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LINCOLN'S ATTITUDE TOWARD THE SUPREME COURT AND THE DRED SCOTT DECISION[1]

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A parallel has been sought to be drawn between Lincoln's criticism of the *Dred Scott* decision and his campaign to bring about the reversal of that opinion and the present criticism of certain opinions of the Supreme Court holding New Deal statutes unconstitutional and the present campaign to bring about a reversal of these opinions. It is therefore timely to examine Lincoln's position in his campaign to reverse the *Dred Scott* decision and the legal and political philosophy upon which his campaign was based.

In 1854, after a prolonged and bitter struggle, Congress passed an act expressly repealing the Act of 1820, prohibiting slavery in that part of the Louisiana Purchase lying north of 36° 30' and not included in the state of Missouri. This prohibition of slavery was an integral part of the so-called "Missouri Compromise," and was intended as a settlement of the national issue arising out of slavery.

The repeal in 1854 of the statutory provision thus forbidding slavery occasioned an outbreak of popular feeling in the North and the outraged elements, including many Northern Democrats, informally joined together in a party of protest which for want of a better name was called the Anti-Nebraska party. The various elements of the opposition held anti-slavery views in various degrees, but all of them were agreed that the slavery provision established by the Act of 1820 should be reestablished. That also was the issue made in the Presidential campaign of 1856 by the same protesting groups, by this time cohesively organized as the Republican Party.

In the campaign of 1856, the extreme slavery elements of the South were contending that Congress had no constitutional power to prohibit slavery in the territories and the *Dred Scott* case was then pending in the United States Supreme Court in which this contention was being set forth.

Lincoln, speaking at a Republican meeting in Galena, on July 23, 1856, said:

> "I grant you that an unconstitutional act is not a law; but I do not ask and will

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[1] http://www.supremelaw.org/decs/dredscot/dredscot.htm

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> not take your construction of the Constitution. The Supreme Court of the United States is the tribunal to decide such a question, and we will submit to its decisions; and if you do also, there will be an end of the matter."

In the Presidential campaign of 1856, Buchanan was the Democratic candidate, Freemont, the Republican candidate and Fillmore, the candidate of the American party. Buchanan was elected, receiving a plurality, but not a majority, of the popular vote. Buchanan's inauguration followed on March 4, 1857. Two days later the United States Supreme Court handed down its decision in the *Dred Scott* case, two of the judges dissenting.

The *Dred Scott* case involved a number of points of law and the case might have been decided upon any one of them, without the Court passing upon the question of whether Congress had power to forbid slavery in the Territories. This latter question, however, was of outstanding political importance and the Court did elect to deal with that question and to make it one of the grounds upon which its decision was based.

Each of the nine justices of the Court wrote separate opinions, six of them concurring in the result that Congress has no such power to prohibit slavery in the Territories, although each opinion varied as to the line of reasoning by which this result was reached. The main opinion was written by Mr. Chief Justice Taney in which five of the justices concurred. His opinion proceeded upon the ground that slaves were property and that the prohibition of slavery in the Territories by Congress was the taking of property without due process of law in violation of the provisions of the Fifth Amendment of the Constitution.

The decision of the Supreme Court raised this dilemma. If Congress had no power to prohibit slavery in the territories, it was idle to organize a party, the basic principle of which was that Congress should pass an act prohibiting slavery in the territories. Therefore, if the *Dred Scott* decision stood, the Republican Party was out of business. One of two things must happen. Either the *Dred Scott* decision must be reversed, or the Republican Party must go out of existence. These were the alternatives which confronted Lincoln and the other Republican leaders.

In meeting this issue, Lincoln was somewhat embarrassed by his Galena speech the year before when he had promised to abide by the decision of the Supreme Court. He did not say anything publicly on the subject until his speech in Springfield on June 26, 1857. In this speech, Lincoln replied to a speech of Douglas some two weeks earlier in which Douglas had urged acquiescence in the *Dred Scott* decision. Lincoln said:

> "Judicial decisions have two uses--first, to absolutely determine the case decided; secondly, to indicate to the

public how other similar cases will be decided when they arise. For the latter use, they are called 'precedents' and 'authorities.'

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

"Judicial decisions are of greater or less authority as precedents according to circumstances. That this should be so accords both with common sense and the customary understanding of the legal profession.

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

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

This was in 1857. In the following year came the famous Lincoln-Douglas Debates. Douglas opened the campaign in a speech at Chicago to which Lincoln replied. In the course of his reply, he said, speaking of the *Dred Scott* decision:

"I have expressed heretofore, and I now repeat, my opposition to the Dred Scott decision; but I should be allowed to state the nature of that opposition, and I ask your indulgence while I do so. What is fairly implied by the term Judge Douglas has used, 'resistance to the decision'? I do not resist it. If I wanted to take Dred Scott from his master, I would be interfering with

property, and that terrible difficulty that Judge Douglas speaks of, of interfering with property, would arise. But I am doing no such thing as that; all that I am doing is refusing to obey it as a practical rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory in spite of the Dred Scott decision, I would vote that it should.

"That is what I would do. Judge Douglas said last night that before the decision he might advance his opinion, and it might be contrary to the decision when it was made; but after it was made he would abide by it until it was reversed. Just so! We let this property abide by the decision, but we will try to reverse that decision. We will try to put it were Judge Douglas would not object, for he says he will obey it until it is reversed. Somebody has to reverse that decision, since it is made; and we mean to reverse it, and we mean to do it peaceably.

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

Later, in July, Douglas spoke in Springfield, urging that everyone should acquiesce in the *Dred Scott* decision. Douglas, as you all know, had been a great adherent of the Jeffersonian doctrines and a disciple of Jefferson. Lincoln, in reply to Douglas, threw in Douglas's teeth a quotation from Jefferson in which Jefferson had said, in speaking on the subject that the Supreme Court should be the ultimate arbiter on constitutional questions:

> "A very dangerous doctrine indeed" Jefferson said "and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, *'Boni judicis est ampliare jurisdictionem*[3];' and their power is the more dangerous as they are in office for life, and not responsible as the other functionaries are, to the elective control. The constitution has erected no such single tribunal, knowing that, to

[3] good justice is broad jurisdiction

> whatever hands confined, with the corruptions of time and party, its members would become despots. It is more wisely made all the departments co-equal and co-sovereign within themselves."

It is to be borne in mind that these are not the words of Lincoln, but Lincoln expressed the same idea in his first inauguration speech when he said:

> "I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of government. And while it is obviously possible that such decisions may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.
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> "At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

How then did Lincoln propose to bring about a reversal of the decision of the Supreme Court in the *Dred Scott* case? His idea seems to have been this, that public opinion affects us all, it affects judges just as well as anyone else. It is a factor which they do take into account in making their decisions and in writing their opinions. In the course of his debates with Douglas, Lincoln said:

> "These things warrant me in saying that Judge Douglas adheres to the Dred Scott decision under rather extraordinary circumstances--circumstances suggesting the question, "Who does he adhere to it so pertinaciously? Why does he thus belie his whole past life? Why, with a long record more marked for hostility to judicial decisions than almost any living man, does he cling to this with a devotion that nothing can baffle?" In this age, and this country, public sentiment is everything. With it, nothing can fail; against it, nothing can succeed. Whoever molds public sentiment, goes deeper than he who enacts statutes or pronounces judicial decisions.

He makes possible the enforcement of them, else impossible.

"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 heard when they were young.

"If by all these means, he shall succeed in molding public sentiment to a perfect accordance with his own, in bringing all men to endorse 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 their 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 accompaniments; that for a strong man to declare himself the superior of a weak one, and therefore 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 everywhere?

"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 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?"

Later in the Galesburg debate, Lincoln said:

"It is my opinion that the Dred Scott decision, as it is, never would have been made in its present form if the party that made it had been sustained previously by the elections. My own opinion is that the new Dred Scott decision, deciding against the right of the people of the states to exclude slavery, will never be made if the party is not sustained by the elections."

Being a parity of reasoning, Lincoln thought that if the view became generally and permanently prevalent that slavery had no proper place in the type of community contemplated by the ideals of the Declaration of Independence, in which all men had an equal right to "life, liberty and pursuit of happiness" then the Supreme Court, sooner or later, would mold its opinions to accord with the prevalent popular view.

And now to comment.

Lincoln's line of thought seems to have been this: Judges are like other human beings. On the whole, they are seeking to do right and perform their duties properly, but they have their failings and prejudices and their own personal equations and personal backgrounds. They make mistakes. These mistakes they, or a later court, frequently correct by overruling or modifying previous decisions. He looked at the Supreme Court as something more than the individuals who composed it at a particular moment. He looked at it as an institution, whose membership was ever changing. A case may be inadequately presented to the Court and on such inadequate presentation, the case may have been decided in a different way from that in which it would have been decided, had it been adequately presented. Frequently when a similar case is afterwards more adequately presented to a court changed or wholly or in part in membership, the Court, in the light of later experiences, may well modify or overrule a decision formerly rendered. Always and properly the Court gives weight to a generally prevalent and well reasoned and persistent public opinion.

Lincoln was not a theorist, but he, perhaps better than any other, understood the practical working of our democracy. Actual experience has demonstrated that the Supreme Court does within bounds and within proper limitations mold or revise its former opinions so as to bring them to accord with a prevalent and persistent popular opinion. The very recent history of the Supreme Court in its change of attitude as to the constitutionality of certain New Deal legislation is sufficient illustration.

Nor is it altogether fair to explain this result by saying, as Mr. Dooley said, that the Supreme Court follows the election returns. If the reasons be sound which led the public to adopt the views held by the winning political party, they should equally operate upon the minds of the judges of the Supreme Court. And further, it is to be assumed that, in accordance with the principles of democratic government, a generally prevalent and long-continued popular opinion is based upon sound grounds. The Supreme Court, functioning as an integral part of our democratic system, may properly accept such working hypothesis.

Nor is this democratic element foreign to our common law system. Within bounds, it is for the jury and not the judge to determine whether the defendant has been negligent and

within bounds the court accepts the determination of the jury, although if the question were to be determined by the judge alone, he would determine it differently. And again, with reference to questions determined by the court, a changed, but now prevalent and continued popular opinion alters the content of legal terms. The term "due process of law" in our constitutional provisions as now expounded by the court has a different content than was given to it by the courts of a hundred years ago, and similarly with the term "interstate commerce."

The democratic element in the development of common law was part of Lincoln's background in his practice as a lawyer at the Illinois bar. In seeking to reverse the *Dred Scott* decision through popular agitation, he applied to constitutional provisions the evolutionary democratic element with the operation of which in respect to common law questions he was familiar in his practice at the bar.

Whether or not this principle be sound, it accords with actual experience. On many constitutional questions, the court of Mr. Chief Justice Taney was at variance with the views theretofore taken by the court of Mr. Chief Justice Marshall. Contrast *Craig v. Missouri* with *Briscoe v. Kentucky.* Between the decision in the two cases, the Supreme Court had come to feel the effect of the influences of the Jacksonian social and political revolution.

Or, contract the effect given to the term "due process of law" in the *Adkins* case a few years before the recent depression, as compared with the effect given the same words in the *West Coast Hotel Co. v. Parrish* case, decided in the current year. In the *Adkins* case, the Supreme Court decided that a law establishing a minimum wage for women violated the "due process" clause. In the *West Coast Hotel Co.* case, the court expressly overruled the *Adkins* case and held that such a law did not violate the "due process" clause.

Or again, contrast the effect given to the term "interstate commerce" in the recent Wagner decision with the meaning given to those words in earlier decisions of the Supreme Court.

Mr. Charles Webster, a member of the Chicago bar, has briefly and better expressed some of the ideas set forth. He says:

> "Honest and constructive criticism of court decisions is not only proper, but should be encouraged. It is by such criticism and discussion, both by the Bar, by the Press, by the Courts themselves, of each other's decisions, and by the dissenting opinions of the minority of the bench, that the great body of the common law of England and this country has grown up and has been developed. Out of such criticism and discussion will emerge, ultimately, that same public policy and political philosophy, that prevailing and strongly

> preponderating public opinion, which will inevitably find expression in the decisions of our courts, and which will meet and find recognition in the solution of the social and economic problems with which we are from time to time confronted."

This holds true not only in the field of the common law but in the field of constitutional law as well. Is it not true that by the operation of such process, the Supreme Court has developed and modified the meaning of the constitutional terms, "commerce among the several states" and "due process of law"?

Indeed, this revolutionary process is a salutary check on the common law doctrine of *stare decisis*[4]. Only the parties directly interested in the outcome of the suit are entitled to be heard when the case is argued before the court. And yet, the opinion in the case and the grounds upon which the opinion proceeds, under the doctrine of *stare decisis*, stand as a precedent for decisions in future cases, involving the rights of persons not parties to the case in which the original opinion was rendered. These persons whose interests may thus be affected, under the operation of the doctrine of *stare decisis*, are entitled to some voice as to whether the particular case shall stand as a precedent, defining their rights for all time. By and large, particularly in the field of constitutional law, they can make their opinions felt only through the process indicated by Mr. Webster.

That was really the justification for Lincoln's attitude upon the *Dred Scott* decision. The people at large were not greatly interested as to whether the Supreme Court held that Dred Scott was yet a slave, but they were greatly interested and were entitled to make themselves heard on the question as to whether the *Dred Scott* case, operating upon the principle of *stare decisis*, should conclude the question as to whether Congress had the power to prohibit slavery in the territories.

The development and modification, whether of the common law or constitutional law, which comes about through this slowly reasoned and evolutionary process, is not an encroachment upon the independence of the judiciary, because its results take effect only when the court accepts the result as sound and chooses to adopt them into the law. Any development or modification of the common or constitutional law which is thus brought about comes through the operation of our democratic process in harmony with, and not inconsistent with, our system of jurisprudence. The process does not involve any exercise of political power, or any interference of one department of the government with another.

The process therefore is of an entirely different nature from the process of bringing about the reversal or modification of judicial decisions through increasing the number of judges or the court or placing on the

[4] to stand by that which is decided

bench members who favor the desired reversal or modification. In such case, the legislative and executive powers, acting together, in effect put upon the constitutional provisions the interpretation which they think proper and then manipulate the membership of the court so that the court will register and give effect to the interpretation of the constitutional provisions determined upon by the legislative and executive departments. In substance, it is an usurpation by the executive and legislative departments of powers which the constitution vests not in them but in the judicial department.

Judgments which the court, thus manipulated, renders are not in reality the judgments of the court but of the legislative and executive departments. "The voice is Jacob's voice, but the hands are the hands of Esau."