Lincoln and the Court

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Contents

Introduction

The story of Lincoln and the Supreme Court has been neglected for too long. Innumerable studies of the Civil War have almost wholly ignored Lincoln's relations with the Court and the role that it played in resolving the agonizing issues raised by the conflict. Lincoln's biographers, too, have slighted his role in appointing Supreme Court justices, and the effect his appointments had in shaping constitutional doctrine, both during the war and after. A recent study of Lincoln and Chief Justice Taney probed some of the issues that separated the wartime president from the Court's presiding justice, but it largely ignored the broader problems that the president confronted in his relations with the associate justices, and with the Court as an institution.[1]

On one level at least, this neglect is entirely understandable, for the military issues of the war were always more pressing than the legal issues, and they demanded more immediate attention. Men were dying on the nation's battlefields while lawyers and judges in Washington and elsewhere were debating the legality of secession, suspension of habeas corpus, imposition of martial law, legal tender, and the blockade of Southern ports. But not far beneath the surface of the battles and skirmishes, sieges and campaigns, the legal issues stirred uneasily.

The Civil War was, at its heart, a legal struggle between two competing theories of constitutional law. The first was that the United States was a league of sovereign states whose legal ties were severable at any time and for any reason, subject only to the political judgment of the severing states that

the cause for the separation was sufficient. The second was that the United States was a permanent union of states, created by a sovereign "people of the United States" and tied together by a "supreme law" that created firm bonds of nationhood.[2] Whether secession was or was not permissible would be decided, in the first instance, by the armies and navies, the generals and admirals, the foot soldiers and sailors locked in deadly combat. Ultimately, however, the question would be argued by lawyers and judges, and submitted for judgment to the Supreme Court, in whose hands the power (and awesome responsibility) of interpreting the Constitution was entrusted. While the issues were being thrashed out in battle, they were also being contested in the courtroom of the Supreme Court in Washington.

Relations between Lincoln and the Supreme Court have a just claim on the attention of history. Lincoln was, more than any other chief executive in the nation's history, a "lawyerly" president. He was, of course, a veteran politician, steeped in the arts of persuasion and compromise, advancing proposals, building alliances, staking out positions, and ultimately counting votes. But he was also an experienced lawyer, the veteran of thousands of courtroom battles, where victories were won not by raw strength or superior numbers, but by appeals to reason and citations of precedent. For almost twenty-five years he made the law his occupation, representing clients, addressing juries, arguing appeals, drafting contracts, wills, and deeds. It was an honorable calling, and one that Lincoln found both financially and emotionally satisfying. But Lincoln's law practice was much more than a way for him to support himself and his family. It provided a framework for his outlook on life, a focus for his public and private energies, and a discipline for his political efforts, which continued through most of his adult life (although with wildly varying levels of success).

Many young men in nineteenth-century America became lawyers first and sought political office thereafter, often to gain notoriety and attract clients. Lincoln, in contrast, developed his interest in politics at about the same time that he became interested in the law. In the early 1830s, he began to read law books and to help his neighbors in New Salem, Illinois, draft legal documents and argue cases in the local justice court. At the same time, he made his first (unsuccessful) effort to win political office. He did not study law in a systematic way until he was elected to the Illinois legislature in 1834, although he had yearned to do so earlier.

His admission to the bar in 1837, and his growing involvement in the activities of the Whig political party, confirmed his belief in the importance of *law* and *order* in a self-governing society. Without order, a society would disintegrate into anarchy; without law, self-government would give way to tyranny and oppression. One of his first major public addresses, delivered to the Young Men's Lyceum of Springfield, Illinois, in 1838, was a plea for social order and respect for the law, in which he urged "reverence for the Constitution and laws" and exhorted "every American, every lover of liberty, every well wisher to his posterity" to swear "never to violate in the least particular, the laws of the country; and never to tolerate their violation by others."[3] As legal historian Mark E. Steiner has pointed out, the Whig Party "attracted lawyers because of the congruence between the Whig commitment to order and tradition and the lawyers' attachment to order and precedent."[4] In his Lyceum speech, Lincoln said that "reverence for the laws" should be "breathed by every American mother, . . . taught in schools, in seminaries, and in colleges. . . . In short," he proclaimed, "let it become the *political religion* of the nation."[5]

Practicing his profession in Illinois's Eighth Judicial Circuit, Lincoln became a skilled courtroom lawyer, able to speak to juries in words that common men could readily understand. But he also developed technical skills (he could, in the words of historian Robert V. Bruce, "split hairs as well as rails") and became a much sought after appellate attorney.[6] Of the several thousand cases he took, more than four hundred were appeals, which demanded extensive research and legal analysis. His most important appellate work was in the Illinois Supreme Court, but he also represented clients in several cases before the United States Supreme Court.[7]

As Lincoln's legal prowess grew through the 1840s and 1850s, he acquired a formidable reputation, first in Illinois, then more broadly in the Ohio River country. He was aware, of course, that many Americans had a low opinion of lawyers, regarding them as "hired guns" whose services were available to the highest bidders, without regard for the truth or justice of their positions. "There is a vague popular belief that lawyers are necessarily dishonest," he once wrote, but he quickly added: "I say vague, because when we consider to what extent confidence and honors are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid."[8] In a word of advice to young men contemplating a legal

career, he wrote: "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."[9] Lincoln followed his own advice, earning the nickname "Honest Abe" in the courtroom and outside of it. It was a nickname that was to win him far greater rewards as a politician than as a lawyer.

Lincoln's emergence as a major player on the American political scene came in 1858, when he engaged in a series of widely publicized debates with Senator Stephen A. Douglas, the "Little Giant" of Illinois politics and the leading prospect for the Democratic presidential nomination in 1860. It was no accident that the principal subject of those debates was the great legal issue then racking the nation, whether the U.S. Supreme Court's controversial decision in *Dred Scott v. Sandford* had properly settled the issue of the expansion of slavery into the western territories.[10] Douglas was a former Illinois Supreme Court judge and current chairman of the Senate committee on territories, and thus well qualified to expound on the issue. Lincoln was a mere lawyer and a former one-term congressman, but in his debates with Douglas he showed an understanding of the constitutional principles underlying the slavery issue that attracted respect (if not agreement) all over the country. Douglas defended *Dred Scott,* while Lincoln deplored it.

Late in 1859, as the nation was beginning to consider candidates for the upcoming presidential campaign, Lincoln was invited to New York to speak on an important topic of the day. It was again no accident that the subject he chose to speak on was the great slavery issue then tormenting the country. Lincoln prepared assiduously for his speech, which was delivered in New York's Cooper Union in February 1860. He read accounts of the debates in the Constitutional Convention of 1787 and the state ratifying conventions that followed. He reviewed James Kent's *Commentaries on the Constitution,* one of the leading American legal texts of the first half of the nineteenth century. He searched the *Annals of Congress* and the *Congressional Globe* for early congressional debates and votes on the issue of slavery.[11] And the speech that he delivered in the Cooper Union read much as a legal brief might have read, for it was based on historical precedents, rigorously analyzed and woven together with logic and reason. Lincoln scholar Harold Holzer has described the speech as "a magnificent anomaly, both lawyerly and impassioned . . . ; almost mordantly le-

galistic and historical."[12] The speech was received in New York with great enthusiasm and, through verbatim texts printed in newspapers and pamphlets, was read all across the country. It spoke with authority and the persuasive power of a lawyer's closing argument to a jury, impressing political leaders that Abraham Lincoln, a little-known lawyer from the West, was a man who might carry the Republican banner in the upcoming presidential election—and, more important, do so successfully.

Lincoln's legal experience gave him insights into the slavery issue, and some definite opinions about what Congress could and could not do about it. He was, of course, personally opposed to slavery. "If slavery is not wrong," he once wrote to a newspaper editor, "nothing is wrong. I can not remember when I did not so think, and feel."[13] But his personal feelings were not embodied in the Constitution. Since the charter gave Congress no power to interfere with "domestic institutions" in the states, it was clear that the power to regulate slavery rested with the states. But the Constitution did give Congress the power to regulate slavery in the District of Columbia; and, despite the contrary holding in *Dred Scott,* Lincoln argued that it also gave Congress the power to exclude slavery from the western territories.[14] In addition, the Constitution's Fugitive Slave Clause, although not explicitly conferring any power on Congress, had traditionally been interpreted as giving the federal legislature the power to compel the return of runaway slaves to their masters.[15] Despite his own personal opposition to slavery, Lincoln was willing to recognize constitutional rules that sanctioned the institution, but firmly resolved not to extend them beyond the limits set by the Constitution. If slavery could not spread into the territories, Lincoln (and his fellow Republicans) believed that it would eventually shrivel and die. By halting its spread (and employing only those means prescribed by the Constitution to do so) they would put slavery on the road to "ultimate extinction."[16]

Lincoln's legal experience also gave him some strong ideas about secession. The intensity of the legal debate over secession is easy to forget, or at least to underestimate, one hundred fifty years after it was (for practical purposes, at least) resolved. It is not difficult to understand why Jefferson Davis argued that secession was a fundamental right, as firmly enshrined in the Constitution as the right of jury trial or the protection of private property.[17] Secession was the cornerstone upon which Davis and the Confederate States of America built

their claim to join the community of nations. Many forget, however, that secession was also debated in the North, and that there was no unanimity of opinion on the subject.

While most legal authorities in loyal states undoubtedly believed that secession was unconstitutional, many argued that the federal government had no power to do anything to stop it. President James Buchanan, Lincoln's hapless predecessor in the White House, was one who argued that secession violated the Constitution, but that the Constitution conferred no power on the national government to "coerce" a secessionist state from leaving the Union or, once having left, to compel it to return.[18] Buchanan's view was shared by the octogenarian chief justice of the Supreme Court, Roger Brooke Taney of Maryland, the old Jacksonian who made a virtually identical argument and anxiously awaited an opportunity to assert it in a Supreme Court opinion.[19] Taney, whose views of constitutional issues differed from Lincoln's in almost every important particular, longed to confront the Civil War president with a judicial edict that would, in effect, have said: *The Southern states were wrong in seceding, but you, sir, are equally wrong in trying to bring them back into the Union*. But Taney died late in the fourth year of the war, before an opportunity arose for him to opine on this critical issue, an old man, sick and embittered by the fighting that was raging about him, convinced that it was all terribly, terribly wrong, and that Lincoln bore a lion's share of blame for the wrong.

Lincoln's Whiggish reverence for law and order continued unabated after he joined the new Republican Party in the mid-1850s. The Constitution was a "law," the "supreme law" of the land, and secession was rebellion, insurrection, and "disorder." By striking at the legal foundations of the supreme law, secessionists threatened to destroy the "order" that made the American promise a reality. In Lincoln's view, the Union was perpetual, and it could not unilaterally be severed by any state or states.[20] As he made his way from Illinois to Washington in early 1861, prepared to take his place as president in one of the most critical times in the country's history, he repeatedly affirmed his loyalty to "the Union, the Constitution and the liberties of the people," concepts he regarded as inseparable. In Lincoln's view, secession was wrong on political, economic, and moral grounds; but it was also wrong because it violated the Constitution.

Unlike Buchanan and Taney, Lincoln believed not only that the federal government had the right and the power under the Constitution to oppose the secessionist states but also that he, as "commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States," had the power, and the duty, to defend the Union.[21] He was, as he reminded those who witnessed his inauguration in 1861, sworn to "preserve, protect and defend the Constitution of the United States," at least to "the best of . . . [his] ability."[22] And so as he called militiamen to Washington, and declared a blockade of Southern ports, and authorized suspension of the writ of habeas corpus along the military line between Washington and Philadelphia, and appointed generals to lead military expeditions into the South, he crafted legal arguments that would sustain him in his efforts to preserve the Union and defend the Constitution.

Lincoln came to the presidency with some well-articulated views of the Supreme Court and its function in the American constitutional system. His respect for the Court, derived from his general reverence and regard for the law, was high. In his rivalry with Douglas, he had proclaimed that he believed as much as the senator "(perhaps more) in obedience to, and respect for the judicial department of the government." He thought that the Supreme Court's "decisions on Constitutional questions, when fully settled, should control, not only in the particular cases decided, but the general policy of the country, subject to be disturbed only by amendment of the Constitution as provided in that instrument itself." The rub, of course, was in the words "fully settled." He believed that the *Dred Scott* decision was "erroneous." But it *was* a decision of the Supreme Court. How could he oppose it? On what grounds could he argue against it? In a speech in his hometown of Springfield, he explained:

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

> then might be, perhaps would be, factious, nay, even revolutionary to not acquiesce in it as a precedent.
>
> But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.[23]

He made it clear that a Supreme Court decision, once made, was binding on the parties to the case and that it was improper for anyone to "resist" it. But if a decision was not "fully settled," those who believed it to be "erroneous" could properly criticize it, point out its deficiencies, and seek to have it changed. Again addressing *Dred Scott,* Lincoln said: "We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this."[24]

Lincoln was not a constitutional scholar—nor did he ever claim to be one. His interest in the law was more practical than theoretical, directed more toward the solution of real problems than the exposition of theories. But he was far more than an "untutored country lawyer," as he has sometimes been portrayed. His biographer David Herbert Donald has noted that he was "an incredibly hardworking lawyer" and that he "took the law, and lawyers, very seriously."[25] And he often surprised those he met with his understanding of legal principles. When two English lawyers visited him one evening in 1864, expecting to encounter the unsophisticated "rail-splitter" they had read about in the newspapers, Lincoln turned the conversation, "unasked, into a forcibly drawn sketch of the constitution of the United States, and the material points of difference between the governments of the two countries." Informed that his visitors were lawyers, Lincoln began to talk "of the landed tenures of England" and explained that, when he was growing up in Kentucky, "they used to be troubled with the same mysterious relics of feudalism." Lincoln's commentary, one of the Englishmen later wrote, was "very lucid and intelligent."[26]

One of Lincoln's law partners once described him as a "case lawyer," a lawyer who studied the law that applied to the cases he was handling and showed little interest in broader or more general legal principles. But when faced with a "case," as another of his partners declared, he would "study out his case and make about as much of it as anybody."[27] Faced with the unprecedented legal

problems presented by the Civil War, President Abraham Lincoln was determined to "study out his case" and "make about as much of it as anybody."

THE SUPREME COURT is a collegial institution. Its members are independent judges, chosen by successive presidents, belonging to competing political parties, varying in age, background, and judicial philosophy. Each judge has an equal voice in the Court's decisions. A decision can be made only by a majority vote, and only in a case that has been brought to the Court by litigants and attorneys.[28] The federal judiciary is an independent branch of the federal government, co-equal with the legislative and executive branches and substantially free of direct influence from either. The Supreme Court stands at the head of the federal judiciary, and its judges hold their positions "during good behavior" (that is, for life).[29] There is never any guarantee that the Supreme Court will support the other two branches of the government, endorse their measures, or affirm their decisions, even in times of war or under the duress of insurrection or rebellion. The Supreme Court exercises independent judgment, and hears cases and makes decisions based on the views of a majority of the judges.

During the Civil War, the Supreme Court could have defied Lincoln's intention to preserve the Union and thwarted his efforts to "defend" the Constitution. (If Taney had had his way, it would have done so.) It could have struck down the president's major war measures. It could have invalidated congressional enactments designed to support the president's prosecution of the war, declaring them unconstitutional and thus void. It could have effectively argued Jefferson Davis's cause in Washington, making it all but impossible for Lincoln to prosecute the war to a successful conclusion. But the Court chose not to do so. In a succession of important cases, some decided by a simple majority vote, the Court took substantially the same view that Lincoln took of his constitutional powers and duties, sustaining his and Congress's key efforts to put down the rebellion and bring the secessionist states back into the Union.

The view has sometimes been advanced that there is no "value" in judicial biography, and that those who write about the law would better spend their time "writing on other matters, cutting-edge issues which can have a significant impact on important questions of the day." According to this view, biographical information about judges "is irrelevant," for it makes no difference whether the author of a judicial opinion "came over on a boat in 1882 or

whether the author's ancestors came over on a boat in 1620. Either way, the opinion has the same value."[30] This argument suggests that judges are automatons who mechanically apply legal rules to real-life controversies. This book rejects that argument for the view that the lives, backgrounds, experiences, temperaments, and characters of the judges who sat on the Supreme Court during the time that Lincoln was president—and in the years immediately following, when Lincoln's initiatives continued to come before the Court for review—are not only informative but also essential to understanding the decisions that the Court made and how the president and the Court interacted. To understand Taney's judicial views, for example, it is helpful to know that he was raised in the late eighteenth century on a tobacco plantation in southern Maryland, in the midst of a slave population; that he spent his early professional years as a lawyer in Frederick, Maryland, where slaves worked in his office and his home; that he rose to national prominence through the favor of President Andrew Jackson, also a slaveholder; and that, to the end of his long life, he sympathized with the South in its commercial, social, and political struggles with the North, growing bitter in the vague realization, as his biographer Carl Brent Swisher has written, that his views on the great issues dividing the nation were not shared by most Americans.[31]

The late Chief Justice William Rehnquist wrote about "the human factor that inevitably enters into even the most careful judicial decision."[32] This "human factor" recognizes that judges are not all alike; that they have feelings and emotions; that they experience disappointments and anxieties; that they have sympathies and sometimes resentments. Good judges strive to overcome their emotions, to apply the law dispassionately, and to make judgments that are firmly grounded in legal rules. Even the best judges, however, are unable to achieve this goal in all of their decisions. This book attempts to portray the Supreme Court justices of Lincoln's time as living and breathing human beings, buffeted by the exigencies of the time, attempting to live up to their judicial oaths, sometimes failing but mostly succeeding, shaped by their life experiences and the pressures of the war. They were not cogs in an impersonal machine but people—like generals and admirals and senators and congressmen, cabinet secretaries, and even the president himself. By coming to know them as people, we can better understand the arguments they advanced and the decisions they made.

This is a book about lawyers and laws, judges and courts, statutes and constitutional provisions. It is not, however, a "law book." It makes no effort to analyze the great legal issues of the Civil War to the point of exhaustion. It describes the legal controversies that arose during the fighting, and the lawyers and judges who participated in their resolution. It is a book that will, I hope, appeal to scholars and general readers, to lawyers, judges, and laymen, to those who are steeped in constitutional history and those who know little about it. It is a book of history—legal history, to be sure—but history first and foremost, and it tells how that history helped to affect the outcome of the war, and shape the future of the United States.

1 A Solemn Oath

March 4, 1861, dawned dark and blustery in Washington, with clouds hovering low over the horizon, threatening to unleash a torrent of rain. A few drops of water fell before eight o'clock, but they were hardly enough to calm the dust that lay thick in the streets. A bracing wind soon swept in from the northwest, clearing the sky but also raising billows of dust that raced across Pennsylvania Avenue and its cross streets.

Abraham Lincoln had arisen at five o'clock in his bedroom in Willard's Hotel and begun preparations for the busy day ahead. After an early breakfast in his private parlor, the president-elect gathered his family around him and read aloud the inaugural address that he planned to deliver a few hours later at the Capitol. He conferred with Gideon Welles, his choice to be the new secretary of the navy, Edward Bates, his attorney general–designate, and Judge David Davis of Illinois, the man who had engineered his presidential nomination at the Republican convention the previous May. Retiring to his room, he dressed in a new black suit, with freshly shined boots, a stovepipe hat, and a gold-headed cane that had been given to him for use on this day, then awaited the arrival of the outgoing president, James Buchanan, who would transport him from the hotel to the Capitol in an open barouche.

The chamber of the United States Senate was crowded with spectators when Buchanan and Lincoln entered at a few minutes past one o'clock. The outgoing vice president, John C. Breckinridge of Kentucky, had already administered the oath of office to the new vice president, Hannibal Hamlin of Maine,

and Hamlin now occupied the presiding officer's chair. The galleries were filled with hundreds of ladies, while the Senate floor was crowded with the important guests who, by tradition, would witness the departure of the old chief executive and the arrival of the new: the ministers and attachés of the diplomatic corps, the members of the Senate and House of Representatives, and the eight sitting judges of the Supreme Court.

Buchanan and Lincoln entered the chamber arm in arm, not to signify any political affinity (there was none), but to demonstrate the civil courtesies that should be exchanged when power passes from one president to another according to the dictates of the Constitution. Observing the two men, a reporter for the *New York Times* thought that Buchanan was "pale, sad, and nervous" and that Lincoln's face was "slightly flushed, with compressed lips." While an oath was administered to the newly elected Senator James Pearce of Maryland, Buchanan and Lincoln sat in front of Hamlin's marble desk. Buchanan "sighed audibly, and frequently," the *Times* reporter noted, while Lincoln was "grave and impassive as an Indian martyr."[1]

A line of procession now formed, with the marshal of the District of Columbia in the lead, followed by the judges of the Supreme Court, the sergeant at arms of the Senate, and the Senate committee on arrangements, headed up by Lincoln's old friend from Illinois, now senator of Oregon, Edward D. Baker. Then followed the president and the president-elect, the vice president, the secretary of the Senate, the senators and congressmen, and the other dignitaries. The procession passed through a corridor and out onto a large wooden platform that straddled the east-portico steps. Built specially for the inauguration, the platform was decorated with red, white, and blue bunting and guarded by fifty armed soldiers who stood silently beneath it. From two nearby artillery batteries, the army's aged general in chief, Winfield Scott, surveyed the portico, the platform, the unfinished dome of the Capitol (now being raised to a grander height), and the tens of thousands of guests who crowded the Capitol grounds.

Buchanan, Lincoln, the Supreme Court judges, and the members of the committee on arrangements seated themselves in plush chairs that had been removed from the Senate and placed beneath a small wooden canopy. Then Senator Baker stepped forward and announced, in the stentorian tones for which he was noted: "Fellow-Citizens: I introduce to you Abraham Lincoln,

the President elect of the United States of America." Lincoln rose, walked to a table that had been placed beneath the canopy, and bowed low to acknowledge the applause of the crowd.[2]

Lincoln had come to the Capitol to take his oath of office as sixteenth president of the United States. The president's oath (the only one that the Constitution prescribes in precise terms) is set forth in Article II, Section 1, which provides (in relevant part): "Before he [the president] enter on the execution of his office, he shall take the following oath or affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.'"

Long tradition dictated that the oath should be administered by the chief justice of the Supreme Court. Roger Taney was more experienced in carrying out this duty than any man in the history of the United States, for in the almost quarter-century he had occupied the chief justiceship he had administered the oath to six presidents (his first was Martin Van Buren in 1837). Now almost eighty-four years old, he was about to administer the oath to his seventh. Six feet tall, gaunt, with a flat chest, stooped shoulders, tobacco-stained teeth, and long hair that cascaded over his collar and drooped across his forehead, Taney was a living link with the history of the United States. Born in Maryland in 1777, he was more than thirty years older than the president-elect. He was, in fact, older than the Constitution, older than the Supreme Court, older than the Capitol before which he was now to perform a ceremonial duty of special solemnity and importance.

Although both the president-elect and the chief justice were tall, thin men, they contrasted in countless other ways. Taney was quiet, formal, and perpetually dignified, the president affable, casual, and habitually (some thought annoyingly) humorous. The customary expression on Taney's face was so dour that his severest critics professed to see a sinister look in it.[3] Originally a Federalist in the tradition of Alexander Hamilton, John Adams, and his venerated predecessor as chief justice, John Marshall, Taney came under the influence of Andrew Jackson late in the 1820s and soon became one of the Tennessean's most trusted lieutenants. In 1829, President Jackson made Taney his attorney general, and he filled the post with distinction until 1831, when he returned to his law practice in Baltimore. When Jackson embarked on a plan to dismantle

the Second Bank of the United States (which he deemed a "monster") and when Secretary of the Treasury William J. Duane refused his order to withdraw federal deposits from the bank, Jackson fired Duane and named Taney as his successor. The promptness with which the Marylander carried out the president's order caused Jackson's opponents to condemn him as a lackey but persuaded the president that he was a man he could trust. In 1834, Jackson nominated Taney to be an associate justice of the Supreme Court but the Senate refused to confirm him. Then John Marshall died on July 6, 1835, ending a distinguished career of more than thirty-four years as head of the federal judiciary. Jackson took revenge on his enemies in the Senate by naming Taney to succeed Marshall as chief justice. Thanks to recent changes in the Senate, Taney's nomination was confirmed by a vote of twenty-nine to fifteen.[4]

Taney and Lincoln differed not only in appearance, demeanor, and experience but also in their views of the Constitution, and their conceptions of the role that the Supreme Court should play in settling the profound questions that now beset the nation. In his opinion in the *Dred Scott* case, Taney had publicly expressed confidence in the Supreme Court's authority to settle questions that gnawed at the heart of national policy—slavery in the territories, the status of free blacks, the future of the "peculiar institution" itself.[5]

Taney's public statements about slavery had been uniformly—and not surprisingly—supportive, for he was raised on a slave plantation and lived all of his life in Maryland and the District of Columbia, where slavery was a part of everyday life. In *Dred Scott,* he expressed harshly racist views of constitutional doctrine and history, making it clear that he believed that persons of African descent (whether slave or free) were ineligible to participate in the political life of the United States simply because of their race. After *Dred Scott* became a national cause célèbre, however, some of the chief justice's defenders claimed that he was "personally" opposed to slavery.[6] They reported the surprising fact that many years earlier, while arguing a case before a Maryland jury, he had described the institution as an "evil" and a "blot on our national character." It was in 1818, and Taney's client was a Methodist minister from Pennsylvania who had given an antislavery sermon in a camp meeting and thereafter been indicted for attempting to incite slaves to insurrection. Taney defended the minister on free-speech grounds but also told the jury that slavery "must be gradually wiped away." Around the same time, Taney was reported to have

freed eight or more of his own slaves (though he kept a couple who were "too old to learn a living").

But after 1818 Taney cast no more aspersions on slavery, and in 1832, while serving as Andrew Jackson's attorney general, he made harshly racist statements that would have been very much at home in his *Dred Scott* opinion. In an official attorney general's opinion, he described Americans of African descent as "degraded" and "the only class of persons who can be held as mere property, as slaves." He charged that African Americans "were never regarded as a constituent portion of the sovereignty of any state." They were "not looked upon as citizens by the contracting parties who formed the Constitution" and were "evidently not supposed to be included by the term *citizens*."[7] If, in 1818, Taney had disparaged slavery in an effort to win a jury trial (he was successful in the effort), he staunchly defended slavery and denigrated African Americans during the rest of his long public life as both attorney general and chief justice.[8]

Taney's views about the secession crisis were expressed more privately. Like President Buchanan, he believed that secession was constitutionally impermissible but that the federal government had no authority to "coerce" a seceding state to remain in the Union. Buchanan's views on the subject had been expressed in his last annual message to Congress, delivered on December 3, 1860. The outgoing executive rejected the idea that the federal government was "a mere voluntary association of States, to be dissolved at pleasure by any one of the contracting parties." "If this be so," he argued, "the Confederacy is a rope of sand, to be penetrated and dissolved by the first adverse wave of public opinion in any of the States. . . . By this process a Union might be entirely broken into fragments in a few weeks which cost our forefathers many years of toil, privation, and blood to establish." But Buchanan searched the Constitution for any language that would give the president or Congress power to keep a state in the Union against its will and, "after much serious reflection," concluded that there was none.[9] Taney's own views on secession were expressed in an unpublished memorandum probably written in February 1861, about a month before he was to administer the presidential oath to Lincoln. In that memorandum, he said that the Confederate states were wrong to claim a constitutional right to secede. But, he wrote, federal laws could be enforced within a state only by its own citizens, and the federal military could enter a state only at the call of state officials. Thus it was impermissible for the federal government, against

the will of a seceding state, to subject it to military action to prevent it from severing its ties with the Union.[10] It was thus wrong, in the view of both Buchanan and Taney, for a state to break the bonds that tied it to the other states, but also wrong for the federal government to attempt to stop it.

It was a cramped position that led Buchanan to a course of executive paralysis and Taney to a sense of impending doom. In a letter written late in 1860 to his son-in-law, the chief justice revealed that his thoughts had "been constantly turned to the fearful state of things in which we have been living for months past." He remembered the violent slave uprising that had swept over the Caribbean Island of Santo Domingo in the 1790s and harbored gloomy fears that similar bloodshed might be visited on the slaveholding states of the American South. He prayed that such a catastrophe could be averted and that his "fears may prove to be nothing more than the timidity of an old man."[11]

Taney *was* an old man (he was fond of reminding people of the fact, perhaps to gain their sympathy), but he had never been timid. He was as confident in his eighties of the rightness of his positions as he had been in his thirties and forties, and as forceful as ever in asserting them. When, in his *Dred Scott* opinion, he denied that African Americans were regarded by the framers of the Constitution as citizens of the United States, and asserted that Congress's effort in the Missouri Compromise of 1820 to restrict the spread of slavery into the western territories was unconstitutional (propositions that were as hotly contested in 1857 as they had been in 1820), he stated his positions with certainty. His propositions, he said, were "too plain for argument." He was interpreting the Constitution "according to its true intent and meaning," and "in a manner not to be mistaken."[12]

But Lincoln, and a host of other Americans, disagreed with Taney's positions—not just his notions about slavery and secession but also the constitutional principles that he asserted in *Dred Scott*. The latter had become a bone of contention in Lincoln's senatorial debates with Stephen Douglas in 1858. Now, as president, the Illinoisan would be called upon to make decisions that would almost certainly clash with the conclusions enunciated by the old chief justice in *Dred Scott*.

LINCOLN HAD BEEN in Washington only ten days when he took his seat on the inauguration platform, and he had been busy all of that time. He had been formally introduced to Taney and the associate justices of the Supreme Court

eight days before, but he already knew much about them, for his legal practice had obliged him to study their opinions and occasionally represent clients who had cases before the Court. On March 7 and 8, 1849, just after his first (and only) term as a U.S. congressman came to an end, Lincoln appeared before Chief Justice Taney and the associate justices of the Supreme Court in Washington to argue the case of *Lewis v. Lewis*. This was an appeal from the U.S. Circuit Court for Illinois, where a suit had been filed in 1843 alleging the breach of a covenant in the sale of a parcel of real property. Lincoln represented the defendant and argued that the cause of action, which arose in 1819, was barred by the Illinois statute of limitations. The original statute, passed by the Illinois legislature in 1827, required that the suit be commenced within sixteen years but provided an exemption for persons who were outside Illinois. The plaintiff in *Lewis v. Lewis* was an Ohioan and thus outside Illinois. But in 1837 the statute was amended to repeal the exemption for persons outside the state. Lincoln argued that the statutory period should be measured from 1827, while the plaintiff's attorney argued that the sixteen-year clock did not start to run until 1837. It was a technical argument but an important one, both for the parties and for Illinois law. The Supreme Court's decision in *Ross v. Duval* (1839) appeared to support Lincoln's position.[13] But on March 13, 1849, Chief Justice Taney decided otherwise, ruling that the limitation period did not begin to run until 1837.[14] According to John P. Frank, a close student of Lincoln's legal career, Taney's decision was "utterly in conflict" with *Ross v. Duval* and "in all fairness . . . must be regarded as overruling the earlier case."[15] Associate Justice John McLean agreed and dissented from Taney's opinion, but the chief justice's view prevailed. Although the loss was difficult for Lincoln, it taught him some valuable lessons about Supreme Court decisions. Among them was one he would later remember when discussing the *Dred Scott* decision: No matter how clearly or emphatically it may be stated, a decision of the U.S. Supreme Court is not writ in stone. If members of the Court later decide to overrule (or merely disregard) it, an entirely different decision may be handed down.

Lincoln had been attorney of record in other cases before the United States Supreme Court, and he had participated in cases that were appealed to the Supreme Court by other lawyers. But his participation in these other cases was limited to trial work, writing briefs, or helping other lawyers prepare legal theories. *Lewis v. Lewis* was the only case in which he presented an oral argument.[16]

On Monday, February 25, 1861, the president-elect had made his first courtesy call on Chief Justice Taney and the associate justices of the Supreme Court. He met them in the reception room adjoining their new courtroom on the main floor of the Capitol, created out of the chamber vacated by the Senate when it moved into larger and grander quarters in the new north wing of the Capitol in January 1859. The Court had met for the first time in the new courtroom on December 4, 1860, when it opened the December term of that year. The new courtroom was a semicircular space, measuring forty-five feet across, with a domed ceiling, a large chandelier, a richly carpeted floor, and a marble colonnade in front of which the bench and the justices' chairs were laid out in a straight line. A gilded eagle, left over from the Senate days, looked down on the spectators from a perch above the chief justice's chair. Remodeled and furnished at a cost of $25,000, the new courtroom was a vast improvement over the damp, poorly lit basement room that had been the Court's headquarters from 1810 to 1860. When Justice John Catron of Tennessee first learned of plans for the new courtroom, he wrote the court clerk that the information was "truly gratifying to me, who has been greviously [*sic*] annoyed by the dampness, darkness, and want of venilation [*sic*], of the old basement room; into which, I have always supposed, the Sup. Court was thrust in a spirit of hostility to it, by the Political Department."[17]

Lincoln entered the justices' reception room at three o'clock in the afternoon, accompanied by Senator William H. Seward of New York, who was soon to become his secretary of state. Like Lincoln, Seward had been a critic of the *Dred Scott* decision, but he had gone much further than Lincoln, charging that, when the justices decided the case, they resembled the obsequious courtiers of the tyrannical King Charles I, and reminding his listeners that "judicial usurpation is more odious and intolerable than any other among the manifold practices of tyranny."[18] Seward's words had outraged Taney, who said privately that if the New Yorker had been nominated and elected president instead of Lincoln, he would have refused to administer the oath of office "to such a man."[19] If Taney still harbored personal enmity toward Seward when he and Lincoln came to the justices' reception room on February 25, no evidence of it has survived. In the biography that they later wrote about Lincoln, John G. Nicolay and John Hay, the new president's private secretaries, noted that when the president-elect went to the Capitol to meet members of Congress "he was enthusiastically welcomed by friends and somewhat sullenly greeted by foes." But

when he went to the Supreme Court, the "venerable chief and associate justices extended to him an affable recognition as the lawful successor in constitutional rulership."[20]

As chief justice, Taney was the principal object of Lincoln's interest and attention. The old Marylander had a kind of charm that ingratiated him to new acquaintances, even those who did not share his views or admire his record. A man who knew him in Maryland said that he spoke with "so much sincerity . . . that it was next to impossible to believe he could be wrong." But another Marylander, alluding to Taney's Roman Catholic religion, complained of the judge's "infernal apostolic manner." He reminded many men of the Pope, speaking "ex cathedra, infallibly."[21]

Taney had never enjoyed robust health, and when he became chief justice he was already fifty-nine years old, so many people had expected him to serve a short term. Despite frequent absences from the bench due to sickness, he hung on to his position year after year, decade after decade, confounding those who thought he lacked staying power. In April 1860 he suffered a fall as he stepped from his carriage onto a marble pavement at the entrance to the Capitol and had to spend a long period away from the Court. This incident gave rise to reports that he was disabled, perhaps even near death. He relished the opportunity to deny them. "I see by the Baltimore Sun of yesterday," he wrote in May 1860, "that I am again put to death, with a very short reprieve. . . . I am fully sensible that in the course of nature, it cannot be long before my last hour may come, but it would seem that there are some political writers of letters, and some newspapers who think that the event has been delayed too long, and mean to kill me at least in public opinion, by the influence of the press."[22] Taney supported Breckinridge, the proslavery Democrat, in the presidential election of 1860, and after the Republicans won there were rumors that the chief justice would submit his resignation so that the Democratic president James Buchanan could name his successor. But Taney denied the rumors, writing in a letter to an admirer: "You are right in supposing that at such a time I should not think of resigning my place on the Bench of the Supreme Court. I am sensible that it would at this moment be highly injurious to the public, and subject me to the suspicion of acting from unworthy motives."[23]

When he took his position as successor to the great John Marshall in 1836, many thought Taney a poor choice. His critics said that he was too much of a

politician to settle into the reflective habits of a jurist, and too closely associated with the combative style of Jackson's administration to be an impartial administrator of justice. But Jackson's critics would have considered any selection he made a poor choice. Those who venerated Marshall wanted Associate Justice Joseph Story to be named chief justice. One of the most scholarly judges ever to sit on the Court, Story had served as a loyal lieutenant to Marshall ever since his appointment by President Madison in 1811, helping Marshall craft a constitutional jurisprudence that accommodated national aspirations while it respected clearly defined limits of federal power. And while he served as an associate justice, Story built a reputation as a legal writer and educator of the first rank (he was Dane Professor of Law at Harvard and the author of a series of authoritative legal treatises). But Jackson had no affection for Marshall and little more for Story, and he chose instead to name one of his own loyalists. After Taney began his work as chief justice, Story came to admire him as a legal craftsman and a gentleman, but he never got over the loss of Chief Justice Marshall. "I miss the Chief Justice at every turn," Story admitted. "I am the last of the old race of Judges." Daniel Webster, one of the Supreme Court's great lawyers and a nationalist in the Marshall-Story mold, agreed. "Judge Story . . . thinks the Supreme Court is *gone* and I think so too."[24]

The Supreme Court was not gone, of course, but it *had* changed and would continue to change. And Andrew Jackson was responsible for much of that change, as Abraham Lincoln could perceive when he visited the judges on February 25. In fact, four of the eight sitting justices had been appointed directly by Jackson (Jackson nominated six justices in all, more than any other president up to that time except George Washington). The remaining four justices were appointees of presidents who were strongly influenced by Jackson, both in their political views and their judicial philosophies. "Old Hickory" had left the presidency twenty-four years before, but the mark he put on the Supreme Court was still very evident in February 1861.

The Supreme Court that Lincoln encountered was overwhelmingly Democratic. Only one of the justices, John McLean, was a Republican, and even he could trace his political roots to Andrew Jackson (McLean was Jackson's first Supreme Court appointment, in 1829). Four of the justices were from slaveholding states and supported slavery, both publicly and privately. Three were northern Democrats who supported slavery, or at least did not oppose it

(Democrats of this stripe were called doughfaces, because they could be easily twisted and shaped). Before May 31, 1860, the Court had had an even more Southern, proslavery, and Democratic tilt to it, but on that date Associate Justice Peter V. Daniel of Virginia died after eighteen years of Supreme Court service.

Daniel was a Southern aristocrat who vehemently defended states' rights and slavery and whose loyalty to the Democratic party was dependable. His appointment to the Supreme Court came from Martin Van Buren in 1841, but he had earlier been appointed to the federal district court by Jackson. While Daniel was on the bench, the Supreme Court had five justices from the South and only four from the North, eight who defended slavery and only one who opposed it, eight Democrats and only one Republican. Considering the population disparity between the two sections of the country (approximately 70 percent of the population lived in the North in 1860, only 30 percent in the South), the South's strong presence in the Supreme Court was remarkable. With characteristic indecisiveness, James Buchanan dithered over Daniel's successor for months. On February 5, 1861, with only a month left in his term, he nominated Jeremiah Sullivan Black of Pennsylvania, a doughface who had been Buchanan's attorney general from 1857 to 1860 and had briefly served as secretary of state. But Black's nomination to the Supreme Court was rejected by the Senate on February 21. A month earlier, Black had privately belittled Lincoln's abilities, dismissing him as being "very small potatoes and few in a hill" and writing: "He had no reputation even in the region where he belongs except what arose out of certain loose stump speeches consisting mainly in making comical faces and telling smutty anecdotes."[25] Now Lincoln would have the opportunity to appoint a Supreme Court justice to the seat Black had been denied.

John McLean was not the oldest justice in 1861, though he was the most senior, having served thirty-one years on the Court. Born in New Jersey in 1785, he had moved with his family through Virginia and Kentucky to Ohio, where he became a lawyer, a member of Congress, and a state supreme court judge before President James Monroe named him commissioner of the General Land Office in 1822. The following year Monroe promoted him to postmaster general, and he kept that position all through the presidency of John Quincy Adams. But in the next election he threw his support to Andrew Jackson, and

Jackson rewarded him with an appointment to the United States Supreme Court, where he took his oath of office in January 1830. A large man with a large head (in later years bald in front but covered on each side by long and somewhat disheveled hair), McLean was, as one historian put it, "a great man in body, and perhaps in mind." Edward Bates thought he had "great talents, with a mind able to comprehend the greatest subject," though future president Rutherford B. Hayes allowed that he could be "stiff as a crowbar."[26] McLean was less known for his judicial decisions than for the fact, as Daniel Webster put it, that he always had "his head turned too much by politics." During the whole of his career as a Supreme Court justice he had aspired to the presidency, first as a Jacksonian, later as a Whig, and finally as a Republican. McLean had his supporters, but they were never numerous enough to win him the nomination of any party. Though courteous in his relations with others, McLean often gave the impression of being cold and unfeeling. Salmon P. Chase, also an Ohioan, once commented of McLean: "It is a thousand pities that a man of such real benevolence of heart as the Judge possesses, should not allow more of it to flow out into his manners."[27]

Aside from his political ambition, McLean was best known for his steadfast opposition to slavery, an opposition that had its roots in the religious precepts of his Scotch-Irish forebears (Ulstermen who spelled their name "McClain" when they first came to America). In fact, McLean was the only justice still sitting on the Court in 1861 who had dissented from the proslavery *Dred Scott* decision of 1857. The dissent he filed in that case strongly challenged Chief Justice Taney's views about African Americans and the power of Congress to regulate slavery in the territories. Some thought, in fact, that McLean's views on those questions had precipitated Taney's extreme pronouncements on the same issues, for it was speculated that the chief justice would have refrained from addressing them if McLean had not insisted on doing so in his dissent. In *Dred Scott,* McLean argued from the Constitution and history but also from his conscience. It was a habit that went back to his days as a state court judge, when he often moralized from the bench. "On such occasions," his biographer said, "the Justice's role was approximating that of the Methodist lay preacher."[28]

Now seventy-five years old, McLean may still have had some presidential ambitions (as late as 1860 he received twelve votes at the Republican

nominating convention in Chicago, and Lincoln himself spoke favorably about his candidacy), but nobody now expected him to attain that office.[29] It was McLean's duty as senior associate justice to preside over the Court during Taney's frequent absences, and he did this so expertly that the *New York Tribune* praised his efficiency, commenting in 1860: "During the recent illness of Judge Taney, he dispatched more business than was almost ever known before by the profession."[30]

Associate Justice James M. Wayne of Georgia was second in seniority to McLean. Nominated by Andrew Jackson in January 1835 and confirmed by the Senate just eight days later, Wayne was now seventy-one years old and beginning his twenty-seventh year on the Court. A one-time rice planter and slaveholder from Savannah, he had been a lawyer, a state court judge, mayor, and a Democratic congressman before he began his Supreme Court career. Wayne was a consistent supporter of slavery (in fact, he was the only associate justice who completely agreed with Taney's *Dred Scott* opinion in 1857). But his proslavery view was balanced by a nationalist outlook that led him to sustain federal power and rein in excessive claims of states' rights. A handsome man, and a favorite of the ladies when he was young, Wayne had matured over the years into a silver-haired gentleman of grace and impeccable manners. Though Lincoln's attorney general, Edward Bates, would soon declare him "habitually bland," he would allow that the septuagenarian from Georgian "never forgets that he, himself is a gentleman."[31]

Associate Justice John Catron of Tennessee was next in seniority to Wayne. Catron was cut from rougher cloth than the Georgian, though he shared many of the same political and judicial views, supporting slavery and following a constitutional jurisprudence that accommodated nationalist aspirations. Though it is uncertain where and exactly when Catron was born, it is believed he was born in Pennsylvania around the year 1786.[32] His parents were German immigrants who took him to Virginia and then to Kentucky while he was still a child. As an adult, he moved on to Tennessee, where he built his first home in the foothills of the Cumberland Mountains. In 1818, on the advice of Andrew Jackson (with whom he had served a brief stint as a soldier in the War of 1812), he moved to Nashville, where he became a successful lawyer.

Catron was more than six feet tall, with a large frame, black eyes, a big nose, and a prominent, almost combative jaw. As one of his biographers noted,

his "manner attracted attention, and his supreme self-confidence begat the confidence of his clients."[33] After six years of legal practice, he was elected a justice of the Tennessee Court of Errors and Appeals, where he became chief judge in 1831. A loyal Jacksonian, Catron managed Martin Van Buren's presidential campaign in Tennessee in 1836, and on the very last day of Jackson's presidency, he was nominated to be an associate justice of the United States Supreme Court. The Senate confirmed the nomination five days later. Associate Justice John Archibald Campbell of Alabama commented that the Tennessee judge "had indomitable courage and practical ability" and was "always listened to with respect."[34] When Lincoln visited the justices in their new conference room, the seventy-five-year-old Catron was three months away from completing his twenty-fourth year of Supreme Court service.

Associate Justice Samuel Nelson of New York was sixty-eight years old and beginning his seventeenth year on the Supreme Court. Nominated by President John Tyler in February 1845 and confirmed by the Senate in the same month, Nelson was a doughface Democrat who had been a trial and appellate court judge in his home state before he joined the nation's highest court. Born in 1792, of Scotch-Irish ancestry, he spent his boyhood on a farm in upstate New York, then went away for three years of academy training and a rigorous course of study at Vermont's Middlebury College. After graduating in 1813, he returned to New York and embarked on a legal career that led him to choice political appointments, first as a local postmaster and later as a judge. Nelson's nomination to the United States Supreme Court was a kind of accident, made possible by the fact that President Tyler had been unsuccessful in his efforts to nominate a string of men before him. One of Tyler's nominees was denied confirmation by the Senate, another withdrew his name from consideration, and four or five potential nominees (including former President Martin Van Buren) either declined to be considered or were deemed so inappropriate that the president quickly dropped them. Nelson's name was offered and promptly confirmed by the Senate, in part to break the impasse.

In appearance, Nelson was a stern-looking man with a large head that was made to appear even larger by luxuriant hair and full side whiskers that drooped low across his collar. George Templeton Strong, a young lawyer who encountered him one day at a Columbia Law School commencement, described Nelson as looking "leonine and learned enough to represent Ellenbor-

ough and Kenyon and Mansfield and Marshall all in one."[35] Though a Northerner by birth and upbringing, Nelson was friendly to Southern interests, and his father was rumored to have financed his college education through the sale of a Negro slave girl, a fact that may have given the young man an early proslavery inclination.[36] Whether or not this was the case, his votes on the Supreme Court revealed a tendency to be, if not proslavery, at least "grimly anti-antislavery."[37]

Next in seniority after Nelson was Associate Justice Robert C. Grier of Pennsylvania. Like his New York colleague, the sixty-seven-year-old Grier was a doughface Democrat who supported the Supreme Court's proslavery positions while taking a generally centrist position on other issues. Born in Cumberland County, Pennsylvania in 1794, he had moved north to Lycoming County while he was still an infant. There his father supported his large family as a Presbyterian minister, farmer, and schoolmaster. Grier received his first lessons from his father, who was proficient in Greek and Latin. He later left for Dickinson College, the same school from which Chief Justice Taney had received his college education almost twenty years earlier. After graduating in 1812, Grier taught school for a while, and then in 1817 he embarked on a legal career that led him to the Allegheny County District Court at Pittsburgh in 1833. Grier's appointment to the Supreme Court, much like Nelson's, resulted from the inability of Presidents Tyler and Polk to fill a Supreme Court vacancy that first opened in 1844. After several unsuccessful attempts to find a suitable nominee (James Buchanan was twice offered the post but was unable to decide whether to accept it), Polk fixed on the almost unknown Grier, whose nomination was approved the day after it was submitted to the Senate.

Standing over six feet tall, with a rotund figure, a ruddy complexion, and blond hair, Grier was an imposing man with an explosive temper.[38] The *New York Tribune* described him as "impulsive and precipitate."[39] Edward Bates called him "a natural-born vulgarian, and, by long habit, coarse and harsh," though Justice Campbell praised his "vigorous thought" and "large mindedness."[40] His temperament aside, Grier was a man who commanded the respect of the other justices and the attorneys who argued their cases before the Supreme Court.

Associate Justice John Archibald Campbell of Alabama was the court's youngest member (only forty-nine years old on that day in 1861) but not the

most junior in service. Born in Georgia in June 1811 to a successful attorney and plantation owner, Campbell had been a child prodigy and had entered Franklin College (later the University of Georgia) at the age of eleven, graduated at fourteen, and then accepted an appointment from Secretary of War John C. Calhoun to the U.S. Military Academy at West Point.[41] He had been at West Point for only three years when his father died and he had to return to Georgia to help support his family. Deciding to change his goal from a military to a legal career, he read law for a year and was admitted to the Georgia and Florida bars. In 1830 he moved to Montgomery, Alabama, where he married into a socially prominent family and began a successful law practice. After 1837 he continued his practice in Mobile.

A slaveholder in both Georgia and Alabama, Campbell was nonetheless reflective about the peculiar institution and its role in Southern life.[42] He wrote scholarly articles on the subject, arguing that slavery was an ancient institution that was both acceptable and useful. He pointed out that slavery in a particular state existed under the protection of that state's law and that neither the federal government nor any other state could interfere with it. Although admitting that the institution was disappearing around the world because it was no longer acceptable to modern societies, he believed that its final day was a long way off. Slaves had to be prepared for their freedom before they could be emancipated, he said, and white Southerners had to be constantly on guard against the kind of violence that had once swept Santo Domingo. Above all, Campbell argued, the South should never yield to "visionary and unreasonable fanatics" (that is, Northern abolitionists).[43]

Appointed to the Supreme Court by President Franklin Pierce in 1853, Campbell was nearing the end of his eighth year as an associate justice. Although he was admired for his intelligence and thoughtfulness, he was not widely loved, even in his home state of Alabama, where "to the general public he seemed cold."[44] He had a nervous habit of tugging on his bushy eyebrows when he was deep in thought (he was almost always deep in thought). Southerners suspected that he was not sufficiently loyal to slavery (though he took a strong proslavery stance in *Dred Scott*), and Northerners suspected that he was more devoted to his state and region than to the nation. The *New York Tribune* spoke for many Northerners in 1857 when it described Campbell as "more fanatical than the fanatics—more Southern than the extreme South from which

he comes." Campbell, the *Tribune* said, was "a middle-aged, middle-sized man, bald, and possessed of middling talents."[45] Fair or not, the judgment summarized the feeling of many observers, both North and South.

Associate Justice Nathan Clifford of Maine was the junior member of the Supreme Court in 1861. Born in New Hampshire in 1803, he had begun his legal career in that state in 1827 but soon moved to Maine, where he served three terms in the legislature and was twice elected to the U.S. House of Representatives. President Polk named him U.S. attorney general in 1846, then in 1848 sent him to Mexico to negotiate a peace treaty with the southern republic. Once his work on the treaty was completed, he stayed on in Mexico as the American minister until the end of 1849.

A Democratic Party regular, Clifford sought election to the Senate in 1850 and again in 1853, but was unsuccessful both times. He was disappointed when President James Buchanan passed him over for a cabinet nomination in 1857, for he had been one of Buchanan's most loyal supporters, but was finally pleased when, after a predictable four months of hesitation, the president nominated him to succeed Associate Justice Benjamin R. Curtis of Massachusetts in 1858.[46] Like Buchanan, Clifford was a Northern man with Southern sympathies, and his nomination was controversial. The *New York Tribune* said that it confirmed Northern impressions that the Supreme Court had become "a mere party machine, to do the bidding of the dominant faction, and to supply places to reward party hacks." Despite stiff opposition in the Senate, the nomination was confirmed after thirty-four days by the thin margin of twenty-six to twenty-three.[47] In the three years that had passed since Clifford joined the Court, he had done nothing to change his image as a party hack.[48] A tall man who weighed upwards of three hundred pounds, Clifford seemed to wear a perpetually vacant expression on his face. Supreme Court historian Charles Fairman described him as "devoid of humor" and "the most prolix and most pedestrian member of the Court."[49]

As the last words of Senator Baker's introduction boomed out from the inaugural platform, Abraham Lincoln rose and moved toward the speakers' table. The spectators' cheers were hesitant, for they could not see precisely what the president-elect was doing. Carrying both his top hat and his gold-headed cane, Lincoln paused for a moment, uncertain how to extract his speech from

his pocket. Then Stephen Douglas extended his arm. "Permit me, sir," the Illinois senator said, taking the hat and holding it in his lap for the duration of Lincoln's speech. It was a gesture well calculated to show that, though the two men had clashed on many issues in the past, in the secession crisis that now faced the nation they stood together. Lincoln spread his text on the table, adjusted his reading glasses, and began to speak. His voice was high-pitched but calm, and it carried well over the crowd. A reporter for a Louisville newspaper who was sitting nearby thought that it sounded "as if he had been delivering inaugural addresses all his life."[50]

Lincoln began by reminding his "fellow citizens" that, in "compliance with a custom as old as the government itself," he was appearing before them "to take, in your presence, the oath prescribed by the Constitution of the United States, to be taken by the President 'before he enters on the execution of his office.'" He acknowledged that many people in the Southern states were apprehensive that the accession of a Republican president would endanger "their property, and their peace, and personal security," but he assured them that there had "never been any reasonable cause for such apprehension." He proceeded to address issues that he believed would calm Southern fears of the new administration. He repeated statements he had previously made in which he denied any intention of interfering with slavery in any state in which it then existed, and affirmed his intention to maintain "inviolate" the rights of the states, "especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively." He pointedly denied an intention to invade any of the states that had just seceded from the Union, or to use force "against, or among the people anywhere." He would continue mail service in all parts of the country, he said, except where it was "repelled." He would hold and occupy "the property, and places belonging to the government," and collect federal duties and imposts. "In doing this," he said, "there needs to be no bloodshed or violence; and there shall be none, unless it is forced upon the national authority."

He spoke about the Fugitive Slave Law, which had occasioned so much controversy in both North and South, and quoted the precise language of Article IV, Section 2, of the Constitution, the Fugitive Slave Clause: "No person held to service or labor 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 labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[51] He reiterated his intention to support this provision, although he allowed that there was "some difference of opinion" on whether it should be enforced by national or by state authority (the Constitution was silent on this point). But he said he thought that question was "not a very material one," for if "the slave is to be surrendered, it can be of but little consequence to him, or to others, by which authority it is done."

He next addressed the question of secession. He believed that the Union was perpetual and that it could not unilaterally be severed by any state or states. Perpetuity was "implied, if not expressed, in the fundamental law of all national governments," he said. It was also supported by the history of the United States, for the Articles of Confederation had expressly stated in 1778 that the Union was "perpetual," and the Constitution had been adopted in 1787 to establish "a more perfect Union." He all but pleaded with the states that had already joined the Confederacy to reconsider their positions, and with states that had not taken steps toward disunion to reflect "before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes." "Plainly," he declared, "the central idea of secession, is the essence of anarchy."

He then turned to a question of particular interest to Chief Justice Taney and the seven associate justices, who were listening to him speak. It was "the position assumed by some," he said, "that constitutional questions are to be decided by the Supreme Court." He was referring to the *Dred Scott* decision and the possibility that another such decision, made by the same justices (or perhaps a new group), would be advanced in an effort to decide, once and for all, the momentous issues that now faced the country. He did not deny that Supreme Court decisions "must be binding in any case, upon the parties to a suit as to the object of that suit," nor that those decisions "are also entitled to very high respect and consideration, in all parallel cases by all other departments of the government." But, he continued, "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."

He denied that the view he expressed represented an assault on the Supreme Court judges. It was their duty to decide cases properly brought before them, and it was "no fault of theirs, if others seek to turn their decisions to political purposes." But some issues were too big to be confided to any group of judges, however wise. "One section of our country believes slavery is *right,* and ought to be extended," he said, "while the other believes it is *wrong,* and ought not to be extended." He reminded his listeners that "this country, with its institutions, belongs to the people who inhabit it" and that, whenever they grew weary of the existing government, they could "exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it. I can not be ignorant of the fact that many worthy, and patriotic citizens are desirous of having the national constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject." He said that he had a "patient confidence in the ultimate justice of the people" and asked: "Is there any better, or equal hope, in the world?"

Lincoln then proceeded to address the threat of impending military conflict—a threat that all felt, though few were willing to address head on. "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 yourself 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."

The president-elect closed his address with the affirmation that Americans, Northerners and Southerners alike, were "not enemies, but friends," saying almost imploringly: "We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."[52]

In all, Lincoln had spoken for thirty minutes. The *New York Times* reporter said that Chief Justice Taney "did not remove his eyes from Mr. Lincoln during the entire delivery." James Buchanan, in contrast, seemed "sleepy and tired," while Senator Douglas muttered from time to time during the presentation.

"Good," he said at one point. "That's so," at another. "No coercion," and "Good again."[53]

Now Chief Justice Taney stepped forward, holding out a Bible. In a low voice, he recited the prescribed words of the oath and asked Lincoln to repeat them. Speaking in a "firm but modest voice," the president proclaimed his oath: "I, Abraham Lincoln, do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States."[54]

The chief justice was the first person who shook hands with the new president. Then came James Buchanan, Stephen A. Douglas, Salmon P. Chase, and a host of minor officials. After a brief delay, Lincoln and Buchanan, again arm in arm, retreated from the platform into the Senate chamber, while the Marine band outside played patriotic tunes, "Hail Columbia," "Yankee Doodle," and "The Star-Spangled Banner." In a little while another procession was formed outside the Capitol. Dignitaries once again took seats in their carriages, and the barouche with Abraham Lincoln and James Buchanan in it led the whole party to the White House.[55]

Lincoln now plunged into the work of the presidency. The day following his inauguration, he received an urgent message from Major Robert Anderson at Fort Sumter in South Carolina, advising him that it would take at least 20,000 men to reinforce the beleaguered fort in Charleston harbor, which state officials had demanded be turned over to them. The president conferred with General in Chief Winfield Scott, who agreed with Anderson's assessment. The Senate confirmed the president's cabinet nominations: William H. Seward of New York as secretary of state, Salmon P. Chase of Ohio as secretary of the treasury, Simon Cameron of Pennsylvania as secretary of war, Gideon Welles of Connecticut as secretary of the navy, Caleb B. Smith of Indiana as secretary of the interior, Montgomery Blair of Maryland as postmaster general, and Edward Bates of Missouri as attorney general. These seven men, representing different sections of the country and different factions of the Republican Party, had little more in common than a commitment to preservation of the Union and a desire to share in the spoils of Republican victory. Not surprisingly, however, five of the seven were lawyers by profession, like the president himself (Cameron was a printer and newspaper publisher, and Welles–originally a lawyer–was a journalist). Whatever their other abilities (or shortcomings), Lincoln's cabinet

officers shared the new president's understanding of government as a legal process. Even the process of waging war—if a war there must be—would be conceived and carried out in the broad framework of legal rules and constitutional precepts.

WHILE THE PRESIDENT worked in the White House, the justices of the Supreme Court carried on their duties in the Capitol. They had memorialized the death of Associate Justice Peter V. Daniel of Virginia when they met for the first time in their new courtroom on December 4, 1860, then proceeded to consider the cases on their docket, listening patiently to the oral arguments of the lawyers (which sometimes seemed almost interminable), researching the controlling precedents, and retiring to their conference room to discuss the cases, assign the writing of opinions, and read the opinions in open court.[56] The docket for the December term of 1860 (most of which extended into 1861) contained a typical mix of cases, including land disputes, commercial disagreements, and real or imagined controversies between citizens of different states. Two cases, however, stood out from the rest, and decisions in both were announced on March 14, 1861.

Kentucky v. Dennison was one of many cases that had their origins in the desire of slaves to seek freedom, oftentimes by escaping into free states or, if brought by their masters into a free state while still in bondage, by running away. As human as this desire certainly was, it was firmly prohibited by the Fugitive Slave Clause. Although the clause did not explicitly authorize Congress to enact enforcing legislation, it was assumed from an early date that it had the power to do so, and Fugitive Slave Laws were enacted in 1793 and 1850, prescribing procedures under which slave owners could go into free states and demand the surrender of escaped slaves. When the constitutionality of the 1793 act was eventually challenged, it was upheld by the Supreme Court in *Prigg v. Pennsylvania* in 1842.[57] In that case, Justice Joseph Story sustained the federal law and condemned state "freedom laws" that attempted to interfere with it. Not surprisingly, Chief Justice Taney concurred in Story's 1842 opinion, while Justice McLean dissented from it.

In October 1859, a slave girl owned by a Kentuckian had run away from her master while he was traveling through Ohio on his way to Virginia. The girl, identified in the court records as Charlotte, was helped in her bid for free-

dom by an Ohio resident named Willis Lago, described in the same records as a "free man of color." Back in Kentucky an indictment was returned accusing Lago of the crime of "assisting a slave to escape." A copy of the indictment, certified and authenticated according to the Fugitive Slave Law of 1793, was presented to Governor William Dennison of Ohio, with a demand that Lago be turned over to the Kentucky authorities for trial. After conferring with his attorney general, Dennison determined that Lago was not subject to extradition, for Ohio law provided that a prisoner could be extradited only for treason or felony and, under Ohio law, Lago's alleged offense was neither. The Commonwealth of Kentucky then petitioned the Supreme Court in Washington to issue a writ of mandamus compelling Dennison to extradite Lago. Kentucky pointed out that the 1793 act provided that "it shall be the duty" of the governor to surrender a fugitive under the specified circumstances.[58]

The decision in *Kentucky v. Dennison* was announced on March 14 by Chief Justice Taney. He ruled that Kentucky's demand for Lago was plainly authorized by the act of 1793 and that the duty of Ohio's governor to surrender the man was clear. "The exception made to the validity of the indictment," he stated, "is altogether untenable." But Taney was more than usually sensitive to claims of state's rights. He knew that a writ of mandamus issuing from the Supreme Court to the governor of Ohio would signify that other states were also subject to the compulsion of federal law. In the nation's current secession crisis, a writ of mandamus would be taken as a precedent that the federal government could compel the states to act according to its dictates rather than theirs. It was a precedent that Taney was not willing to lay down. And so he examined the Fugitive Slave Law for any provision subjecting the governor of Ohio to a penalty for failing to do his duty. He found none. "It is true that Congress may authorize a particular State officer to perform a particular duty," Taney wrote, "but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal." When the Constitution was framed, Taney said, "it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State. . . . But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department to use any coercive means to compel him." And upon that ground the Court overruled the motion for mandamus.[59] Char-

lotte had achieved her freedom, and Lago was not subject to the tender mercies of Kentucky justice.

The second case of special interest that was decided by the Supreme Court on March 14, 1861, drew a crowd of spectators to the tribunal's elegant new courtroom to hear Justice Wayne read the court's opinion. *Gaines v. Hennen* gave signs of signaling an end to one of the most celebrated (and protracted) legal struggles in American history. Usually referred to as the "Gaines case," the litigation involved the title to large tracts of land in New Orleans estimated to be worth as much as $15 million.

A woman who called herself Myra Clark had appeared in New Orleans in 1834 with a New York–born husband and a claim that she was the legitimate daughter of Daniel Clark, a wealthy Irishman who had died in New Orleans in 1813. After her birth, she said, her father had sent her off to be raised by a family in Delaware. He had visited her there from time to time but taken precautions to conceal his paternity (Myra's mother was an exotic New Orleans beauty who may or may not have been married to another man when she met Clark and conceived Myra). Myra and her husband had recently investigated the facts of Clark's marriage to her mother and convinced themselves not only that Myra was Clark's legitimate daughter but also that, shortly before his death, he had made a will leaving all of his New Orleans property to her. They said his business partners had suppressed the will and begun selling off parts of the property.

The legal wrangling over the Clark estate began in Louisiana state courts but soon found its way into the federal courts in New Orleans. At issue were the legitimacy of Myra Clark, the existence of Daniel Clark's will, the jurisdiction of the federal courts to become involved in the controversy, and the applicability of equity rules in federal courts. The case came before the United States Supreme Court more than a dozen times, where arguments were made by Chief Justice Taney's brother-in-law Francis Scott Key and by Taney's friend Reverdy Johnson. Even Daniel Webster, Henry Clay, and the future justice Campbell of Alabama, while still a practicing lawyer, became involved in the litigation. After the death of her first husband, Myra Clark married Major General Edmund P. Gaines, a hero of the War of 1812, who had the financial means to continue the litigation and who gave the case the name by which it would be remembered in the Supreme Court reports.

In this phase of her struggle, Mrs. Gaines, now represented by Caleb Cushing, a Massachusetts lawyer who was attorney general under President Franklin Pierce, was seeking to establish title to New Orleans land claimed by a man named Douglas Hennen. Although the Hennen tract was only part of the Clark estate, a newspaper reported that it covered "about two-thirds of the city of New Orleans." The Supreme Court case was argued in a crowded courtroom in mid-February 1861, and on March 14, in a long and detailed opinion, Justice Wayne sustained Mrs. Gaines's position.[60] If she was not technically legitimate, Wayne ruled, the evidence established that her father had married her mother in good faith, so for purposes of inheritance she would be regarded as legitimate and her claim to the Hennen property was valid. Justices McLean, Nelson, and Clifford concurred in Wayne's opinion. Chief Justice Taney and Justices Grier and Catron dissented. Because of his previous involvement in the case, Justice Campbell took no part in the decision. "Thus," Justice Wayne stated at the end of his opinion, "after a litigation of thirty years, has this Court adjudicated the principles applicable to [Mrs. Gaines's] rights in her father's estate. They are now finally settled. When, hereafter, some distinguished American shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its Courts."

Wayne was partly right and largely wrong. The legal principles established in the Gaines case were not especially noteworthy, although the case's fame proved to be long-lasting. But the decision rendered in 1861 did not finally settle the litigation. Mrs. Gaines went north after the decision, apprehensive that the victory she had won in Washington might be disregarded in the new Confederate State of Louisiana. Her apprehension was well founded, for her case was not finally settled until 1891, after the war that started in 1861 had been fought to a Confederate surrender and Louisiana and the other Confederate states had been subjected to the rigors of post-war reconstruction. But Mrs. Gaines had died at the age of eighty in 1885. By 1891 both she and Justice Wayne had long since been laid to rest in their graves.

FOLLOWING THE ANNOUNCEMENT of its decisions in *Kentucky v. Dennison* and *Gaines v. Hennen,* the Supreme Court adjourned. Their duties in Washington concluded, the judges left the capital city for their circuits, Justice McLean heading home to Ohio, Justice Clifford to Maine, Nelson to New York, and

Grier to Pennsylvania. It was more difficult for the Southern justices to determine exactly when they would leave Washington, or if they would leave at all. The federal courts were under siege in the states that had already seceded, and the status of the courts in the border states was uncertain. Justice Catron, determined to do his duty, announced that he was going home to Nashville. But Justice Wayne showed no interest in leaving for Savannah, and Justice Campbell decided to remain in Washington, at least for a while. Chief Justice Taney had, in the late 1850s, closed his house in Baltimore and settled into a rented house on Indiana Avenue in Washington. It was near enough to Baltimore that he could go there on short notice, if and when he was needed in the circuit court.

And so, ten days after Abraham Lincoln was inaugurated as sixteenth president of the United States, the Supreme Court found itself in a quandary. What were its duties in the looming sectional crisis, and how should those duties be discharged? On March 4, before tens of thousands of witnesses, the president had taken an "oath registered in Heaven" to "preserve, protect, and defend" the Constitution. The Supreme Court justices had also taken oaths to discharge their official duties "agreeably to the Constitution and laws of the United States."[61] Now each official—president and the Supreme Court justice—would have to decide how their oaths would govern their duties.