Appendix D: New Estimates on Civil War Deaths

Estimated Toll in Civil War Grows to About 750,000

**Terrible Swift Sword**

By assigned normal death tolls, the Civil War is estimated to have taken about 500,000 lives. By assigning normal death rates to a population that was 10 years younger, as it was in 1860, that estimate rises to about 600,000. By assigning death rates to a population that was 10 years older, as it was in 1865, that estimate rises to about 50,000. War deaths then, as now, were at least twice as common among soldiers as among civilians. The war ended in 1865, but the toll continued to swell for more than a century.

For the first time in American history, the government had the chance to study the war deaths systematically. The army medical service kept careful records of all deaths during the war. The civilian death toll was far greater than that of the military. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population. The war had a greater effect on the nation's economy than on its population.

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Appendix E: The American Civil War as a Constitutional Crisis
The American Civil War as a Constitutional Crisis

ARTHUR BESTOR

WITHIN the span of a single generation—during the thirty-odd years that began with the annexation of Texas in 1845 and ended with the withdrawal of the last Union troops from the South in 1877—the United States underwent a succession of constitutional crises more severe and menacing than any before or since. From 1845 on, for some fifteen years, a constitutional dispute over the expansion of slavery into the western territories grew increasingly tense until a paralysis of normal constitutional functioning set in. Abruptly, in 1860–1861, this particular constitutional crisis was transformed into another: namely, that of secession. Though the new crisis was intimately linked with the old, its constitutional character was fundamentally different. The question of how the Constitution ought to operate as a piece of working machinery was superseded by the question of whether it might and should be dismantled. A showdown had come, and the four-year convulsion of Civil War ensued. Then, when hostilities ended in 1865, there came not the hoped for dawn of peace, but instead a third great constitutional struggle over Reconstruction, which lasted a dozen years and proved as harsh and divisive as any cold war in history. When the nation finally emerged from three decades of corrosive strife, no observer could miss the profound alterations that its institutions had undergone. Into the prodigious vortex of crisis and war every current of American life had ultimately been drawn.

So all-devouring was the conflict and so momentous its effects, that to characterize it (as I have done) as a series of constitutional crises will seem to many readers an almost irresponsible use of language, a grotesque belittling of the issues. Powerful economic forces, it will be pointed out, were pitted against one another in the struggle. Profound moral perplexities were generated by the existence of slavery, and the attacks upon it had social and psychological repercussions of incredible complexity. The various questions

*Mr. Bestor, professor of history at the University of Washington, presented a version of this paper, May 3, 1963, to a joint session of the Mississippi Valley Historical Association and the American Studies Association in Omaha. He has also incorporated a few passages from a paper read, August 28, 1963, to the Pacific Coast Branch of the American Historical Association in San Francisco. Mr. Bestor has examined certain points in the present discussion more fully in a previous article "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1816–1860" (Journal of the Illinois State Historical Society, LIV [Summer 1961].

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at issue penetrated into the arena of politics, shattering established parties and making or breaking the public careers of national and local leaders. Ought so massive a conflict to be discussed in terms of so rarified an abstraction as constitutional theory?

To ask such a question, however, is to mistake the character of constitutional crises in general. When or why or how should they arise if not in a context of social, economic, and ideological upheaval? A constitution, after all, is nothing other than the aggregate of laws, traditions, and understandings—in other words, the complex of institutions and procedures—by which a nation brings to political and legal decision the substantive conflicts engendered by changes in all the varied aspects of its societal life. In normal times, to be sure, routine and recurrent questions of public policy are not thought of as constitutional questions. Alternative policies are discussed in terms of their wisdom or desirability. Conflicts are resolved by the ordinary operation of familiar constitutional machinery. A decision is reached that is essentially a political decision, measuring, in some rough way, the political strength of the forces that are backing or opposing some particular program of action, a program that both sides concede to be constitutionally possible, though not necessarily prudent or desirable.

When controversies begin to cut deep, however, the constitutional legitimacy of a given course of action is likely to be challenged. Questions of policy give place to questions of power; questions of wisdom to questions of legality. Attention shifts to the Constitution itself, for the fate of each particular policy has come to hinge upon the interpretation given to the fundamental law. In debating these constitutional questions, men are not evading the substantive issues. They are facing them in precisely the manner that the situation now requires. A constitutional dispute has been superadded to the controversies already present.

Should the conflict become so intense as to test the adequacy of existing mechanisms to handle it at all, then it mounts to the level of a constitutional crisis. Indeed the capability of producing a constitutional crisis is an ultimate measure of the intensity of the substantive conflicts themselves. If, in the end, the situation explodes into violence, then the catastrophe is necessarily a constitutional one, for its very essence is the failure and the threatened destruction of the constitutional framework itself.

The secession crisis of 1860–1861 was obviously an event of this kind. It was a constitutional catastrophe in the most direct sense, for it resulted in a civil war that destroyed, albeit temporarily, the fabric of the Union.

There is, however, another sense—subtler, but perhaps more significant—in which the American Civil War may be characterized as a constitutional
crisis. To put the matter succinctly, the very form that the conflict finally took was determined by the pre-existing form of the constitutional system. The way the opposing forces were arrayed against each other in war was a consequence of the way the Constitution had operated to array them in peace. Because the Union could be, and frequently had been, viewed as no more than a compact among sovereign states, the dissolution of the compact was a conceivable thing. It was constitutional theorizing, carried on from the very birth of the Republic, which made secession the ultimate recourse of any group that considered its vital interests threatened.

Since the American system was a federal one, secession, when it finally occurred, put the secessionists into immediate possession of fully organized governments, capable of acting as no ad hoc insurrectionary regime could possibly have acted. Though sometimes described as a “Rebellion” and sometimes as a “Civil War,” the American conflict was, in a strict sense, neither. It was a war between pre-existing political entities. But it was not (to use a third description) a “War between the States,” for in war the states did not act severally. Instead, the war was waged between two federations of these states: one the historic Union, the other a Confederacy that, though newly created, was shaped by the same constitutional tradition as its opponent. In short, only the pre-existing structure of the American Constitution can explain the actual configuration even of the war itself.

The configurative role that constitutional issues played is the point of crucial importance. When discussed in their own terms and for their own sakes, constitutional questions are admittedly theoretical questions. One may indeed say (borrowing a phrase that even academicians perfidiously employ) that they are academic questions. Only by becoming involved with other (and in a sense more “substantive”) issues, do they become highly charged. But when they do become so involved, constitutional questions turn out to be momentous ones, for every theoretical premise draws after it a train of practical consequences. Abstract though constitutional issues may be, they exert a powerful shaping effect upon the course that events will in actuality take. They give a particular direction to forces already at work. They impose upon the conflict as a whole a unique, and an otherwise inexplicable, pattern or configuration.

To speak of a configuration of forces in history is to rule out, as essentially meaningless, many kinds of questions that are popularly supposed to be both answerable and important. In particular, it rules out as futile any effort to decide which one of the various forces at work in a given historical situation was “the most important cause” of the events that followed, or “the decisive factor” in bringing them about, or “the crucial issue” involved. The
reason is simple. The steady operation of a single force, unopposed and un-
interrupted, would result in a development so continuous as to be, in the
most literal sense, eventless. To produce an event, one force must impinge
upon at least one other. The event is the consequence of their interaction.
Historical explanation is, of necessity, an explanation of such interactions.

If interaction is the crucial matter, then it is absurd to think of assigning
to any factor in history an intrinsic or absolute weight, independent of its
context. In the study of history, the context is all-important. Each individual
factor derives its significance from the position it occupies in a complex
structure of interrelationships. The fundamental historical problem, in short,
is not to measure the relative weight of various causal elements, but instead
to discover the pattern of their interaction with one another.¹

A cogent illustration of this particular point is afforded by the contro-
versy over slavery, which played so significant a role in the crisis with which
this paper deals. Powerful emotions, pro and con, were aroused by the very
existence of slavery. Powerful economic interests were involved with the
fate of the institution. Nevertheless, differences of opinion, violent though
they were, cannot, by themselves, account for the peculiar configuration of
events that historically occurred. The forces unleashed by the slavery con-
troversy were essentially indeterminate; that is to say, they could lead to any
number of different outcomes, ranging from simple legislative emancipation
to bloody servile insurrection. In the British West Indies the former
occurred; in Haiti, the latter. In the United States, by contrast with both,
events took an exceedingly complicated course. The crisis can be said to
have commenced with a fifteen-year dispute not over slavery itself, but over
its expansion into the territories. It eventuated in a four-year war that was
avowedly fought not over the issue of slavery, but over the question of the
legal perpetuity of the Union. The slavery controversy, isolated from all
other issues, cannot begin to explain why events followed so complex and
devious a course. On the other hand, though other factors must be taken
into account in explaining the configuration of events, these other factors,
isolated from those connected with slavery, cannot explain why tensions
mounted so high as to reach the breaking point of war.

¹ A contrary view is advanced by Sidney Hook: "The validity of the historian's findings
will . . . depend upon his ability to discover a method of roughly measuring the relative strength
of the various factors present." (Social Science Research Council, Bulletin 56, Theory and Prac-
tice in Historical Study: A Report of the Committee on Historiography [New York, 1946], 113.)
Hook, writing as a philosopher, insists that his criterion is part of the "pattern of inquiry which
makes a historical account scientific." (Ibid., 115.) But, as another philosopher, Ernest Nagel,
points out, "the natural sciences do not appear to require the imputation of relative importance
to the causal variables that occur in their explanations." On the contrary, "if a phenomenon
occurs only when certain conditions are realized, all these conditions are equally essential, and
no one of them can intelligibly be regarded as more basic than the others." (Ernest Nagel,
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No single factor, whatever its nature, can account for the distinctive form that the mid-nineteenth-century American crisis assumed. Several forces converged, producing a unique configuration. Men were debating a variety of issues simultaneously, and their various arguments intertwined. Each conflict tended to intensify the others, and not only to intensify them but also to alter and deflect them in complicated ways. The crisis was born of interaction.

The nature of these various converging conflicts is abundantly clear. They are spread at length upon the historical record. Documents, to be sure, are not always to be taken at face value; there are occasions when it is legitimate to read between the lines. Nevertheless, the documentary record is the foundation upon which historical knowledge rests. It can be explained, but it cannot be explained away, as many writers on the causes of the Civil War attempt to do. Most current myths, indeed, depend on such wholesale dismissals of evidence. Southern apologetics took form as early as 1868 when Alexander H. Stephens unblinkingly asserted that "this whole subject of Slavery, so-called, . . . was, to the Seceding States, but a drop in the ocean compared with . . . other considerations," by which he meant considerations of constitutional principle. The dogma of economic determinism can be sustained only by dismissing, as did Charles and Mary Beard in 1927, not merely that part of the record which Stephens rejected but also the part he accepted. Having decided, like Stephens, that "the institution of slavery was not the fundamental issue," the Beards went on to assert that constitutional issues likewise "were minor factors in the grand dispute."

When the historical record is as vast as the one produced by the mid-nineteenth-century American crisis—when arguments were so wearisomely repeated by such multitudes of men—it is sheer fantasy to assume that the issues discussed were not the real issues. The arguments of the period were public ones, addressed to contemporaries and designed to influence their actions. If these had not touched upon genuine issues, they would hardly have been so often reiterated. Had other lines of argument possessed a more compelling force, they would certainly have been employed.

The only tenable assumption, one that would require an overwhelming mass of contrary evidence to rebut, is that men and women knew perfectly well what they were quarreling about. And what do we find? They argued

about economic measures—the tariff, the banking system, and the Homestead Act—for the obvious reason that economic interests of their own were at stake. They argued about slavery because they considered the issues it raised to be vital ones—vital to those who adhered to the ideal of a free society and vital to those who feared to disturb the status quo. They argued about the territories because they felt a deep concern for the kind of social order that would grow up there. They argued about the Constitution because they accepted its obligations (whatever they considered them to be) as binding.

These are the data with which the historian must reckon. Four issues were mentioned in the preceding paragraph: the issue of economic policy, the issue of slavery, the issue of the territories, and the issue of constitutional interpretation. At the very least, the historian must take all these into account. Other factors there indisputably were. To trace the interaction of these four, however, will perhaps suffice to reveal the underlying pattern of the crisis and to make clear how one of these factors, the constitutional issue, exerted a configurative effect that cannot possibly be ignored.

Conflicts over economic policy are endemic in modern societies. They formed a recurrent element in nineteenth-century American political conflict. To disregard them would be an even greater folly than to assume that they determined, by themselves, the entire course of events. Between a plantation economy dependent upon the sale of staples to a world market and an economy in which commerce, finance, and manufacturing were rapidly advancing, the points of conflict were numerous, real, and important. At issue were such matters as banks and corporations, tariffs, internal improvements, land grants to railroads, and free homesteads to settlers. In a general way, the line of division on matters of economic policy tended, at mid-century, to coincide with the line of division on the question of slavery. To the extent that it did so (and it did so far less clearly than many economic determinists assume), the economic conflict added its weight to the divisive forces at work in 1860–1861.

More significant, perhaps, was another and different sort of relationship between the persistent economic conflict and the rapidly mounting crisis before the Civil War. To put the matter briefly, the constitutional theories that came to be applied with such disruptive effects to the slavery dispute had been developed, in the first instance, largely in connection with strictly economic issues. Thus the doctrine of strict construction was pitted against the doctrine of loose construction as early as 1791, when Alexander Hamilton originated the proposal for a central bank. And the doctrine of nullification was worked out with ingenious thoroughness in 1832 as a weapon against
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the protective tariff. Whatever crises these doctrines precipitated proved to be relatively minor ones so long as the doctrines were applied to purely economic issues. Within this realm, compromise always turned out to be possible. The explosive force of irreconcilable constitutional theories became apparent only when the latter were brought to bear upon the dispute over slavery.

Inherent in the slavery controversy itself (the second factor with which we must reckon) were certain elements that made compromise and accommodation vastly more difficult than in the realm of economic policy. To be sure, slavery itself had its economic aspect. It was, among other things, a labor system. The economic life of many regions rested upon it. The economic interests that would be affected by any tampering with the institution were powerful interests, and they made their influence felt.

Nevertheless, it was the noneconomic aspect of slavery that made the issues it engendered so inflammatory. As Ulrich B. Phillips puts it, “Slavery was instituted not merely to provide control of labor but also as a system of racial adjustment and social order.” The word “adjustment” is an obvious euphemism; elsewhere Phillips speaks frankly of “race control.” The effort to maintain that control, he maintains, has been “the central theme of Southern history.” The factor that has made the South “a land with a unity despite its diversity,” Phillips concludes, is “a common resolve indomitably maintained—that it shall be and remain a white man’s country.”

It was this indomitable resolve—say rather, this imperious demand—that lay at the heart of the slavery controversy, as it lies at the heart of the struggle over civil rights today. To put the matter bluntly, the demand was that of a master race for a completely free hand to deal as it might choose with its own subject population. The word “sovereignty” was constantly on the lips of southern politicians. The concept they were invoking was one that Blackstone had defined as “supreme, irresistible, absolute, uncontrolled authority.” This was the kind of authority that slaveholders exercised over their chattels.

If slavery had been a static system, confined geographically to the areas where the institution was an inheritance from earlier days, then the demand of the slaveholding states for unrestricted, “sovereign” power to deal with

it was a demand to which the majority of Americans would probably have reconciled themselves for a long time. In 1861, at any rate, even Lincoln and the Republicans were prepared to support an ironclad guarantee that the Constitution would never be amended in such a way as to interfere with the institution within the slaveholding states. An irrepealable amendment to that effect passed both houses of Congress by the necessary two-thirds vote during the week before Lincoln's inauguration. The incoming President announced that he had "no objection" to the pending amendment, and three states (two of them free) actually gave their ratifications in 1861 and 1862. If the problems created by slavery had actually been, as slaveowners so vehemently maintained, of a sort that the slaveholding states were perfectly capable of handling by themselves, then the security offered by this measure might well have been deemed absolute.

As the historical record shows, however, the proposed amendment never came close to meeting the demands of the proslavery forces. These demands, and the crisis they produced, stemmed directly from the fact that slavery was not a static and local institution; it was a prodigiously expanding one. By 1860 the census revealed that more than half the slaves in the nation were held in bondage outside the boundaries of the thirteen states that had composed the original Union. The expansion of slavery meant that hundreds of thousands of slaves were being carried beyond the territorial jurisdictions of the states under whose laws they had originally been held in servitude. Even to reach another slaveholding state, they presumably entered that stream of "Commerce... among the several States," which the Constitution gave Congress a power "to regulate." If they were carried to United States territories that had not yet been made states, their presence there raised questions about the source and validity of the law that kept them in bondage.

Territorial expansion, the third factor in our catalogue, was thus a

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* Joint Resolution to Amend the Constitution, Mar. 2, 1861, 12 US Statutes at Large 251. It passed the House by a vote of 133 to 65 on February 28, 1861, and the Senate by a vote of 24 to 12 on the night of March 3-4, 1861. Technically, the sitting of March 2, 1861, was still in progress in the Senate, hence the date attached to the joint resolution as officially published. (Congressional Globe, 36 Cong., 2 sess., 1285, 1409 [Feb. 28, Mar. 2, 1861].)


* Of the 2,953,750 slaves in the United States in 1860, 2,174,996 were held in the 9 states of Kentucky, Tennessee, Florida, Alabama, Mississippi, Missouri, Arkansas, Louisiana, and Texas. (US, Ninth Census [1870], Vol. 1, The Statistics of the Population [Washington, D. C., 1872], 3-8 [a corrected recollection of previous census figures].)

* US Constitution, Art. I, Sec. 8 [clause 3].

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crucial element in the pattern of interaction that produced the crisis. The
timing of the latter, indeed, indicates clearly the role that expansion played.
Slavery had existed in English-speaking America for two centuries without
producing any paralyzing convulsion. The institution had been brought to an
end in the original states of the East and North by unspectacular exercises of
legislative or judicial authority. Federal ordinances barring slavery from the
Old Northwest had operated effectually yet inconspicuously since 1787. At
many other points federal authority had dealt with slavery, outlawing the for-
eign slave trade on the one hand and providing for the return of fugitive slaves
on the other. Prior to the 1840’s constitutional challenges to its authority in
these matters had been few and unimportant. Indeed, the one true crisis of
the period, that of 1819-1821 over Missouri, was rooted in expansionism,
precisely as the later one was to be. The nation was awaking to the fact that
slavery had pushed its way northward and westward into the virgin lands
of the Louisiana Purchase. Only when limits were drawn for it across the
whole national domain did the crisis subside.

Suddenly, in the election of 1844, the question of territorial expansion
came to the fore again. Events moved rapidly. Within the space of precisely
a decade, between the beginning of 1845 and the end of 1854, four successive
annexations added a million and a quarter square miles to the area under
undisputed American sovereignty.11 Expansion itself was explosive; its
interaction with the smoldering controversy over slavery made the latter
issue explosive also.

The annexation of Texas in 1845, the war with Mexico that followed,
and the conquests in the Southwest which that war brought about gave
to the campaign against slavery a new and unprecedented urgency. Within
living memory the plains along the Gulf of Mexico had been inundated by
the westward-moving tide of slavery. Alabama and Mississippi, to say noth-
ing of Arkansas and Missouri, furnished startling proof of how quickly
and ineradicably the institution could establish itself throughout great new
regions. Particularly telling was the example of Texas. There slavery had
been carried by American settlers to nominally free soil beyond the bound-
aries of the United States; yet in the end the area itself was being incorpo-

11 The area of so-called “continental” United States (exclusive of Alaska as well as of
Hawaii) is officially put at 3,022,387 square miles. It attained this size in 1854. More than
two-fifths of this area, that is, 1,234,387 square miles, is conventionally regarded as having been
acquired through the annexation of Texas by joint resolution in 1845, the partition of the Oregon
country by agreement with Great Britain in 1846, the cessions from Mexico by the treaty ending
the Mexican War in 1848, and the additional territory acquired from the latter country by the
Gadsden Purchase of 1853-1854. The conventional reckoning (which disregards all the complex
questions created by prior American claims) is given in US Bureau of the Census, Historical
Statistics of the United States, Colonial Times to 1957: A Statistical Abstract Supplement (Wash-
ington, D. C., 1966), 236.
rated in the Union. To guard against any possible repetition of these developments, antislavery forces reacted to the outbreak of the Mexican War by introducing and supporting the Wilmot Proviso. Originally designed to apply simply to territory that might be acquired from Mexico, it was quickly changed into an all-encompassing prohibition: “That there shall be neither slavery nor involuntary servitude in any territory on the continent of America which shall hereafter be acquired by or annexed to the United States . . . in any . . . manner whatever.”[12] The steadfast refusal of the Senate to accept the proviso did not kill it, for the prospect of continuing expansion kept the doctrine alive and made it the rallying point of antislavery sentiment until the Civil War.

This prospect of continuing expansion is sometimes forgotten by historians who regard the issue of slavery in the territories as somehow bafflingly unreal. Since 1854, it is true, no contiguous territory has actually been added to the “continental” United States. No one in the later 1850’s, however, could know that this was to be the historic fact. There were ample reasons to expect otherwise. A strong faction had worked for the annexation of the whole of Mexico in 1848. Filibustering expeditions in the Caribbean and Central America were sporadic from 1849 to 1860. As if to spell out the implications of these moves, the notorious Ostend Manifesto of 1854 had announced (over the signatures of three American envoys, including a future President) that the United States could not “permit Cuba to be Africanized” (in plainer language, could not allow the slaves in Cuba to become free of white domination and control), and had defiantly proclaimed that if Spain should refuse to sell the island, “then, by every law, human and divine, we shall be justified in wresting it from Spain if we possess the power.”[13] This was “higher law” doctrine with a vengeance.

Behind the intransigent refusal of the Republicans in 1860-1861 to accept any sort of compromise on the territorial question lay these all too recent developments. Lincoln’s letters during the interval between his election and his inauguration contained pointed allusions to filibustering and to Cuba.[14]

[12] This was the form in which the proviso was adopted by the House on February 15, 1847. (Congressional Globe, 29 Cong., 2 sess., 424-25 [Feb. 15, 1847].) In its original form, as moved by David Wilmot of Pennsylvania on August 8, 1846, and adopted by the House the same day, it spoke only of “the acquisition of any territory from the Republic of Mexico.” (Ibid., 29 Cong., 1 sess., 1217 [Aug. 8, 1846].)

[13] Ostend Manifesto (actually dated at Aix-la-Chapelle), Oct. 18, 1854, The Ostend Conference, 6v. (House Executive Documents, 33 Cong., 2 sess., X, No. 93), 131. Though the Secretary of State, William L. Marcy, was forced by public opinion to repudiate the manifesto, James Buchanan was helped to the presidency in 1857 by the fact that his signature was on it.

[14] Collected Works of Lincoln, ed. Basler et al., IV, 154, 155, 172. It should be noted that Stephen A. Douglas, in his third debate with Lincoln, at Joliet, Illinois, on September 15, 1858, declared in forthright language that the doctrine of popular sovereignty ought to apply “when we get Cuba” and “when it becomes necessary to acquire any portion of Mexico or
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And his most explicit instructions on policy, written on February 1, 1861, to William H. Seward, soon to take office as his Secretary of State, were adamant against any further extension of slavery in any manner:

I say now... as I have all the while said, that on the territorial question—that is, the question of extending slavery under the national auspices,—I am inflexible. I am for no compromise which assists or permits the extension of the institution on soil owned by the nation. And any trick by which the nation is to acquire territory, and then allow some local authority to spread slavery over it, is as obnoxious as any other.

The obnoxious "trick" that Lincoln feared was, of course, the acceptance of Stephen A. Douglas' doctrine of popular sovereignty. The supreme importance that Lincoln attached to the territorial issue was underlined by the final paragraph of his letter, wherein he discussed four other issues on which antislavery feeling ran high: the Fugitive Slave Act, the existence of slavery in the national capital, the domestic slave trade, and the slave code that the territorial legislature of New Mexico had enacted in 1859. Concerning these matters, Lincoln wrote Seward:

As to fugitive slaves, District of Columbia, slave trade among the slave states, and whatever springs of necessity from the fact that the institution is amongst us, I care but little, so that what is done be comely, and not altogether outrageous. Nor do I care much about New-Mexico, if further extension were hedged against. 18

The issues raised by territorial expansion were, however, not merely prospective ones. Expansion was a present fact, and from 1845 onward its problems were immediate ones. Population was moving so rapidly into various parts of the newly acquired West, most spectacularly into California, that the establishment of civil governments within the region could hardly be postponed. Accordingly, within the single decade already delimited (that is, from the beginning of 1845 until the end of 1854), state or territorial forms of government were actually provided for every remaining part of the national domain, except the relatively small enclave known as the Indian Territory (now Oklahoma). The result was an actual doubling of the area of the United States within which organized civil governments existed. 18 This process of political creation occurred not only in the new

Canada, or of this continent or the adjoining islands. (Ibid., III, 115.) The word was "when," not "if."

18 Lincoln to Seward, Feb. 1, 1861, Ibid., IV, 183.
19 At the beginning of 1845 the United States comprised approximately 1,788,000 square miles (exclusive of its claims in the Oregon country). Of this total, 945,000 square miles were within the boundaries of the 26 full-fledged states of the Union; another 320,000 square miles belonged to organized territories; and the remaining 514,000 square miles were without organized civil governments. At the end of 1854 the total area had increased to approximately 3,023,000 square miles, of which 1,542,000 lay within the 31 states that were now members of the Union (Florida, Texas, Iowa, Wisconsin, and California having been admitted during the decade); another 1,410,000 square miles belonged to organized territories; and only 70,000
acquisitions, but it also covered vast areas, previously acquired, that had been left unorganized, notably the northern part of the old Louisiana Purchase. There, in 1854, the new territories of Kansas and Nebraska suddenly appeared on the map. With equal suddenness these new names appeared in the newspapers, connected with ominous events.

The process of territorial organization brought into the very center of the crisis a fourth factor, the last in our original catalogue, namely, the constitutional one. The organization of new territories and the admission of new states were, after all, elements in a constitution-making process. Territorial expansion drastically changed the character of the dispute over slavery by entangling it with the constitutional problem of devising forms of government for the rapidly settling West. Slavery at last became, in the most direct and immediate sense, a constitutional question, and thus a question capable of disrupting the Union. It did so by assuming the form of a question about the power of Congress to legislate for the territories.

This brings us face to face with the central paradox in the pre-Civil War crisis. Slavery was being attacked in places where it did not, in present actuality, exist. The slaves, close to four million of them, were in the states, yet responsible leaders of the antislavery party pledged themselves not to interfere with them there.17 In the territories, where the prohibition of slavery was being so intransigently demanded and so belligerently resisted, there had never been more than a handful of slaves during the long period of crisis. Consider the bare statistics. The census of 1860, taken just before the final descent into Civil War, showed far fewer than a hundred slaves in all the territories,18 despite the abrogation of restrictions by the Kansas-Nebraska Act and the Dred Scott decision. Especially revealing was the

17 In his first inaugural, Lincoln reiterated a statement he had made earlier in his debates with Douglas: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." (Collected Works of Lincoln, ed. Bailor et al., IV, 263.) The statement was originally made in the debate at Ottawa, Illinois, August 21, 1858. (Ibid., III, 165; see also the discussion of the proposed constitutional amendment of Mar. 2, 1861, above, notes 6–8.)
18 US, Eighth Census (1860), Preliminary Report on the Eighth Census, 1860 (Washington, D. C., 1861), 131, confirmed in the final report, Population of the United States in 1860 (Washington, D. C., 1864), 499–500. Slaves were recorded in only three territories: fifteen in Nebraska, twenty-nine in Utah, and two in Kansas; a total of forty-six. Certain unofficial preliminary reports gave slightly higher figures: ten slaves in Nebraska, twenty-nine in Utah, twenty-four in New Mexico, and none in Kansas; a total of sixty-three. (American Annual Cyclopaedia, 1861 [New York, 1862], 696.) It should be noted that the census figures for 1860 were tabulated in terms of civil divisions as they existed early in 1861. Thus Kansas was listed as a state, though it was not admitted until January 29, 1861, and statistics were presented for the territories of Colorado, Dakota, and Nevada, though these were organized only in February and March 1861.
situation in Kansas. Though blood had been spilled over the introduction of slavery into that territory, there were actually only 627 colored persons, slave or free, within its boundaries on the eve of its admission to statehood (January 29, 1861). The same situation obtained throughout the West. In 1846, at the time the Wilmot Proviso was introduced, the Union had comprised twenty-eight states. By the outbreak of the Civil War, more than two and a third million persons were to be found in the western areas beyond the boundaries of these older twenty-eight states, yet among them were only 7,687 Negroes, free or slave. There was much truth in the wry observation of a contemporary: "The whole controversy over the Territories...related to an imaginary negro in an impossible place."  The paradox was undeniable, and many historians treat it as evidence of a growing retreat from reality. Thus James G. Randall writes that the "larger phases of the slavery question...seemed to recede as the controversies of the fifties developed." In other words, "while the struggle sharpened it also narrowed." The attention of the country was "diverted from the fundamentals of slavery in its moral, economic, and social aspects," and instead "became concentrated upon the collateral problem as to what Congress should do with respect to slavery in the territories." Hence "it was this narrow phase of the slavery question which became, or seemed, central in the succession of political events which actually produced the Civil War." As Randall sees it, the struggle "centered upon a political issue which lent itself to slogan making rather than to political analysis."  

Slogan making, to be sure, is an important adjunct of political propaganda, and slogans can easily blind men to the relatively minor character of the tangible interests actually at stake. Nevertheless, a much more profound force was at work, shaping the crisis in this peculiar way. This configurative force was the constitutional system itself. The indirectness of the attack upon slavery, that is to say, the attack upon it in the territories, where

19 Census figures for the six states admitted from 1846 to 1861, inclusive (Iowa, Wisconsin, California, Minnesota, Oregon, and Kansas), and for the seven organized territories enumerated in the census of 1860 (Colorado, Dakota, Nebraska, Nevada, New Mexico, Utah, and Washington) showed an aggregate of 2,359,995 white persons, 7,541 free persons of color, and 46 slaves; making a total (including also "civilized Indians" and "Asiatics") of 2,383,677 persons. (Eightth Census [1860], Population, 598-99.) Ironically enough, the aborigines in the Indian Territory held in slavery almost as many Negroes as were to be found, slave or free, in the entire area just specified. (Eightth Census [1860], Preliminary Report, 136.) This special tabulation for the Indian Territory (not incorporated in the regular census tables) showed 65,680 Indians, 1,988 white persons, 494 free colored persons, and 7,369 slaves.

20 James G. Blaine, Twenty Years of Congress (2 vols., Norwich, Conn., 1884), I, 272, quoting an unnamed "representative from the South."

21 James G. Randall, The Civil War and Reconstruction (Boston, 1937), 114-15. In a later work, Randall described the issue of slavery in the territories, when debated by Lincoln and Douglas in 1858, as "a talking point rather than a matter for governmental action, a campaign appeal rather than a guide for legislation." (Lincoln the President [4 vols., New York, 1945-55], I, 125.)
it was merely a future possibility, instead of in the states, where the institution existed in force, was the unmistakable consequence of certain structural features of the American Constitution itself.

A centralized national state could have employed a number of different methods of dealing with the question of slavery. Against most of these, the American Constitution interposed a barrier that was both insuperable and respected. By blocking every form of frontal attack, it compelled the adoption of a strategy so indirect as to appear on the surface almost timid and equivocal. In effect, the strategy adopted was a strategy of “containment.” Lincoln traced it to the founding fathers themselves. They had, he asserted, put into effect a twofold policy with respect to slavery: “restricting it from the new Territories where it had not gone, and legislating to cut off its source by the abrogation of the slave trade.” Taken together, these amounted to “putting the seal of legislation against its spread.” The second part of their policy was still in effect, but the first, said Lincoln, had been irresponsibly set aside. To restore it was his avowed object:

I believe if we could arrest the spread [of slavery] and place it where Washington, and Jefferson, and Madison placed it, it would be in the course of ultimate extinction, and the public mind would, as for eighty years past, believe that it was in the course of ultimate extinction. The crisis would be past.

Whether or not slavery could have been brought to an end in this manner is a totally unanswerable question, but it requires no answer. The historical fact is that the defenders of slavery regarded the policy of containment as so dangerous to their interests that they interpreted it as signifying “that a war must be waged against slavery until it shall cease throughout the United States.” On the other hand, the opponents of slavery took an uncompromising stand in favor of this particular policy because it was the only one that the Constitution appeared to leave open. To retreat from it

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As I have written elsewhere: “The fact that the controversy of 1856–1860 turned on the extension of slavery to the territories (and, to a lesser extent, on the fugitive-slave law) showed that anti-slavery leaders, far from shunting the Constitution, were showing it a punctilious respect. Had they been disposed, as their opponents alleged, to ride roughshod over constitutional limitations, they would hardly have bothered with the question of the territories or the question of fugitive slaves.” (Arthur Bestor, “State Sovereignty and Slavery,” Journal of the Illinois State Historical Society, LIV [Summer 1961], 127.)

The failure of the Republicans to mount a frontal attack upon slavery in the slaveholding states seemed to the Beards sufficient reason for treating the attack upon slavery as hardly more than a sham battle. Secession, they argued, was the southern planters’ “response to the victory of a tariff and homestead party that proposed nothing more dangerous to slavery itself than the mere exclusion of the institution from the territories.” (Beard, Rise of American Civilization, III, 57, see also 39–40.)

First debate with Douglas, Ottawa, Ill., Aug. 21, 1858, Collected Works of Lincoln, ed. Basler et al., III, 18 (italics of the original not reproduced here).

would be to accept as inevitable what Lincoln called "the perpetuity and nationalization of slavery." 26

To understand the shaping effect of the Constitution upon the crisis, one must take seriously not only the ambiguities that contemporaries discovered in it, but also the features that all alike considered settled. The latter point is often neglected. Where constitutional understandings were clear and unambiguous, responsible leaders on both sides accepted without serious question the limitations imposed by the federal system. The most striking illustration has already been given. Antislavery leaders were willing to have written into the Constitution an absolute and perpetual ban upon congressional interference with slavery inside the slaveholding states. They were willing to do so because, as Lincoln said, they considered "such a provision to now be implied constitutional law," which "might without objection be 'made express, and irrevocable.'" 27

Equally firm was the constitutional understanding that Congress had full power to suppress the foreign slave trade. On the eve of secession, to be sure, a few fire-eaters proposed a resumption of the importation of slaves. The true index of southern opinion, however, is the fact the Constitution of the Confederate States outlawed the foreign trade in terms far more explicit than any found in the Constitution of the United States. 28

Far more surprising, to a modern student, is a third constitutional understanding that somehow held firm throughout the crisis. The Constitution grants Congress an unquestioned power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." 29 Employing this power, Congress had outlawed the foreign slave trade in 1808, with the general acquiescence that we have just noted. To anyone familiar with twentieth-century American constitutional law, the commerce clause would seem to furnish an obvious weapon for use against the domestic slave trade as well. Since the 1860's the power of Congress to regulate interstate commerce has been directed successively against lotteries, prostitution, child labor, and innumerable other social evils that are observed to propagate themselves through the channels of interstate commerce.

27 First inaugural, Mar. 4, 1861, ibid., IV, 270; see also above, notes 6-8.
28 In the US Constitution the only reference to the slave trade is in a provision suspending until 1808 the power of Congress to prohibit "the Migration or Importation" of slaves. (Art. I, Sec. 9 [clause 1].) The power itself derives from the commerce clause (Art. I, Sec. 8 [clause 3]), and Congress is not required to use it. By contrast, the Confederate Constitution not only announced that the foreign slave trade "is hereby forbidden," but also went on to require its Congress to pass the necessary enforcement laws. (Constitution of the Confederate States, Art. I, Sec. 9 [clause 1]; cited in Jefferson Davis, The Rise and Fall of the Confederate Government [2 vols., New York, 1881], I, 657.)
29 US Constitution, Art. I, Sec. 8 [clause 3].
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The suppression of the domestic slave trade, moreover, would have struck a far more telling blow at slavery than any that could possibly have been delivered in the territories. Only the unhampered transportation and sale of slaves from the older seaboard regions can account for the creation of the black belt that stretched westward through the new Gulf States. By 1840 there were already as many slaves in Alabama and Mississippi together, as in Virginia. During the twenty years that followed, the number of slaves in the two Gulf States almost doubled, while the number of slaves in Virginia remained almost stationary.\(^9\)

The migration of slaveholding families with the slaves they already possessed can account for only part of this change. The domestic slave trader was a key figure in the process. His operations, moreover, had the indirect effect of pouring money back into older slaveholding states like Virginia, where slavery as an economic system had seemed, in the days of the Revolution, on the verge of bankruptcy. Furthermore, a direct attack upon the domestic slave trade might well have aroused less emotional resentment than the attack actually made upon the migration of slaveholders to the territories, for the slave trader was a universally reprobated figure, the object not only of antislavery invective but even of southern distrust and aversion.

No serious and sustained effort, however, was ever made to employ against the domestic slave trade the power of Congress to regulate interstate commerce. The idea was suggested, to be sure, but it never received significant support from responsible political leaders or from public opinion. No party platform of the entire period, not even the comprehensive, detailed, and defiant one offered by the Liberty party of 1844, contained a clear-cut proposal for using the commerce power to suppress the interstate traffic in slaves. Public opinion seems to have accepted as virtually axiomatic the constitutional principle that Henry Clay (who was, after all, no strict constructionist) phrased as follows in the set of resolutions from which the Compromise of 1850 ultimately grew:

Resolved, That Congress has no power to prohibit or obstruct the trade in slaves between the slaveholding States; but that the admission or exclusion of slaves brought from one into another of them, depends exclusively upon their own particular laws.\(^21\)

\(^9\) In 1840 there were 448,545 slaves in Alabama and Mississippi, as against 448,987 in Virginia. In 1860 there were 872,711 slaves in the two Gulf States, as against only 400,865 in Virginia. During the same twenty years there was a net increase of 365,011 in the white population of the two Gulf States, and a net increase of 306,331 in the white population of Virginia. (US, Ninth Census [1870], 1, Population, 3-8.)

\(^21\) Last of the eight resolutions introduced in the Senate by Henry Clay, Congressional Globe, 31 Cong., 1 sess., 246 (Jan. 29, 1850). According to Clay himself, the resolution proposed no new legislation, but merely asserted "a truth, established by the highest authority of law in this country." He expected, he said, "one universal acquiescence." (Ibid.)
American Civil War as Constitutional Crisis

Careful students of constitutional history have long been at pains to point out that the broad interpretation that John Marshall gave to the commerce clause in 1824 in the notable case of Gibbons v. Ogden\textsuperscript{32} represented a strengthening of federal power in only one of its two possible dimensions. The decision upheld the power of Congress to sweep aside every obstruction to the free flow of interstate commerce. Not until the end of the nineteenth century, however, did the commerce power begin to be used extensively for the purpose of regulation in the modern sense, that is to say, restrictive regulation. The concept of a “federal police power,” derived from the commerce clause, received its first clear-cut endorsement from the Supreme Court in the Lottery Case,\textsuperscript{33} decided in 1913. These facts are well known. Few scholars, however, have called attention to the dramatic illustration of the difference between nineteenth- and twentieth-century views of the Constitution that is afforded by the fact that the commerce clause was never seriously invoked in connection with the slavery dispute. This same fact illustrates another point as well: how averse to innovation in constitutional matters the anti slavery forces actually were, despite allegations to the contrary by their opponents.

Various other constitutional understandings weathered the crisis without particular difficulty, but to catalogue them is needless. The essential point has been made. The clearly stated provisions of the Constitution were accepted as binding. So also were at least two constitutional principles that rested upon no specific written text, but were firmly ingrained in public opinion: the plenary authority of the slaveholding states over the institution within their boundaries and the immunity of the domestic slave trade to federal interference.

In the Constitution as it stood, however, there were certain ambiguities and certain gaps. These pricked out, as on a geological map, the fault line along which earthquakes were likely to occur, should internal stresses build up to the danger point.

Several such points clustered about the fugitive slave clause of the Constitution.\textsuperscript{34} Clear enough was the principle that slaves might not secure their freedom by absconding into the free states. Three vital questions, however, were left without a clear answer. In the first place, did responsibility for returning the slaves to their masters rest with the states or the federal government? As early as 1842, the Supreme Court, in a divided opinion, placed responsibility upon the latter.\textsuperscript{35} This decision brought to the fore a second

\textsuperscript{32} 9 Wheaton 1 (1824).
\textsuperscript{33} 19 C. Harter \textit{et al.}, 188 US Reports 321 (1903).
\textsuperscript{34} US Constitution, Art. IV, Sec. 2 [clause 3].
\textsuperscript{35} 23 Pet. 539 (1842).
question. How far might the free states go in refusing cooperation and even impeding the process of rendition? The so-called “personal liberty laws” of various northern states probed this particular constitutional question. Even South Carolina, originator of the doctrine of nullification, saw no inconsistency in its wrathful denunciation of these enactments, “which either nullify the Acts of Congress or render useless any attempt to execute them.”

A third question arose in connection with the measures adopted by Congress to carry out the constitutional provision, notably the revised Fugitive Slave Act of 1850. Were the methods of enforcement prescribed by federal statute consistent with the procedural guarantees and underlying spirit of the Bill of Rights? From the twentieth-century viewpoint, this was perhaps the most profound of all the constitutional issues raised by the slavery dispute. It amounted to a direct confrontation between the philosophy of freedom and the incompatible philosophy of slavery. Important and disturbing though the issues were, the mandate of the fugitive slave clause was sufficiently clear and direct to restrain all but the most extreme leaders from outright repudiation of it.

Of all the ambiguities in the written Constitution, therefore, the most portentous proved to be the ones that lurked in the clause dealing with territory: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” At first glance the provision seems clear enough, but questions were possible about its meaning. Eventually they were raised, and when raised they turned out to have so direct a bearing upon the problem of slavery that they would not down. What did the Constitution mean by mingling both “Territory” and “other Property,” and speaking first of the power “to dispose of” such property? Was Congress in reality given a power to govern, or merely a proprietor’s right to make regulations for the orderly management of the real estate he expected eventually to sell? If it were a power to govern, did it extend to all the subjects on which a full-fledged state was authorized to legislate? Did it therefore endow Congress with...

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89 In 1844, to be sure, the Liberty party solemnly repudiated this specific obligation: “We hereby give it to be distinctly understood, by this nation and the world, that, as abolitionists, ... we owe it to the Sovereign Ruler of the Universe, as a proof of our allegiance to Him, in all our civil relations and offices, whether as private citizens, or as public functionaries sworn to support the Constitution of the United States, to regard and to treat the [fugitive slave clause] of that instrument ... as utterly null and void, and consequently as forming no part of the Constitution of the United States, whenever we are called upon, or sworn, to support it.” (National Party Platforms, 1840-1896, ed. Kirk H. Porter and Donald B. Johnson (Urbana, Ill., 1956), 8.) Lincoln, on the other hand, solemnly reminded the nation in his first inaugural that public officials “swear their support to the whole Constitution—this provision as much as to any other.” (Collected Works of Lincoln, ed. Basler et al., IV, 263.)

90 US Constitution, Art. IV, Sec. 3 (clause 2).
powers that were not federal powers at all but municipal ones, normally reserved to the states? In particular, did it bestow upon Congress, where the territories were concerned, a police power competent to deal with domestic relations and institutions like slavery?

This chain of seemingly trivial questions, it will be observed, led inexorably to the gravest question of the day: the future of slavery in an impetuously expanding nation. On many matters the decisions made by territorial governments might be regarded as unimportant, for the territorial stage was temporary and transitional. With respect to slavery, however, the initial decision was obviously a crucial one. A single article of the Ordinance of 1787 had eventuated in the admission of one free state after another in the Old Northwest. The omission of a comparable article from other territorial enactments had cleared the way for the growth of a black belt of slavery from Alabama through Arkansas. An identical conclusion was drawn by both sides. The power to decide the question of slavery for the territories was the power to determine the future of slavery itself.

In whose hands, then, had the Constitution placed the power of decision with respect to slavery in the territories? This was, in the last analysis, the constitutional question that split the Union. To it, three mutually irreconcilable answers were offered.

The first answer was certainly the most straightforward. The territories were part of the "Property belonging to the United States." The Constitution gave Congress power to "make all needful Rules and Regulations" respecting them. Only a definite provision of the Constitution, either limiting this power or specifying exceptions to it, could destroy the comprehensiveness of the grant. No such limitations or exceptions were stated. Therefore, Congress was fully authorized by the Constitution to prohibit slavery in any or all of the territories, or to permit its spread thereto, as that body, in exercise of normal legislative discretion, might decide.

This was the straightforward answer; it was also the traditional answer. The Continental Congress had given that answer in the Ordinance of 1787, and the first Congress under the Constitution had ratified it. For half a century thereafter the precedents accumulated, including the precedent of the Missouri Compromise of 1820. Only in the 1840's were these precedents challenged.

Because this was the traditional answer, it was (by definition, if you like) the conservative answer. When the breaking point was finally reached in 1860-1861 and four identifiable conflicting groups offered four constitutional doctrines, two of them accepted this general answer, but each gave it a peculiar twist.
Among the four political factions of 1860, the least well-organized was the group that can properly be described as the genuine conservatives. Their vehicle in the election of 1860 was the Constitutional Union party, and a rattletrap vehicle it certainly was. In a very real sense, however, they were the heirs of the old Whig party and particularly of the ideas of Henry Clay. Deeply ingrained was the instinct for compromise. They accepted the view just stated, that the power of decision with respect to slavery in a particular territory belonged to Congress. But they insisted that one additional understanding, hallowed by tradition, should likewise be considered constitutionally binding. In actually organizing the earlier territories, Congress had customarily balanced the prohibition of slavery in one area by the erection elsewhere of a territory wherein slaveholding would be permitted. To conservatives, this was more than a precedent; it was a constitutional principle. When, on December 18, 1860, the venerable John J. Crittenden offered to the Senate the resolutions summing up the conservative answer to the crisis, he was not in reality offering a new plan of compromise. He was, in effect, proposing to write into the Constitution itself the understandings that had governed politics in earlier, less crisis-ridden times. The heart of his plan was the re-establishment of the old Missouri Compromise line, dividing free territories from slave. An irrepealable amendment was to change this from a principle of policy into a mandate of constitutional law.

That Congress was empowered to decide the question of slavery for the territories was the view not only of the conservatives, but also of the Republicans. The arguments of the two parties were identical, up to a point; indeed, up to the point just discussed. Though territories in the past had been apportioned between freedom and slavery, the Republicans refused to consider this policy as anything more than a policy, capable of being altered at any time. The Wilmot Proviso of 1846 announced, in effect, that the time had come to abandon the policy. Radical though the proviso may have been in a political sense, it was hardly so in a constitutional sense. The existence of a congressional power is the basic constitutional question.

In arguing for the existence of such a power over slavery in the territories, the Republicans took the same ground as the conservatives. In refusing to permit mere precedent to hamper the discretion of Congress in the use of that power, they broke with the conservatives. But the distinction they made between power and discretion, that is, between constitutional law and political policy, was neither radical nor unsound.

One innovation did find a place in antislavery, and hence in Republican, constitutional doctrine. Though precedent alone ought not to hamper the

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99 Congressional Globe, 36 Cong., 2 sess., 114 (Dec. 18, 1860).
discretion of Congress, specific provisions of the Constitution could, and in Republican eyes did, limit and control that discretion. With respect to congressional action on slavery in the territories, so the antislavery forces maintained, the due process clause of the Fifth Amendment constituted such an express limitation. "Our Republican fathers," said the first national platform of the new party in 1856, "ordained that no person shall be deprived of life, liberty, or property, without due process of law." To establish slavery in the territories "by positive legislation" would violate this guarantee. Accordingly the Constitution itself operated to "deny the authority of Congress, of a Territorial Legislation [sic], of any individual, or association of individuals, to give legal existence to Slavery in any Territory of the United States." 49 The Free Soil platform of 1848 had summed the argument up in an aphorism: "Congress has no more power to make a Slave than to make a King; no more power to institute or establish Slavery, than to institute or establish a Monarchy." 41 As a doctrine of constitutional law, the result was this: the federal government had full authority over the territories, but so far as slavery was concerned, Congress might exercise this authority in only one way, by prohibiting the institution there.

The conservatives and the Republicans took the constitutional system as it stood, a combination of written text and historical precedent, and evolved their variant doctrines therefrom. By contrast, the two other factions of 1860—the northern Democrats under Stephen A. Douglas, and the southern Democrats whose senatorial leader was Jefferson Davis and whose presidential candidate was John C. Breckinridge—appealed primarily to constitutional theories above and beyond the written document and the precedents. If slogans are meaningfully applied, these two factions (each in its own way) were the ones who, in 1860, appealed to a "higher law."

For Douglas, this higher law was the indefeasible right of every community to decide for itself the social institutions it would accept and establish. "Territorial Sovereignty" (a more precise label than "popular sovereignty") meant that this right of decision on slavery belonged to the settlers in a new territory fully as much as to the people of a full-fledged state. At bottom the argument was one from analogy. The Constitution assigned responsibility for national affairs and interstate relations to the federal government; authority over matters of purely local and domestic concern were reserved to the states. So far as this division of power was concerned,

49 National Party Platforms, ed. Porter and Johnson, 27. This argument from the due process clause went back at least as far as the Liberty party platform of 1844. (Ibid., 5.) It was reiterated in every national platform of an antislavery party thereafter: in 1848 by the Free Soil party, in 1852 by the Free Democrats, and in 1856 and 1860 by the Republicans. (Ibid., 13, 18, 27, 32.)

41 Ibid., 13. Repeated in the Free Democratic platform of 1852. (Ibid., 18.)
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Douglas argued, a territory stood on the same footing as a state. It might not yet have sufficient population to entitle it to a vote in Congress, but its people were entitled to self-government from the moment they were "organized into political communities." Douglas took his stand on what he regarded as a fundamental principle of American political philosophy: "that the people of every separate political community (dependent colonies, Provinces, and Territories as well as sovereign States) have an inalienable right to govern themselves in respect to their internal polity." 42

Having thus virtually erased the constitutional distinction between a territory and a state—a distinction that was vital (as we shall see) to the state sovereignty interpretation—Douglas proceeded to deal with the argument that since a territorial government was a creation of Congress, the powers it exercised were delegated ones, which Congress itself was free to limit, to overrule, or even to exercise through direct legislation of its own. He met the argument with an ingenious distinction. "Congress," he wrote, "may institute governments for the Territories," and, having done so, may "invest them with powers which Congress does not possess and can not exercise under the Constitution." He continued: "The powers which Congress may thus confer but can not exercise, are such as relate to the domestic affairs and internal polity of the Territory." 43 Their source is not to be sought in any provision of the written Constitution, certainly not in the so-called territorial clause, 44 but in the underlying principle of self-government.

Though Douglas insisted that the doctrine of popular sovereignty embodied "the ideas and principles of the fathers of the Revolution," his appeal to history was vitiated by special pleading. In his most elaborate review of the precedents (the article in Harper's Magazine from which quotations have already been taken), he passed over in silence the Northwest Ordinance of 1787, with its clear-cut congressional ban on slavery. 45 Douglas chose instead to dwell at length upon the "Jeffersonian Plan of government for the Territories," embodied in the Ordinance of 1784. 46 This plan, it is true, treated the territories as virtually equal with the member states of the Union, and thus supported (as against subsequent enactments) Douglas' plea for the largest measure of local self-government. When, however, Douglas went on

43 Ibid., 530-31.
44 Douglas insisted that this clause referred "exclusively to property in contradistinction to persons and communities." (Ibid., 528.)
45 He likewise ignored all subsequent enactments of the same sort, save to register agreement with the dictum of the Supreme Court, announced in the Dred Scott opinion, that the Missouri Compromise had always been unconstitutional. (Ibid., 530.)
46 Ibid., 535-46.
to imply that the "Jeffersonian Plan" precluded, in principle, any congressional interference with slavery in the territories, he was guilty of outright misrepresentation. Jefferson's original draft (still extant in his own hand) included a forthright prohibition of slavery in all the territories. The Continental Congress, it is true, refused at the time to adopt this particular provision, a fact that Douglas mentioned, but there is no evidence whatever to show that they believed they lacked the power to do so. Three years later, the same body exercised this very power by unanimous vote of the eight states present.

Disingenuousness reached its peak in Douglas' assertion that the Ordinance of 1784 "stood on the statute book unrepealed and irrepealable... when, on the 14th day of May, 1787, the Federal Convention assembled at Philadelphia and proceeded to form the Constitution under which we now live." Unrepealed the ordinance still was, and likewise unimplemented, but irrepealable it was not. Sixty days later, on July 13, 1787, Congress repealed it outright and substituted in its place the Northwest Ordinance, which Douglas chose not to discuss.

Despite these lapses, Douglas was, in truth, basing his doctrine upon one undeniably important element in the historic tradition of American political philosophy. In 1860 he was the only thoroughgoing advocate of local self-determination and local autonomy. He could justly maintain that he was upholding this particular aspect of the constitutional tradition not only against the conservatives and the Republicans, but also (and most emphatically) against the southern wing of his own party, which bitterly repudiated the whole notion of local self-government, when it meant that the people of a territory might exclude slavery from their midst.

This brings us to the fourth of the parties that contested the election of 1860, and to the third and last of the answers that were given to the question of where the Constitution placed the power to deal with slavery in the territories.

48 Douglas, "Federal and Local Authority," 526. The antislavery provision came to a vote in the Continental Congress on April 15, 1786, under a rule requiring the favorable vote of the majority of the states for adoption. Six states voted in favor of the provision, only three against it. One state was divided. Another state could not be counted, because a quorum of the delegation was not present, but the single delegate on the floor voted "aye." (*Journals of the Continental Congress*, ed. Worthington C. Ford et al. [34 vols., Washington, D.C., 1904-37], XXVI, 247.)
49 *Ibid.*, XXXII, 343. This was the vote on July 13, 1787, adopting the Ordinance of 1787 with its antislavery article; only one member voted against the ordinance. There is no evidence of opposition to the antislavery article itself, which was added as an amendment in the course of the preceding debate.
50 Douglas, "Federal and Local Authority," 526.
51 *Journals of the Continental Congress*, ed. Ford et al., XXXII, 343. As if anticipating
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At first glance there would appear to be only two possible answers. Either the power of decision lay with the federal government, to which the territories had been ceded or by which they had been acquired; or else the decision rested with the people of the territories, by virtue of some inherent right of self-government. Neither answer, however, was acceptable to the proslavery forces. By the later 1850's they were committed to a third doctrine, state sovereignty.

The theory of state sovereignty takes on a deceptive appearance of simplicity in most historical accounts. This is because it is usually examined only in the context of the secession crisis. In that situation the corollaries drawn from the theory of state sovereignty were, in fact, exceedingly simple. If the Union was simply a compact among states that retained their ultimate sovereignty, then one or more of them could legally and peacefully withdraw from it, for reasons which they, as sovereigns, might judge sufficient. Often overlooked is the fact that secession itself was responsible for reducing the argument over state sovereignty to such simple terms. The right to secede was only one among many corollaries of the complex and intricate doctrine of the sovereignty of the states. In the winter and spring of 1860-1861, this particular corollary, naked and alone, became the issue on which events turned. Earlier applications of the doctrine became irrelevant. As they dropped from view, they were more or less forgotten. The theory of state sovereignty came to be regarded simply as a theory that had to do with the perpetuity of the Union.

The simplicity of the theory is, however, an illusion. The illusion is a consequence of reading history backward. The proslavery constitutional argument with respect to slavery in the territories cannot possibly be understood if the fifteen years of debate prior to 1860 are regarded simply as a dress rehearsal for secession. When applied to the question of slavery, state sovereignty was a positive doctrine, a doctrine of power, specifically, a doctrine designed to place in the hands of the slaveholding states a power sufficient to uphold slavery and promote its expansion within the Union. Secession might be an ultimate recourse, but secession offered no answer whatever to the problems of power that were of vital concern to the slaveholding states so long as they remained in the Union and used the Constitution as a piece of working machinery.

As a theory of how the Constitution should operate, as distinguished from a theory of how it might be dismantled, state sovereignty gave its own distinctive answer to the question of where the authority lay to deal with mat-

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Douglas' contention that the earlier ordinance was “irrepealable,” the Congress that had adopted it not only repealed it, but declared it “null and void.”
ters involving slavery in the territories. All such authority, the theory insisted, resided in the sovereign states. But how, one may well ask, was such authority to be exercised? The answer was ingenious. The laws that maintained slavery—which were, of course, the laws of the slaveholding states—must be given extraterritorial or extrajurisdictional effect. In other words, the laws that established a property in slaves were to be respected, and if necessary enforced, by the federal government, acting as agent for its principals, the sovereign states of the Union.

At the very beginning of the controversy, on January 15, 1847, five months after the introduction of the Wilmot Proviso, Robert Barnwell Rhett of South Carolina showed how that measure could be countered, and pro-slavery demands supported, by an appeal to the mystique of the sovereignty of the several states:

Their sovereignty, unalienated and unimpaired . . . , exists in all its plenitude over our territories; as much so, as within the limits of the States themselves. . . . The only effect, and probably the only object of their reserved sovereignty, is, that it secures to each State the right to enter the territories with her citizens, and settle and occupy them with their property—with whatever is recognised as property by each State. The ingress of the citizen, is the ingress of his sovereign, who is bound to protect him in his settlement.

Nine years later the doctrine had become the dominant one in pro-slavery thinking, and on January 24, 1856, Robert Toombs of Georgia summed it up succinctly: “Congress has no power to limit, restrain, or in any manner to impair slavery: but, on the contrary, it is bound to protect and maintain it in the States where it exists, and wherever its flag floats, and its jurisdiction is paramount.” In effect, the laws of slavery were to become an integral part of the laws of the Union, so far as the territories were concerned.

Four irreconcilable constitutional doctrines were presented to the American people in 1860. There was no consensus, and the stage was set for civil war. The issues in which the long controversy culminated were abstruse. They concerned a seemingly minor detail of the constitutional system. The arguments that supported the various positions were intricate and theoretical. But the abstractness of constitutional issues has nothing to do, one way or the other, with the role they may happen to play at a moment of crisis. The sole question is the load that events have laid upon them. Thanks to the structure of the American constitutional system itself, the abstruse issue of slavery in the territories was required to carry the burden of well-nigh all

82 These terms were suggested, and their propriety defended, in my article, “State Sovereignty and Slavery,” 128–31, 147.
83 Congressional Globe, 29 Cong., 2 sess., Appendix, 246 (Jan. 15, 1847).
84 Speech in Boston, reprinted in an appendix to Stephens, Constitutional View, I, 625–47, esp. 625.
the emotional drives, well-nigh all the political and economic tensions, and well-nigh all the moral perplexities that resulted from the existence in the United States of an archaic system of labor and an intolerable policy of racial subjection. To change the metaphor, the constitutional question of legislative authority over the territories became, so to speak, the narrow channel through which surged the torrent of ideas and interests and anxieties that flooded down from every drenched hillside upon which the storm cloud of slavery discharged its poisoned rain.