Court. [Applause] He shifts his ground."[66] Thus Lincoln uses the "Freeport Doctrine" to not only further distance Douglas from Buchanan, but to attack Douglas' legal reasoning and highlight the irreconcilability between the *Dred Scott* decision and popular sovereignty.

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[64] Fehrenbacher, *Prelude to Greatness*, 121-142.
[65] Ibid., III, 129.
[66] Ibid.

The fourth debate at Charleston presented Lincoln with his second chance to open the debate and took the opportunity to dispel the notion that he was in favor of social and political equality for the Negro. Lincoln must have believed that Douglas' strategy in branding him an abolitionist was working. Lincoln's opening began with some severe language as he tried to make clear that his position was for free labor for the negro, not political and social equality, thus keeping his distance from the abolitionists. Lincoln stated that "I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races-that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, not to intermarry with white people."[67] In this statement we find a window into Lincoln's thinking about African-Americans and the language is jarring. In Illinois where there were many southerners, perhaps it was politically expedient. Nonetheless it is evidence of Lincoln's belief at the time that black and white America might not be able to occupy the same ground and that colonization was the most efficacious method to address the problem of race.

At Galesburg, the site of the fifth debate, Lincoln used the language of the Declaration of Independence and argued that "in their right to 'life, liberty and the pursuit of happiness' as proclaimed in that old Declaration, the inferior races are our equals."[68] In this debate and the two that followed, Lincoln returned to the fundamental foundations of American freedoms. Lincoln challenged Douglas or anyone else to prove that "the negro was not included in the Declaration of Independence."[69] Lincoln was emboldened at Galesburg when he admonished Douglas to stop misleading the crowd by claiming that

[67] Ibid., 145-46.
[68] Ibid., 220.

Lincoln gave "speeches of one sort for the people of the Northern end of the State, and of a different sort for the Southern people."[70] This was friendly territory for Lincoln, but he none the less rebutted Douglas' contention by pointing to the obvious fact that Douglas "assumes that I do not understand that my speeches will be put in print and read North and South."[71] Sealing his argument on this point Lincoln uses a blend of logic and humor and concludes "[b]ut the Judge will have it that if we do not confess that there is a sort of inequality between the white and black races, which justifies us in making them slaves, we must, then, insist that there is a degree of equality that requires us to make them our wives."[72] The second foundational freedom Lincoln returned to at Galesburg was the Constitution. Again Lincoln takes issue with the Supreme Court over *Dred Scott*. He cites a section from the Supreme Court opinion, '"Now as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution."'[73] Lincoln's legal argument here is textual. He argues that the "falsehood in fact is a fault of the premises…I believe that the Supreme Court and the advocates of that decision may search in vain for the place in the Constitution where the right of property in a slave is distinctly and expressly affirmed."[74] Lincoln was correct as a technical matter. Using a textual analysis, slavery is not affirmed in the Constitution, nor however, is it condemned. The three places where reference to slavery are made in the constitution are the three-fifths compromise, the fugitive slave law, and the international slave trade provision, each of which, when

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[69] Ibid.
[70] Ibid., 221.
[71] Ibid.
[72] Ibid.
[73] Ibid., 230.
[74] Ibid., 231.

combined created a compelling argument that the Constitution implicitly sanctioned slavery. Lincoln was splitting legal hairs.

Galesburg was also significant because in this debate Lincoln also began to reduce the issue of slavery to elemental moral terms of right and wrong. The thrust of Lincoln's contention was that the Negro was entitled by right to a share in the bounty that the Declaration of Independence provided. Douglas and the Democratic party had continually claimed that there is nothing wrong with slavery and that as such, the Negro could be treated like any other property if that is the will of the people.

> Judge Douglas declares that if any community wants Slavery they have a right to have it. He can say logically, if he says that there is no wrong in Slavery; but if you admit that there is a wrong in it, he cannot say logically say that anybody has a right to do wrong.
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> And I do think—I repeat, though I said it on a former occasion—that Judge Douglas, and whoever like him teaches that the negro has no share, humble though it may be, in the Declaration of Independence, is going back to the era of our liberty and independence, and so far as in him lies, muzzling the cannon that thunders its annual joyous return; that he is blowing out the moral lights around us, when he contends that whoever wants slaves has a right to hold them; that he is penetrating , so far as lies in his power, the human soul, and eradicating the light of reason and the love of liberty, when he is in every possible way preparing the public mind, by his vast influence, for making the institution of slavery perpetual and national.
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> Lincoln was then greeted with Great applause, and cries of Hurrah for Lincoln and "That's the true doctrine."[75]

In the penultimate debate at Quincy, Lincoln again countered the charge of abolitionist. He reiterated his position "that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races", but that "in the right to eat the bread without leave of anybody else which his own hand

[75] Ibid., 234.

earns, he is my equal and the equal of Judge Douglas, and the equal of every other man.[76] Lincoln pointed out the distinction that "the Republican Party think it wrong—we think it is a moral, a social and a political wrong."[77] Lincoln grounded his reasoning on this point in the value of each person's labor. This was an argument that Lincoln would more fully develop the following year in his Address before the Wisconsin State Agricultural Society in Milwaukee on September 30, 1859.

In Milwaukee, Lincoln expressed his interpretation of the labor theory of value. On the surface it seemed an odd forum—an agricultural society—to express one of his fundamental objections to slavery. Upon closer examination, however, it was the perfect choice. Southern slaves, for the most part, worked the land. They plowed, planted, and picked the crops that defined southern agricultural life. To place the injustice of slavery before a group of Northern farmers helped bring the issue into a sharper focus for they too tilled the earth. Operating from the assumption that "[t]he world is agreed that labor is the source from which human wants are mainly supplied," Lincoln distinguished between those who believe "it is best that capital shall hire laborers, and thus induce them to work by their own consent; or buy them and drive them to it without their consent."[78] People could understand and relate to these ideas about labor. After all most people had to work. They might not be able to envision Negroes voting or sitting on juries, but they could certainly understand the fairness of a day's wage for a day's labor.

Lincoln believed that free labor had the capacity to effect change. Free labor meant that one's condition in life was not fixed, and this for Lincoln produced hope. A fragment of Lincoln's notes reveals his belief in economic liberalism.

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[76] Ibid., 249.
[77] Ibid., 254.

> Free labor has the inspiration of hope; pure slavery has no hope. The power of hope upon human exertion, and happiness, is wonderful. The slave-master himself has a conception of it; and hence the system of tasks among slaves. The slave whom you cannot drive with the lash to break seventy-five pounds of hemp in a day, if you will task him to break a hundred, and promise him pay for all he does over, he will break you a hundred and fifty. You have substituted hope for the rod. And yet perhaps it does not occur to you, that to the extent of your gain in the case, you have given up the slave system, and adopted the free system of labor.[79]

In Milwaukee Lincoln summarized the situation: "The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This say its advocates, is free labor—the just and generous, and prosperous system, which opens the way for all—gives hope to all, and energy, and progress, and improvement of condition to all."[80] This is similar to Lincoln's rise from the poor young man with nothing more than his labor to a respected middle class attorney. Lincoln converted his physical labor to intellectual labor early on in his career. As he claimed, his father taught him to work, but never to love it. The constant for Lincoln was that labor, whether it physical or intellectual, was the primary source of value. The application of this idea formed the critical link for Lincoln's thought on the relationship between the Declaration of Independence and the Negro's right to life liberty and the pursuit of happiness.

Alton served as the venue for the final debate in this dramatic series. Lincoln got to the "nub" of the question as he so often did in his legal cases. Lincoln argued that"[t]he sentiment that contemplates the institution of slavery in this country as a wrong is the sentiment of the Republican party. It is the sentiment around which all their actions—all

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[78] Ibid., 477.
[79] Ibid., 462-63.
[80] Ibid., 478-79.

their arguments circle—from which all their propositions radiate."[81] This was one of the bedrock principles of the Republican Party. Douglas' contention that popular sovereignty and giving the community their voice may sound logical, but when it applied to something immoral, it was tantamount to granting authority to the mob. On this point the people's voice must be silenced as "he cannot say people have a right to do wrong."[82] The Republican Party, like the nation, in Lincoln's view, must stand for something. This was a departure from the ideas expressed in the *Federalist*. Madison's claim that "ambition must be made to counteract ambition" proved insufficient for Lincoln on the issue of slavery.[83] Lincoln moved beyond Madison's Federalist paper number ten and instead of faction and self-interest, Lincoln injects morality and choice. The choice was basic. It was a choice between right and wrong.[84]

Lincoln provided the summation to his case on slavery at Alton. Whether slavery was right or wrong,

> …[t]hat is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and ever will continue to struggle. The one is the common right of humanity and the other is the divine right of kings. It is the same spirit that says, You work and toil and earn bread, and I'll eat it. No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.[85]

Lincoln also claimed that slavery should be put where he argued the founders' intended it: on the road to ultimate extinction. Free labor and the intent of the founders

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[81] Ibid., 312-13.
[82] Ibid., 315.
[83] The *Federalist*, No. 51.

would be analytical categories that Lincoln continued to develop in the following year as he continued to argue against "the peculiar institution." Thus the debates ended on October 15, 1858. The campaigns continued for another three weeks and on November 2, 1858, the polls revealed that the Illinois legislature would, once again, deny Lincoln a seat in the Senate, and return Stephen Douglas to Washington to serve another term as the senior Senator from Illinois.

Lincoln could take little solace in the fact that the Republicans had won the popular vote. The legislature had the final say and certified Douglas the winner. Lincoln, however, captured the nation's attention and claimed that he was "glad I made the late race. It gave me a hearing on the great and durable question of the age, which I could have had in any other way; and though I now sink out of view, and shall be forgotten, I believe I have made some marks which will tell for the cause of civil liberty long after I am gone."[86] Lincoln did not "sink out of view," but rather the debates served as a springboard to national attention. Soon after the final debate, however, Lincoln was once again practicing law before the Sangamon Circuit Court consenting to a judgment on behalf of his client in *Gothard v. Caldwell*.[87] Money judgments, divorce, and debt and breach of contract replaced the "great and durable question of the age." Lincoln recovered quickly from his defeat and just over a month after the election Lincoln wrote Alexander Sympson that "I expect the election went hard with you. So it did with me too, perhaps not quite so hard as you may have supposed. I have an abiding faith that we

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[84] Jaffa, *The Crisis of the House Divided*, 230, 237-38; John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism*, Chicago: The University of Chicago Press, 1984, 296-333; Diggins, *On Hallowed Ground*, 29-30.
[85] *Collected Works*, III, 315.
[86] Ibid., 339.
[87] *Gothard v. Caldwell, LPAL*; Miers, *Lincoln Day By Day*, II, 235.

shall beat them in the long run. Step by step the objects of the leaders will become too plain for the people to stand them. I write merely to let you know that I am neither dead nor dying."[88] Lincoln would rise once more and this time capture the Presidency.

Lincoln, Douglas, and the Declaration of Independence

Lincoln spent the first nine months of 1859 attending to his law practice, but still found some time to deliver public speeches. He had to be careful, however, about over committing himself as "I shall go to the wall for bread and meat, if I neglect my business this year as well as last."[89] Soon enough, however, Lincoln was back on the campaign trail. Lincoln was asked to speak in Ohio as part of an effort to rebut Stephen Douglas' campaign swing through the state in conjunction with the publication of Douglas' essay in *Harper's Magazine* entitled "The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories." Lincoln's two speeches in the state together with the Cooper Union Address provide a culmination to Lincoln's debates with Stephen Douglas and further illustrate Lincoln's evolving jurisprudence on the eve of his election to the Presidency.

Douglas' article was an effort to provide his most comprehensive statement of the doctrine of popular sovereignty. Douglas used historical texts such as Jonathan Elliot's *Debates*, George Bancroft's *History of the United States* as well as various histories of the original colonies. The theoretical problem that Douglas faced was to explain the validity of popular sovereignty in light of *Dred Scott*. In short, if Congress had no constitutional authority to prohibit slavery in the territories, how could the territorial legislatures exercise such a power? If Taney was correct, there could be no popular

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[88] *Collected Works*, III, 346.

sovereignty. Douglas argued by analogy, and drew parallels between the colonies on the eve of independence and the western territories to demonstrate historical support for his notion of popular sovereignty. Douglas argued that it was not independence in the first instance that the founders were arguing for, but rather the main complaint was an infringement on "the right of every distinct political community—dependent Colonies, Territories, and Provinces, as well as sovereign states—to make their own local laws, form their own domestic institutions, and manage their own internal affairs."[90] Douglas was able to get around the theoretical problem by claiming the Congress has powers it can confer, but not exercise and explained that "[t]he powers which Congress may thus confer but can not exercise, are such as relate to the domestic affairs and internal polity of the Territory, and do not affect the general welfare of the Republic."[91] Douglas concluded that "[t]his dividing line between Federal and local authority was familiar to the framers of the Constitution."[92]

Lincoln rebutted this argument first in Columbus, Ohio, on September 16, 1859, then in Cincinnati the following day, and finally in New York City five months later on February 27, 1860. Lincoln's address at Cooper Union serves as the most fully developed legal argument. Lincoln's first speech in Columbus, however, was notable for his legal warning of a second *Dred Scott* decision that would require free states to recognize the property rights of slave owners who brought their slaves into the free northern states. Dred Scott II never materialized because the Civil War intervened. There was one case,

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[89] Ibid., 400.
[90] Jaffa, *In the Name of the People*, Douglas, "The Dividing Line Between Federal and Local Authority," 67-68. See also Johannsen, "Stephen A. Douglas, 'Harper's Magazine,' and Popular Sovereignty," *The Mississippi Valley Historical Review* 45 (March 1958) 606.
[91] Ibid., 65.
[92] Ibid.

however, that some scholars believed could have provided the factual support for the case Lincoln feared.[93]

People v. Lemmon involved the transit of eight slaves by boat from Virginia through New York with Texas as the ultimate destination. This appeared to be a true transit case, but in 1841 New York repealed the exception for slaves in transit so that without any legal support the slaves were freed under a writ of habeas corpus. Thus the facts lent themselves to a possible test case to determine what if any rights slaveholders had in the States. Judge Hiram Denio, writing for the majority of the New York Court of Appeals, summed up the problem: "Hence, if the appellant can claim exemption from the operation of the statute on which the respondent relies, on the ground that she is a citizen of a State where slavery is allowed, and that our Courts are obliged to respect the title which those laws confer, she may retain the slaves here during her pleasure; and as one of the chief attributes of property is to use it, or sell or dispose of it, I do not see how she could be debarred of these rights within our jurisdiction as long as she may choose to exercise them."[94] The case was argued before New York's highest court on January 24, 1860 and decided in the March term, 1860. The Court ultimately rejected the slave owners' argument and found that there was "nothing in the National Constitution or the laws of Congress to preclude the State judicial authorities from declaring these slaves, thus introduced into the territory of this State, free, and setting them at liberty."[95] The submission of this case made Lincoln's appearance at Cooper Union quite timely.

Lincoln's Cooper Union Address exemplified the convergence of law and politics. It also illustrated how Lincoln's legal experience helped fuel his political

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[93] Fehrenbacher, *The Dred Scott Case*, 444-45.
[94] *Lemmon v. The People*, 20 N.Y. 562 (1860).

career.[96] Addressing a New York audience was an important event for Lincoln and it is significant that the "backwoods lawyer" chose a sophisticated legal analysis as the topic for this elite congregation. At the Cooper Institute Lincoln used legal reasoning combined with political appeal to argue his case. Lincoln was very happy for the offer and as Herndon reports, Lincoln "came rushing into the office one morning, with the letter from New York City."[97] At Cooper Union, Lincoln's attack on the extension of slavery was based on a legal analysis that demonstrated Lincoln's rigorous legal mind. He saw his argument as grounded in the original intent of the founders and framers of the Constitution. This was a well-researched speech and illustrated what Lincoln could accomplish with adequate preparation. Herndon reported that Lincoln "spent the intervening time in careful preparation. He searched through the dusty volumes of congressional proceedings in the State library, and dug deeply into political history. He was painstaking and thorough in the study of his subject…"[98] Herndon went on to claim that "[n]o former effort in the line of speech-making had cost Lincoln so much time and thought as this one."[99] Like many great speeches, the concluding lines aroused the audience to a fever pitch. The New Yorkers were transfixed when Lincoln concluded "LET US HAVE FAITH THAT RIGHT MAKES RIGHT, AND IN THAT FAITH, LET US, TO THE END, DARE TO DO OUR DUTY AS WE UNDERSTAND IT."[100] What, made this address so highly regarded by the critical New York audience, however, was more than just a great ending. Structured "like a lawyer's brief, it was logical, temperate

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[95] Ibid.
[96] See Harold Holzer, *Lincoln at Cooper Union: The Speech that made Abraham Lincoln President*, New York: Simon & Schuster, 2004 for a discussion on how this speech helped fuel Lincoln's path to the Presidency.
[97] Herndon, *Life of Lincoln*, 367.
[98] Ibid.
[99] Ibid., 368.

in tone, powerful—irresistibly driving conviction home to men's reasons and their souls"[101] as Lincoln's legal analysis swayed the crowd. This was Lincoln's chance to shine before an audience that had not heard him speak before. When the curtain fell, Lincoln broke through the tough veneer of the great metropolis and emerged as a national politician to be taken seriously.

Lincoln crafted a conservative constitutional argument and illustrated the influence of foundational principles. Lincoln looked to the past to provide guidance for the future. The central thrust of Lincoln's argument was based on the original intent of the founders. He sought to demonstrate that the Republican Party was not a sectional, but a national party and was also the political group that were the true inheritors of the founders' ideals. As his starting point, Lincoln took a statement made by his long time adversary Stephen Douglas. Douglas had contended in the *Harper's Magazine* piece that "Our fathers, when they framed the Government under which we live, understood this question just as well, and even better, than we do now."[102] The question posed was "does the proper division of local from federal authority, or anything in the Constitution, forbid our Federal Government to control as to slavery in our Federal Territories."[103] Lincoln examined the opinion of the thirty-nine signers of the Constitution as the basis for his original intent reasoning. The first and perhaps most compelling piece of evidence in Lincoln's argument was the Ordinance of 1787, which prohibited slavery in the Northwest Territory: the present states of Illinois, Michigan, Indiana, Wisconsin and Ohio. This land was the only territory owned by the United States at the time of the

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[100] *Collected Works*, III, 550.
[101] Herndon, *Life of Lincoln*, 368.
[102] *Collected Works*, III, 522.
[103] Ibid., 523.

Constitution's adoption and came into the United States' possession during the time of the government of the Articles of Confederation. Although the Northwest Territory is not specifically mentioned in the Constitution, Lincoln points out that, one of the earliest acts of the first Congress in 1789 was to pass legislation that enforced "the Ordinance of '87 including the prohibition of slavery in the Northwest Territory."[104] This law went through all stages of the legislative process "without a word of opposition, and finally passed both branches without yeas and nays, which is equivalent to an unanimous passage."[105] Lincoln pointed out that of the thirty-nine signers of the Constitution, sixteen were in Congress at that time and offered no objection to the expression of congressional authority. These members were significant in that as not only signers, but also as members of Congress, they had a special obligation to oppose legislation that ran contrary to the Constitution since they had taken an oath. Even George Washington, then President, but also one of the thirty-nine original signers approved this expression of congressional authority when he signed the bill into law within a month of the bill's first reading.[106]

Lincoln's analysis continued as he examined the role Congress played in newly acquired lands such as the Louisiana Territory. In 1804 Congress organized the territory that comprises present-day Louisiana. While slavery was not prohibited in this future state, Congress, as Lincoln points out "did interfere with" and "take control of it."[107] The Congressional proscriptions were significant. "First. That no slave should be carried into the territory from foreign parts. Second. That no slave should be carried into it who

[104] Ibid., 527.
[105] Ibid.
[106] Ibid.
[107] Ibid., 528.

had been imported into the United States since the first day of May, 1798. Third. That no slave should be carried into it, except by the owner, and for his own use as a settler; and for his own use as a settler; the penalty in all the cases being a fine upon the violator of the law, and freedom to the slave."[108] Lincoln was charting out a conservative legal position in grounding his argument in the deeds of the founders. The principle of *stare decisis* is a legal principle that compels an attorney to look to the past for guidance and support. This was the basis of the common law system. At Cooper Union Lincoln reached into the past and used historical events as foundational support for his argument that the founders had intended congressional regulation of slavery in the territories.

Lincoln then brought his twenty-odd years of legal experience to bear on the issue and in a brilliant use of legal reasoning argued that the Southern people were the ones deviating from the ideals of the Constitution, not the Republicans. First Lincoln sought to dispel the notion that the Republican Party is a sectional party and that the south should realize that the Republican position is allied to the founders' ideals. All the Republicans ask is that slavery be marked *"[a]s those fathers marked it, so let it again be marked, as an evil not to be extended, but to be tolerated and protected only because of and so far as its actual presence among us makes that toleration and protection a necessity. Let all the guaranties those fathers gave it, be, not grudgingly, but fully and fairly maintained.* For this Republicans contend, and with this, so far as I know or believe, they will be content."[109] Thus stated, the policy of the Republican Party was to look back to founding principles rather than make a radical departure from cherished ideals as Lincoln claimed the South was set upon. Lincoln, however, went further and

[108] Ibid., 528-29.
[109] Ibid., 535.

claimed that the South were the radicals as they turned their back on the foundations of American political history. The radicalism in the southern policy lies in a variety of approaches: "[s]ome are for reviving the foreign slave trade; some for a Congressional Slave-Code for the Territories; some for Congress forbidding the Territories to prohibit Slavery within their limits; some for maintaining Slavery in the Territories through the judiciary; some for the 'gur-reat pur-rinciple' that 'if one man would enslave another, no third man should object,' fantastically called 'Popular Sovereignty.'"[110] Lincoln argued that these ideas were antithetical to the ideals of the founders and were a radical departure from our democratic charter. In the South's case that "never a man among you in favor of federal prohibition of slavery in federal territories, according to the practice of 'our fathers who framed the Government under which we live. Not one of all your various plans can show a precedent or an advocate in the century within which our Government originated. Consider, then, whether your claim of conservatism for yourselves and your charge of destructiveness against us, are based on the most clear and stable foundations."[111] The positions thus contrasted in Lincoln's analysis found his party the party of hope. Hope because Lincoln was shaping the law in the present as he used the past to argue for an American future without slavery.

Lincoln's legal analysis was evidence of a reflective legal mind, one capable of constructing an argument that supported the rights of free men with a respect for law as he understood it. The public mind had drifted off course and Lincoln sought to return it to coherency. The tools he used were born of his law practice. Our political institutions, passed down from the revolutionary generation, were the firmest foundation for not only

[110] Ibid., 537-38.
[111] Ibid., 538.

preserving the Union and our Constitution but also for putting slavery on the course of ultimate extinction. These ideals shaped the circuit-riding lawyer from Illinois who was on his way toward his party's nomination for President and ultimately the White House.

CONCLUSION

CALL OUT THE WAR POWER

> Abraham Lincoln wielded more authority than any single Englishman has done since Oliver Cromwell.
>
> James Bryce[1]

> Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?
>
> Abraham Lincoln[2]

Lincoln deeply believed in "the promise of American life" and for Lincoln the Declaration of Independence contained that sacred pledge. Lincoln also believed that the law expressed through the Constitution offered hope to America. These two documents and the ideals they contain fused in Lincoln's legal and political imagination and represented "the last best, hope of earth."[3] Prior to Lincoln's First Inaugural, he began musing on the relationship between these two American state papers. First he considered the Declaration of Independence and found a crucial principle—"'Liberty to all'—the principle that clears the *path* for all—gives *hope* to all—and, by consequence, *enterprize*,

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[1] James Bryce, *The American Commonwealth*, 2 vols., New York: The Macmillan Co., 1893, I, 61.
[2] *Collected Works*, IV, 426.
[3] Ibid., V, 537.

and *industry* to all."[4] Lincoln concluded that this belief "has proved an 'apple of gold' to us."[5] Lincoln then illustrated the connection between 1776 and 1787: "The *Union* and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal* or *destroy* the apple; but to *adorn* and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture."[6] With the connection thus framed, Lincoln set upon "a task more difficult than that which devolved upon General Washington."[7] The first four months of Lincoln's administration—from the First Inaugural to his Message to Congress in Special Session—proved just how difficult a task this was.

Constitutional Crisis

Lincoln's legal mind confronted its greatest challenge when he came to power on March 4, 1861. The constitutional crisis prompted by secession forced Lincoln to address an array of legal issues as soon as he took office. By Inauguration Day, seven southern states had left the Union. Initially, the legality of secession pitted the right of revolution against the claim that "no government proper, ever had a provision in its organic law for its own termination."[8] The Fort Sumter crisis emerged on Lincoln's first full day as President as he learned that this federal installation would have to be provisioned within six weeks' time.[9] Lincoln pledged in his First Inaugural not to be the aggressor, but it was clear that some action would be required since Lincoln also pledged to defend federal property. Soon after the South fired the first shot, Lincoln's

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[4] Ibid., IV, 169.
[5] Ibid.
[6] Ibid.
[7] Ibid., 191.
[8] Ibid., 264.

constitutional powers as Commander-in-Chief were brought to bear on the prosecution of the war as he called out the militia, suspended the writ of habeas corpus, and ordered a naval blockade of the Confederacy. Lincoln's response to the southern rebellion has been called dictatorial, and his suspension of the writ of habeas corpus has been subjected to strict constitutional scrutiny. The times, however, demanded action. Gideon Welles, Lincoln's Secretary of the Navy, claimed that "[f]ew, comparatively know or can appreciate the actual condition of things and state of feeling of the members of the Administration in those days. Nearly sixty years of peace had unfitted us for any war, but the most terrible of all wars, a civil one, was upon us, and it had to be met. Congress had adjourned without making any provision for the storm, though aware it was at hand and soon to burst upon the country. A new Administration, scarcely acquainted with each other, and differing essentially in the past, was compelled to act, promptly and decisively."[10] Lincoln's response to this constitutional crisis during his first four months in office was not tyrannical, but a bold, determined, and decisive exercise in constitutional leadership as he used the law as a weapon to fight for democracy and preserve the Union.[11]

Inauguration day 1861 ushered into American political life both a new president and a new political party. The Republicans standing for "free soil, free labor and free

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[9] Donald, *Lincoln*, 285.

[10] Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, New York: Oxford University Press, 1991, 30-31, quoting Gideon Welles. Neely also cites a conversation between Secretary of State William Seward and Francis B. Carpenter, the artist who painted "The Emancipation Proclamation," in which Seward told Carpenter that the '"great feature of the Administration'" was not the Emancipation Proclamation, but that Carpenter should "go back to the firing on Sumter, or to a much more exciting one than even that, the Sunday following the Baltimore massacre, when the Cabinet assembled or gathered in the Navy Department and, with the vast responsibility that was thrown upon them, met the emergency and its awful consequences, put in force the war power of the government, and issued papers and did acts that might have brought them all to the scaffold." Ibid., 30.

men" threatened the south and their "peculiar institution." The new president needed to provide a constitutional argument explaining why secession was illegal since "a disruption of the Federal Union heretofore only menaced, is now formidably attempted."[12] Four months later in his Message to Congress, Lincoln took aim at what he termed the "sophism…that any state of the Union may, consistently with the national Constitution, and therefore lawfully, and peacefully, withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for just cause, themselves to be the sole judge of its justice, is too thin to merit any notice."[13] Secession raised the difficult constitutional issue of sovereignty, and whether ultimate political power resided with the states or with the People. Lincoln's Union was perpetual and left no room for state sovereignty. Lincoln argued that the "Union is older than any of the States; and, in fact, it created them as States."[14] As creatures of the Union, the states, while possessing some reserved powers in the Constitution, did not, in Lincoln's view, possess the reserved right to destroy the government. Lincoln buttressed his constitutional claim against the secessionists by claiming that the Union is older than the Constitution. Lincoln contended that the adoption of the Declaration of Independence, the Articles of Confederation, and the Constitution of 1787 each built upon the idea of Union. With each new document America moved closer to forming "a more perfect union."[15] The issue thus framed, Lincoln reasoned that "if destruction of the Union by one, or by a part only, of the States,

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[11] Harry v. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, Lanham: Rownam & Littlefield Publishers, Inc., 2000, 364.
[12] *Collected Works*, IV, 264. See Douglas L.Wilson, *Lincoln's Sword : The Presidency and the Power of Words*, New York: Alfred A. Knopf, 2006, 42-70 for a discussion of Lincoln's drafting and writing his First Inaugural.
[13] Ibid., 433.
[14] Ibid., 434.

be lawfully possible, the Union is *less* perfect than before the Constitution having lost the vital element of perpetuity."[16] This interpretation differed from both the contract theory grounded in state sovereignty as well as the constitutional construction posed by the *Federalist.*

Lincoln rejected the claim that the Union was based on a contractual relationship between the states. This contract theory was predicated upon state sovereignty, and that consent to the Union once given could be revoked. Lincoln relied on the countless contract cases he litigated during his career at the bar to point out very simply that one party could not unilaterally terminate a binding contract. The effect of this was a breached contract, not an agreement that became null and void. In order to rescind a contract, both sides had to agree to its termination. Lincoln concluded in the First Inaugural that state-sponsored secession was illegal and reasoned "if the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade, by less than all the parties who made it? One party to a contract may violate it—break it, so to speak; but does it not require all to lawfully rescind it?"[17] Lincoln's duty, as he understood it, was to execute the laws, and thus placed the South on notice that the Union "*will* constitutionally defend, and maintain itself" against what he understood to be a grave threat.[18] If there were any doubt about Lincoln's resolve, he dispelled those apprehensions toward the end of his July 4 Message to Congress as he alerted the world that this would be a democracy that would fight for its life:

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[15] Ibid., 265; U.S. Const., Preamble.
[16] *Collected Works*, IV, 265.
[17] Ibid.
[18] Ibid., 266.

> Our popular government has often been called an experiment. Two points in it our people have already settled--the successful establishing, and the successful administering of it. One still remains—its successful maintenance against a formidable [internal] attempt to overthrow it. It is now for them to demonstrate to the world, that those who can fairly carry an election, can also suppress a rebellion—that ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly and constitutionally, decided, there can be no successful appeal, back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections. Such will be a great lesson of peace; teaching men that what they cannot take by an election, neither can they take it by a war—teaching all, the folly of being the beginners of a war.[19]

This statement, for Lincoln, was the "nub" of the case against the Confederacy. The people of the South voted in the election of 1860. Their people had an opportunity to field candidates, and in fact four candidates ran for president. The southern political voice was not stifled. The candidates who might have been sympathetic to the extension of slavery lost, and Lincoln was not about to allow the South to start a war to get what was unobtainable at the polls.

Lincoln's constitutional position differed from the *Federalist Papers* on the perpetuity issue, but found support in the *Federalist* to refute the states rights contract theory of government. Alexander Hamilton supported the idea of the Constitution as a new government that replaced the sovereignty of the states with the sovereignty of the people, which differed from Lincoln's idea of a perpetual Union of the people predating the Constitution. Hamilton did, however, believe that once the states agreed to the Constitution, they were bound by it and had surrendered the sovereignty they enjoyed under the Articles of Confederation. In *Federalist* No. 22 Hamilton argued that:

> It has not a little contributed to the infirmities of the existing federal system that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has in some instances given

[19] Ibid., 439.

> birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a party to a compact has a right to revoke that compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[20]

Anti-federalists like Patrick Henry also understood the changing balance of sovereignty from the states to the federal government. Henry questioned this when he warned about this fundamental shift in power and said:

> …[t]he fate of this question and America may depend on this: Have they said, we the States? Have they made a proposal of a compact between the States? If they had, this would be a confederation: It is otherwise most clearly a consolidated government. The question turns, Sir, on that poor little thing—the expression, *We, the people*, instead of the States of America. I need not take much pains to show, that the principles of this system, are extremely pernicious, impolitic, and dangerous….It is as radical, if in this transition our rights and privileges are endangered, and the sovereignty of the States be relinquished: And cannot we plainly see, that this is actually the case?[21]

Thus debated, both sides of the Constitutional ratification debate understood that there was to be a decided shift in sovereignty from the states to the people and that once ratified, this change was irrevocable. One of the things all the states agreed to according to Lincoln was that "'The United States shall guarantee to every state in this Union a republican form of government.'"[22] The consequence for Lincoln was clear: "if a State may lawfully get out of the Union, having done so, it may also discard the republican form of government." [23] Lincoln argued that his oath of office commanded him to defend

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[20] Clinton Rossiter, ed., *The Federalist Papers*, New York: Penguin, Mentor edition, 1961, 152.
[21] Ralph Ketcham, ed. *The Anti-Federalist Papers and the Constitutional Convention Debates,* New York: Mentor edition, 1986, 199.
[22] *Collected Works*, IV, 440.
[23] Ibid.

the will of the people. Secession posed a direct threat to the popular government that Lincoln swore to defend. Lincoln claimed in the First Inaugural that "[t]he Chief Magistrate derives all his authority from the people, and they have conferred none upon him to fix terms for the separation of the States. The people themselves can do this also if they choose; but the executive as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor."[24] In *Federalist* No. 43 James Madison listed various powers of the Constitution and among those listed was '"to guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature (when the legislature cannot be convened), against domestic violence. '"[25] The crux of Lincoln's oath was to preserve for all Americans a republican form of government. Secession, as Lincoln understood it was "the essence of anarchy."[26] Lincoln explained that "[a] majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left."[27] Lincoln's oath to "preserve, protect, and defend" America's experiment in popular government required him to present a firm check against the enemies of liberty. Allowing secession would be an invitation to chaos and put the government on the edge of a slippery slope

[24] Ibid., IV, 270.
[25] Rossiter, 274.
[26] *Collected Works*, IV, 268.
[27] Ibid.

that led to despotism. Lincoln warned the south and admonished them that "In *your* hands my dissatisfied fellow countrymen and not in *mine* is the momentous issue of civil war. The government will not assail *you*. You can have no conflict, without being yourselves the aggressors. *You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to 'preserve, protect and defend' it."[28] While appealing to "the better angels of our nature," Lincoln none the less provided a forceful legal rebuttal to the rebellious actions of the Confederates.[29]

Congress was not in session when the Confederates attacked Fort Sumter. It thus fell to Lincoln and his constitutional power as Commander-in-Chief to respond to this military crisis and "call out the war power."[30] On April 15, 1861, three days after the commencement of hostilities, Lincoln issued a proclamation calling for the enlistment of seventy-five thousand troops to put down the rebellion and to ensure the proper enforcement of the laws.[31] Lincoln had pledged in his Inaugural that he would defend federal property and the times required swift action. Significantly, this proclamation also directed the Congress to meet in special session at noon on July 4, 1861. Lincoln included an "appeal to all loyal citizens to favor, facilitate and aid this effort to maintain the honor, the integrity, and the existence of our National Union, and the perpetuity of popular government; and to redress wrongs already long enough endured."[32] Four days after Lincoln called out the militia, he ordered the ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas blockaded pursuant to "the laws of

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[28] Ibid. 271.
[29] Ibid.
[30] Ibid., 426. Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, New York: Oxford University Press, 1991; Daniel Farber, *Lincoln's Constitution*, Chicago: The University of Chicago Press, 2003; James F. Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers*, New York: Simon & Schuster, 2006.
[31] *Collected Works*, IV, 331-33.

the United States and the law of Nations."[33] This action would implicate international law. Under international law the use of a blockade signaled a state of war between the two belligerents. The quandary for Lincoln was that on the one hand it meant recognition of the Confederacy, which is something Lincoln would not do. On the other hand, a naval blockade could only be used in time of war and Congress, to whom the power to declare war belonged, had not made such a declaration. Lincoln's use of this Commander-in-Chief power was ultimately challenged in court.

The Supreme Court affirmed Lincoln's use of his Commander-in-Chief powers in ordering a naval blockade of southern ports in what are known as *The Prize Cases*.[34] In *The Prize Cases*, Union naval vessels acting pursuant to Lincoln's naval blockade seized various ships carrying supplies to the Confederacy. The Supreme Court first noted that the President does not have the power to declare war since this was a congressional responsibility. The Court, however, found legislative support for Lincoln's actions in two congressional acts. Citing laws passed by Congress on February 28, 1795 and March 3, 1807 by which the President "is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States," the Supreme Court held that:

> [i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be unilateral. The President was bound to meet the Civil War in the shape it presented itself, without waiting for Congress to baptize it with a name. Whether the President is fulfilling his duties, as

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[32] Ibid., 332.
[33] Ibid., 338-39.
[34] *The Prize Cases*, 67 U.S. 635 (1862).

> Commander In Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the government to which this power was entrusted.[35]

The most controversial exercise of the war-power, both during the initial phase of the crisis and beyond, however, was Lincoln's decision to suspend the writ of habeas corpus. Habeas corpus is a writ directed to a person who has detained or imprisoned another. The purpose of the writ is to have that person brought before a court of competent jurisdiction so the legality of the detention can be challenged. Without the availability of a writ of habeas corpus, arbitrary arrests are possible, and a person could be imprisoned for an indefinite period of time with no legal recourse to contest the arrest.[36]

The events in Baltimore, Maryland, set into motion the predicate facts that led to Lincoln's first suspension of habeas corpus. Maryland citizens who were sympathetic to the Confederacy sabotaged railroad tracks and severed telegraph lines to obstruct the passage of troops from the North that were on their way to defend Washington in the wake of Fort Sumter. The capitol was surrounded by the slave states of Virginia and Maryland, and Lincoln was deeply worried about defending the seat of government. As Lincoln anxiously awaited troops from the North, he wondered aloud, "Why don't they come! Why don't they come."[37] Prior to Fort Sumter both Virginia and Maryland had remained loyal to the Union. After Sumter, however, Virginia seceded, and Maryland, where confederate sympathies ran deep, was about to vote on secession. The Governor of Maryland pleaded with Lincoln not to send any more troops through Maryland. A

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[35] Ibid.
[36] *Black's Law Dictionary*, Fifth edition, St. Paul: West Publishing, 1979.

committee from Baltimore insisted that no more troops should pass through the state, and advised Lincoln to accept the inevitable and recognize the Confederacy.[38] Lincoln's response to the Baltimore committee revealed how determined he was to defend the Union.

> You, gentlemen, come here and ask for peace on any terms, and yet have no word of condemnation for those who are making war on us. You express great horror of bloodshed, and yet would not lay a straw in the way of those who are organizing in Virginia and elsewhere to capture this city. The rebels attack Fort Sumter, and your citizens attack troops sent to the defense of the Government, and the lives and property in Washington, and yet you would have me break my oath and surrender the Government without a blow. There is no Washington in that—no Jackson in that—no manhood in that. I have no desire to invade the South; but I must have troops to defend this Capitol. Geographically it lies surrounded by the soil of Maryland; and mathematically the necessity exists that they should come over her territory. Our men are not moles, and can't dig under the earth; they are not birds and can't fly through the air. There is no way but to march across, and that they must do. But in doing this there is no need of collision. Keep your rowdies in Baltimore, and there will be no bloodshed. Go home and tell your people that if they will not attack us, we will not attack them; but if they do attack us, we will return it, and that severely.[39]

Maryland's secession vote was scheduled for April 26, 1861. Lincoln acting against the advice of some to arrest the Maryland legislature, allowed them to convene as planned. Lincoln advised General Winfield Scott that the Maryland legislature had a legal right to meet and that should be respected. Should Maryland vote to secede and take hostile action against the United States, however, Lincoln directed that the commanding general should "adopt the most prompt, and efficient means to counteract, even if necessary, to the bombardment of their cities—and in the extremest necessity, the

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[37] Paul M. Angle, ed., *The Lincoln Reader*, New York: DaCapo Press edition, 1947, 362.
[38] Donald, Lincoln, 297-99; Neely, *The Fate of Liberty*, 4-9.
[39] *Collected Works*, IV, 341-42.

suspension of the writ of habeas corpus."[40] These steps proved unnecessary since Maryland's secessionists failed to carry the state for the Confederacy.

Two days after this order Lincoln extended the naval blockade to the ports of the recently seceded states of Virginia and North Carolina and also extended the authorization to suspend habeas corpus. Again to Winfield Scott, Lincoln directed that "[y]ou are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the [any] military line, which is now [or which shall be] used between the City of Philadelphia and the City of Washington, via Perryville, Annapolis City, and Annapolis Junction, you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally, or through the officer in command at the point where the [at which] resistance occurs, are authorized to suspend that writ."[41] This was an enormous delegation of power, but Lincoln justified it as an essential means under his Commander-in-Chief powers to protect the movement of troops. Lincoln suspended habeas corpus three more times before the Special Session of Congress met on July 4, 1861 eventually suspending the writ between Washington and New York City.[42] More suspensions would follow the July 4 Special Session of Congress leading to a nationwide suspension on September 24, 1862.[43]

The constitutionality of this exercise of executive power in suspending habeas corpus was initially challenged in federal court in *Ex Parte Merryman*.[44] John Merryman who was suspected of involvement with the destruction of bridges and telegraph lines in Baltimore was arrested pursuant to the April 27, 1861 suspension and was confined to

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[40] Ibid., 344.
[41] Ibid., 347.
[42] Ibid., 364, 414, 419.
[43] Ibid., V, 436-37.

Fort McHenry. Chief Justice Roger Taney issued a writ of habeas corpus for Merryman's appearance in court. On the appointed court date a member of the U.S. military appeared in court without Merryman and explained that since the writ had been suspended by President Lincoln, Taney's order was without legal effect. Taney then filed an order of contempt but the United States Marshall responsible for serving the contempt order was turned away at Fort McHenry's gate. Taney published his opinion in *Ex Parte Merryman,* and argued that habeas corpus was an Article I power, which belongs to the legislature. Taney noted the monarchial nature of Lincoln's conduct and challenged the president by claiming that "[i]t will then remain for that high officer, in fulfillment of his constitutional obligation, to take care that the laws be faithfully executed, to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[45] Lincoln ignored Taney. Once Lincoln "called out the war power" he justified the legality of these means by the ends they served: preservation of the Union.

Lincoln defended his use of the war power to Congress when it convened in special session on July 4, 1861. In his message to the legislative branch Lincoln explained his actions since the fall of Fort Sumter. Habeas corpus was specifically addressed. Lincoln assuaged the concern about a president that was charged with the responsibility to "'take care that the laws be faithfully executed,' should not himself violate them."[46] Lincoln cited the reality of the laws being disregarded in one third of the states. In rhetoric reminiscent of his jury trial days, Lincoln reduced the question to elemental terms and asked "are all the laws, but one, to go unexecuted, and the

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[44] *Ex Parte Merryman*, 17 Fed Cas., 144, Case No. 9,487, (1861).
[45] Ibid., 153.
[46] *Collected Works*, IV, 430.

government itself go to pieces, lest that one be violated?"[47] Lincoln highlighted the role that taking an official oath by the president played in this decision by asking "[e]ven in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"[48] Lincoln, however, wanted to be clear that no law was broken and stated "[b]ut it was not believed that any law was violated."[49] Lincoln then cited the power to suspend habeas corpus as it appears in the Constitution and using the plain language found that in cases of rebellion or invasion where the public safety may require it, the writ can be suspended. The real issue, however, was whether the power to suspend habeas corpus belonged to the Executive or the Legislature. Habeas corpus suspension is listed as an Article I power, which is the place in the Constitution where one finds the powers of the legislative branch. Thus a plain reading of the text placed the power in the hands of Congress, but Congress was not in session. Lincoln found it hard to believe that "the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."[50] Lincoln alerted Congress to the forthcoming opinion of Attorney General Edwin Bates on the habeas corpus issue. Bates argued that '"in a time like the present, when the very existence of the Nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody, persons known to have criminal intercourse with the

[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid., 430-31.

insurgents.'"[51] Consequently, Lincoln believed he was rightly using a constitutional power as part of his arsenal against the rebellion and thus acted appropriately as Commander-in-Chief. Congress ultimately authorized the suspension of the writ of habeas corpus, which made the issue moot when it finally passed the Habeas Corpus Act in 1863.[52]

The claim that Lincoln presented Congress with a *fait accompli* is as unpersuasive as the dictator thesis. Lincoln confronted a direct threat to the capitol and his anxious state of mind as he waited for the troops to arrive is important to consider. How Lincoln chose to respond in this situation was governed by his war powers and the suspension of habeas corpus, in a case of rebellion, became one of those powers. The way in which habeas corpus is phrased contemplates some type of crisis. It specifically states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."[53] The times for suspension is specifically restricted, but once invoked, this plenary power is as broad as the totality of the circumstances demand. Tethered with the Commander-in-Chief powers that Lincoln inherently possessed with the authority to call out the militia and order a naval blockade, the suspension of habeas corpus sprung from the circumstances as a war power and became an appropriate use of constitutional power. From the fall of Fort Sumter to the Special Session of Congress, Lincoln's rationale for suspending habeas corpus was in furtherance of a legitimate war aim in defending Washington and ensuring the free passage of the militia charged with that responsibility. Lincoln's constitution was not a

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[51] Goodwin, *Team of Rivals*, 355.
[52] Philip Shaw Paludan, *The Presidency of Abraham Lincoln*, Lawrence: University of Kansas Press, 1994, 191-92.
[53] U.S. Const., Art. I, sec. 9.

rigid and stagnant document, but one that was expansive enough to adapt to the times, and meet the crisis at hand. For the next four years Lincoln would employ whatever means necessary to hold the Union together, and concluded, "when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory."[54] Lincoln's administration was rife with legal issues that were thrust upon him during his first four months in office. Lincoln's legal docket only became more crowded as the legal issues surrounding emancipation, military justice, and even Native American policy demanded the president's attention.

The People's President and the People's Lawyer

The trajectory of Lincoln's professional life is a path fused by law and politics. The law shaped the way Lincoln viewed the world, politics, and the important issues he dealt with on the public stage. During the 1850s in the wake of the Kansas-Nebraska Act and the *Dred Scott* decision, Lincoln transcended his early experience as a lawyer, but his legal mind continued to influence his thinking. Lincoln's critique of *Dred Scott* and "popular sovereignty" was grounded in law. Lincoln the lawyer was quick to realize the implications of a second *Dred Scott* decision: slavery in the free states. Political philosophy and the law marched hand in hand when Lincoln took the stage at Cooper Union and provided a forceful legal argument on the original intent of the founder's ideas about slavery. Once in office, Lincoln was beset with an array of legal issues that began with the legality of secession and continued to multiply after the first shots were fired. The July 4, 1861 Special Session of Congress marked the end of Lincoln's first four months in office. This was a momentous time for the new administration. In these

[54] *Collected Works*, IV, 440.

critical months Lincoln set the tone for an expansive use of his constitutional powers as Commander-in-Chief. Throughout the Civil War Lincoln functioned as a legal thinker, and needed to consider not only the political implications of his decisions, but their legality as well.

Lincoln's Civil War policies, like the countless cases that Lincoln tried on the circuit, had consequences for daily life. The lives of those at the very bottom, the slaves, were changed most profoundly. Although the Emancipation Proclamation did not free all the slaves, and Lincoln waited until the border states were securely with the Union before embarking on an emancipation policy, he went as far as he thought the law allowed.[55] Criticized as having "all the moral grandeur of a bill of lading," the Emancipation Proclamation was none the less an important legal document.[56] Lincoln's constitutional power as Commander-in- Chief only allowed him to go so far toward freedom. It was, however, a big step and an important departure from his First Inaugural where Lincoln claimed that he had "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists."[57] Significantly, once this step was taken, Lincoln never changed course, as liberation became a war aim. Lincoln's next step would be a push to pass a constitutional amendment forbidding slavery.

In addition to African-Americans, Native Americans would also find themselves caught in the crossfire of law and politics. The Minnesota Sioux's uprising in late

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[55] The scholarship on Emancipation is immense. The most comprehensive treatment is in Allen C. Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery in America*, New York: Simon & Schuster, 2004; The most recent examination is James Oakes, *The Radical and The Republican: Frederick Douglas, Abraham Lincoln, and the Triumph of Antislavery Politics*, New York: W.W. Norton & Co., 2007, 133-208; For background on the evolution of the text of the Emancipation Proclamation see Wilson, *Lincoln's Sword*, 105-142; Legal analysis is found in Farber, *Lincoln's Constitution*, 152-57; and Simon, *Lincoln and Chief Justice Taney*, 216-220.

[56] Richard Hofstadter, *The American Political Tradition and the Men Who Made It*, New York: Vintage Books, 1948, 169.

summer 1862 was subdued by General John Pope, who had been reassigned after his defeat at the second Battle of Bull Run. Pope wanted to hang over three hundred Sioux, but Lincoln stopped him. Political expedience warranted the gallows as the people of Minnesota were bent on revenge and the mid-term elections were fast approaching. Lincoln resisted this temptation, and reviewed the transcripts of the Sioux warriors accused of capital crimes. Lincoln set aside the death penalty for all but thirty-eight of the Sioux claiming that he "could not afford to hang men for votes." [58]

Lincoln's legacy of martial law provided America with what one historian has claimed a "low tide for liberty."[59] Lincoln's delegation of authority to his commanders in the field to declare martial law permitted the military to abuse the civil rights of civilians critical of military policy. The case of Clement Vallandigham offers an illustration. Vallandigham was arrested under General Ambrose Burnside's General Order No. 38, which prohibited treasonous speech in the jurisdiction of his military command. In May 1863 Vallandigham condemned the war and the president and was promptly arrested.

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[57] *Collected Works*, IV, 263.

[58] David A. Nichols, *Lincoln and the Indians:Civil War Policy and Politics*, Urbana: University of Illinois Press, 1978, 118; Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West*, New York: Henry Holt & Co., 1970, 37-65; David Donald, *Lincoln*, 392-95; Gabor S. Borit, ed., *The Historian's Lincoln: Pseudohistory, Psychohistory, and History*, Urbana: University of Illinois Press, 1996, 149-174. See David A. Nichols, "Lincoln and the Indians" in Borit, ed., *The Historian's Lincoln*, 149-69 for a critical assessment of Lincoln and his decision making regarding the Sioux Indians in Minnesota. Cf, Hans L. Trefousse, Commentary on "Lincoln and the Indians" in Borit, ed., *The Historian's Lincoln*, 170-74, in which Trefousse argues that Lincoln's "commutation of the sentences of the Indian prisoners, no matter what their fate afterward, was an act of courage and compassion as well as justice. The political risks were great; yet Lincoln did not really hesitate." Ibid.,172.

[59] Neely, *The Fate of Liberty*, 51. Neely in *The Fate of Liberty*, Farber in *Lincoln's Constitution*, and Simon in *Lincoln and Chief Justice Taney* all take issue with the use of martial law against civilians in time of war when the civilian courts are open. This was also the verdict of the Supreme Court in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). This decision, written a year after the Civil War was over by Lincoln's old friend and former Illinois Eighth Circuit Judge, David Davis who realized that "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln," and understood that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of protection all classes of men, at all times, and under all circumstances," and therefore held that martial law could not be applied during the Civil War "to

This was political speech, a cherished First Amendment right, made in support of Vallandigham's quest for the governorship of Ohio. Lincoln defended Burnside's actions in a letter to Erastus Corning in which he justified Vallandigham's incarceration by asking "[m]ust I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"[60] While stretching the bounds of the constitution, the decision was nonetheless supported by public opinion.[61]

As Commander-in-Chief, Lincoln had wide discretion in fashioning justice for soldiers who had violated the various Articles of War including the power to blunt some of the harsher applications of wartime justice.[62] Military justice could be severe as many of the soldiers were brought up on charges ranging from desertion and drunkenness to rape and murder. Guns, alcohol, and the terror of war create a dangerous brew. Lincoln reviewed countless cases on appeal from the various military tribunals, as well as various petitions for pardons by those seeking mercy from the Commander-in-Chief.[63] Relying

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citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Ibid., 125, 120-21, 121.

[60] *Collected Works*, VI, 266.

[61] Neely, *The Fate of Liberty*, 65-68; Farber, *Lincoln's Constitution*, 170-74; Simon, *Lincoln and Chief Justice Taney*, 246-54; Hans L. Trefousse*, First Among Equals: Abraham Lincoln's Reputation During His Administration*, New York: Fordham University Press, 2005, 71-73.

[62] Thomas P. Lowry, *Abraham Lincoln and Military Justice*, New York, DaCapo Press: New York. 1999. This is an excellence source for information about Lincoln's military justice. Lowry cites hundreds of cases in which Lincoln decided the fate of U.S. soldiers. The cases are catalogued by category of crimes from desertion to murder. This book was formerly published under the title *Don't Shoot that Boy!* by Savas Publishing Company, 1999.

[63] On a number of occasions during Lincoln's law practice he petitioned either on his own or with others for executive pardons. Pardons from *LPAL* include: *Hyde Requested Lincoln's assistance in obtaining pardon, LPAL; Lincoln et al. petitioned for pardon, LPAL; Lincoln et al. petitioned for pardon of Cunningham, LPAL; Lincoln et al. petitioned for pardon of Fowler, LPAL; Lincoln et al. petitioned for pardon of Heath, LPAL; Lincoln et al. petitioned for pardon of Hill, LPAL; Lincoln et al. petitioned for pardon of Hoffman, LPAL; Lincoln et al. petitioned for pardon of Jones & Jones, LPAL; Lincoln et al. petitioned for pardon of Massie, LPAL; Lincoln, Herndon et al. petitioned for pardon of Hoffman, LPAL; Lincoln, Herndon et al. petitioned for pardon of Lee, LPAL; McKinley requested Lincoln's assistance in obtaining pardon, LPAL; People v. Barrett, LPAL; People v. Bohen et al., LPAL; People v. Crokett, LPAL; People v. Davis, LPAL; People v. Delny, LPAL; People v. Furrow & Rice, LPAL; People v. Hibbs, LPAL; People v. High, LPAL; People v. Lester, LPAL; People v. Loe, LPAL; People v. Merrill, LPAL; People v.*

on his experience as a substitute judge for Judge David Davis during his days on the circuit, Lincoln shaped military jurisprudence as he continued to "search the depths of his mind for original arguments."[64] Sometimes Lincoln's decisions were compassionate, and other times he upheld the death penalty.[65] Lincoln had to formulate policy along military, political, and legal lines. The common thread in all these cases is a respect for the individual's right to justice. Defining them as people, whether slave, soldier, or Sioux, Lincoln gave them their day in "court."

In his July 4, 1861 Message to Congress Lincoln stated that "This is essentially a People's contest. 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. Yielding to partial, and temporary departures, from necessity, this is the leading object of the government for whose existence we contend."[66] Lincoln fought for the people and their right to govern themselves. He was their president, but he was also their advocate as

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Parker, LPAL; People v. Patterson, LPAL; People v. Smith, LPAL; People v. Thompson, LPAL; United States v. Sloan (pardon request made to President Buchanan), LPAL.

[64] Whitney, *On the Circuit with Lincoln*, 255; Emerging from the database of the LPAL are over three hundred cases in which Lincoln served as a judge. Lincoln's reputation for fairness led Judge David Davis to appoint Lincoln to serve as judge when Davis could not. Between 1856 and 1860 Lincoln serves as judge in over 280 cases. In 1858, the year he debated Douglas, Lincoln presided in over one hundred cases. While the vast majority of cases involved more administrative duties rather than substantive judicial opinions, Lincoln, nonetheless, drew upon this decision making experience when deciding matters of military justice during the Civil War, *LPAL.*

[65] Lowry, *Abraham Lincoln and Military Justice*; sleeping soldiers, deserters, and drunks received the benefit of Lincoln's compassion as Lowry points our, "Based upon 43,634 court-martial records, 1,922 men were tried for sleeping on duty. Of these, 78 received death sentences. So far as the record shows, Lincoln spared the life of every man who was found asleep on duty as a sentry, guard, picket, or sentinel." Ibid., 244; In 1861 Lincoln did not review any desertion cases, but in 1862 he reviewed thirteen. Lincoln approved the death penalty in two of those cases and pardoned the other eleven. As the war raged on Lincoln continued to pardon deserting soldiers, but as Lowry points out, in many of those cases Lincoln was affirming the decision of the commanding officer that also recommended leniency. Ibid., 93-94, 142. For the treatment of drunks see Lowry, 71, 73, 148-49, 163. Sex crimes and murder found Lincoln most unforgiving, see Lowry, 181, 256.

he used the law to fight for democracy. Lincoln was not afraid to use what was available to him for this noble purpose. Lincoln was "most happy to believe that the plain people understand, and appreciate this."[67] These "plain people" were the stock from which Lincoln sprung. These were also the ones whom Lincoln represented in court. Throughout his career in law and politics the "plain people" were the focus of Lincoln's attention. Lincoln's belief in the ideals of the Declaration of Independence compelled him to see politics and law in service of the people. Lincoln's law practice forced him to see people as individuals and as such, human beings entitled to justice. The "perpetuation of our political institutions" would help make America "the last best hope of earth" and "reverence for the laws" as Lincoln fashioned this jurisprudence from the courthouse to the White House led the way.[68]

Lincoln knew that once the war was over so too would be the justification for the expansive use of his Commander-in-Chief power. Lincoln looked ahead and envisioned an American future without slavery. The law provided the only guarantee for this destiny. Lincoln's spiritual and legal legacy found expression in the "Civil War Amendments" to the Constitution. Although Lincoln would not live to see the passage of the Thirteenth Amendment, he set the constitutional wheels in motion to certify in law what had been accomplished on the battlefield: the death of slavery. Once in motion these constitutional changes would not stop until the Fourteenth Amendment made the states accountable for protecting "life, liberty and property" and affording their people the "equal protection of the law." Finally, Lincoln's bequest to the former slaves was to

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[66] *Collected Works*, IV, 438.
[67] Ibid.
[68] Ibid., I, 108; V, 537; I, 112.

secure a place at the polls for African-Americans with the passage of the Fifteenth Amendment so that they too could begin to share in the “blessings of liberty.”

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