cial legislation to solve the problem. This may be a harsh condensation, but the main thought of the material advances the idea that the courts, in states where there is no legislative reform, may bring about their own revision of the rule against perpetuities by taking notice of the great body of legislative reform. Some authority is cited to show that the courts may and should do this. Will they do so? Even the authors admit that we will have to "wait and see."

One may have doubts as to the value of a book of this type. This is not to suggest that the material is inferior. The work is an excellent treatment of one of the more difficult phases of the law. However, the fact must be faced that it has not added anything new to the law relating to perpetuities. As the title page informs you: This is a reprint.

JOHN E. HOWE†

CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858. Edited by Paul M. Angle. Chicago: University of Chicago Press, 1958. Pp. 422. $7.50.

During the Faubus affair last autumn, editor-columnist David Lawrence came to the defence of "white supremacy" by quoting Abraham Lincoln. Well, that may not be quite fair: technically, Mr. Lawrence was using Lincoln as authority for the proposition that the Supreme Court is not the final interpreter of the Constitution. After all, had not the Court, in 1857, declared that slavery could not be prohibited in any territory of the United States,[1] and had not Lincoln four years later ignored this decision by asking: "Can Congress prohibit slavery in the territories?" and treating that question as unsettled?[2]

If Mr. Lawrence had perused the Lincoln-Douglas joint debates and individual campaign speeches of 1858, now put together in a handsome centennial edition edited by Paul Angle, he could have found more Lincolnian ammunition for his attack on judicial supremacy. Also, surprisingly, he could have discovered some language seeming to support "white supremacy." What about this, for instance: "I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races, that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black

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1. Dred Scott v. Sandford, 60 U.S. (19 Howard) 393 (1857).

2. Abraham Lincoln, First Inaugural Address, March 4, 1861.

races which I believe will for ever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race."[3] That was Lincoln speaking—Abraham Lincoln at Charleston, Illinois, on September 18, 1858.

Yet surely, say the faithful, this picture of the Great Emancipator as anti-court and anti-negro must be fantastically false. Surely, by the same method of quoting out of context or presenting only part of the picture, we can portray Lincoln as a precedent-respecting lawyer and as an apostle of racial equality and freedom. This picture would be at least as true as the other. To find a better likeness than either we must look at the record. The transcript of the 1858 debates provides as complete a record as any of Lincoln's views, for—despite his opponent's charge that he was tailoring his opinions to suit his audiences—he was both candid and consistent. In "Created Equal?" we can find what he believed about the Dred Scott decision, slavery, and equality.

The seven Lincoln-Douglas debates were hard-hitting verbal battles fought in an extremely close and bitter Senatorial campaign. The campaign attracted national attention originally because Douglas was the presidential hope of the northern Democrats. It soon put Lincoln into the limelight because on hustings he was at least as effective as the eloquent Little Giant. Commenting on Dr. Angle's book, Adlai Stevenson is quoted on the book's "dust jacket" to the effect that the debates set "undimmed before every candidate for public office a model of the democratic dialogue befitting that respect they owe to the intelligence of a free and educated people." Certainly the sixth debate, at Quincy, deserves this accolade, as do substantial parts of the other debates. However, a good deal of the give-and-take came perilously close to mud-slinging. Douglas spent much time trying to smear Lincoln and the Republicans as participants in an abolitionist plot. Lincoln answered by accusing Douglas of using "forged" evidence. Going back to the days when, as a Representative, Lincoln had criticized the Mexican War, Douglas came near to charging his opponent with treason; meanwhile Lincoln was making vehement but vague charges that the Senator had "conspired" with Presidents Pierce and Buchanan and Chief Justice Taney to foist slavery onto the entire country and that the *Dred Scott* opinion was a fruit of this conspiracy. This line of attack lacked substance and petered out; yet Lincoln, in suggesting that there was something irregular about

3. P. 235.

the Supreme Court's behavior in the *Dred Scott* case, was closer to the truth than he knew.[4] And if *Dred Scott* led him into one false start, still he knew that that decision must be the foundation of his whole campaign. For Taney's opinion raised directly the three great issues: (1) the role of the Supreme Court and the respect due its decisions; (2) whether slavery would be permitted in the territories; and (3) the status of the American negro.

First, the role of the Supreme Court. Today we are aware of how, in the *Dred Scott* case, the Chief Justice went far beyond necessity in using three different grounds as the bases of the decision. It would be pleasing to think that Lincoln, the lawyer, attacked the opinion accordingly, and dismissed two-thirds of Taney's language as mere dicta. Indeed in aiming his fire chiefly at that part of the opinion which held the Missouri Compromise unconstitutional, Lincoln was attacking it at its weakest point. The Court had declared that it lacked jurisdiction to decide the case, the question being one of Missouri law.[5] It had added, unnecessarily, that it lacked jurisdiction also because Dred Scott, being a negro, was not a citizen and so could not sue in federal courts. Then, having disclaimed jurisdiction, it went on to pass on the validity of an already repealed Act of Congress.

Unfortunately, in 1858 Brandeis's *Ashwander* opinion,[6] with its "canons" of judicial self-restraint, was still far in the future. It would have served Lincoln well. Even without it, however, Lincoln clearly implied that in saying that slavery could not be prohibited in the territories the Court was straying beyond proper judicial bounds. He spoke of this part of the opinion as formulating a "political rule." Because the "holding" which protected slavery in the territories was not a judicial holding at all, but was *obiter dicta* laying down a "political rule," he did not feel bound to respect it. "If I were in Congress," he declared, "and a vote should come up on a question whether slavery should be prohibited in a new territory in spite of the Dred Scott decision, I would vote that it should." Lincoln denied having any disrespect for courts. "What are the uses of decisions of courts? They have two uses. As rules of property they have two uses. First—they decide upon the question before the court. They decide in this

4. The publication of President Buchanan's papers, long after his death, and subsequent research have revealed that political motivations underlay both Chief Justice Taney's opinion and the dissent, and that the Court's decision was secretly disclosed to Buchanan in time for him to insert a paragraph in his inaugural address, on March 4, 1857, praising the Court and urging acquiescence in its rulings. The Dred Scott decision was handed down two days later.

5. It was on this relatively simple basis that the majority at first agreed to rest the decision, following the precedent of Strader v. Graham, 51 U.S. (10 Howard) 82 (1851).

6. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

case that Dred Scott is a slave. Nobody resists that. Not only that, but they say to everybody else, that persons standing just as Dred Scott stands is as he is. That is, they say that when a question comes up upon another person it will be so decided again, unless the court decides in another way, unless the court overrules its decision. . . ."[7]

Second, the significance of that part of the *Dred Scott* opinion which declared that the fifth amendment prohibited the outlawing of slavery in the territories. Lincoln attacked this not only as a "political rule" but as one which "lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the states themselves."[8] The "evil," of course, was slavery. Just how the Court might have proceeded to strike down state laws outlawing slavery it is hard to see, for in 1858 there was no fourteenth amendment with its due process clause to protect the slaveholder against state action. Did Lincoln expect the Taney court to overrule *Barron v. Baltimore?*[9] Or was he conjuring up an imaginary bugaboo to frighten the voters? However that may be, he was firm and forthright and eloquent when he spoke of the "evil" itself. And it appears that he was indeed convinced that somehow the slave system could be imposed on the northern states, for in his first and most famous campaign speech he said: "Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the states, old as well as new—North as well as South."[10] Lincoln was no abolitionist. He wanted only so to "deal with it [slavery] that in the run of time there may be some promise of an end to it."[11] But he left no doubt of his hatred of slavery: "We think it is a moral, a social, and a political wrong."[12]

This is not the place to deal at length with the other use which Lincoln made of the *Dred Scott* opinion's application to the territories: the "Freeport question" of how Douglas could support *Dred*

7. Speech at Chicago, July 10, 1858, p. 36. Even though Lincoln did not expressly equate "political rule" with "*obiter dicta*," it is reasonable to assume that this was his implication. A similar analysis of the opinion, attacking the Court for purporting to rule on "political subjects" (slavery in the territories) in a case which it was dismissing for want of jurisdiction, had been published in 1857 by former Senator Thomas Hart Benton of Missouri. See Chambers, Old Bullion Benton 433 (1956).

8. Opening speech at Quincy, October 13, 1858, p. 333.

9. 32 U.S. (7 Peters) 243 (1833).

10. Speech at Springfield, June 16, 1858, p. 2.

11. Opening speech at Quincy, October 13, 1858, p. 332. This moderation made Lincoln "available" for the Republican presidential nomination of 1860.

12. Ibid.

Scott and "squatter sovereignty" at the same time.[13] To save his seat in the Senate, Douglas could not afford to alienate those northern Illinois Democrats and old Whigs who believed in territorial self-determination on the slavery issue. So he straddled, enunciating the "Freeport heresy" that any territorial legislature could in effect nullify *Dred Scott* by refusing to enact legislation to protect slave-owners.[14] To this Lincoln replied that every legislator was sworn to uphold the Constitution, and if (which he did not admit) the Constitution required that slavery be permitted in the territories, a legislator would be violating his oath if he went along with Douglas's doctrine of nullification-by-inaction.[15]

The third issue raised by Taney's *Dred Scott* opinion related to the status of the American negro. Taney's view—again unnecessary to the decision of the case—was that under the Constitution, no negro could be a citizen. Douglas agreed with this; in fact, when speaking "down in Egypt" (near Cairo in southern Illinois) Douglas used language vigorous enough to please the "white supremacists" of today.[16] Lincoln answered on a high moral plane, constantly harking back to the Declaration of Independence. As we have seen, he was in no hurry to accord full political and social equality to negroes. But in a fervent passage at Ottawa early in the campaign (and he repeated this word-for-word at Quincy) Lincoln declared his position, hitting both the moral foundation of slavery and the notion that the Constitution consigned negroes permanently to a sub-human status: "There is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own hand

13. Opening speech at Freeport, August 27, 1858, pp. 143-44.

14. This straddle saved Douglas in Illinois, but it bitterly angered the Southern slavocracy and its Northern spokesman, President Buchanan. The journalistic voice of this faction, the Washington Union, coined the phrase "Freeport heresy." Promptly the Democratic administration encouraged independent candidacies in the Illinois race. In the last two debates, Douglas spent much time denouncing not Lincoln but these "renegades" and their journalistic organ. Again he succeeded in Illinois—the split did not cost him the election—but his chances of winning an undivided Democratic presidential nomination went glimmering. A novelist has suggested that Lincoln's challenge at Freeport was calculated to have precisely this effect; and it is true that while Douglas's straddle was not new, it was publicized nationally for the first time after that debate. See Churchill, The Crisis (1929).

15. E.g., rejoinder at Quincy, p. 356.

16. Douglas's opening speech at Jonesboro, September 15, 1858, p. 200.

earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.*"[17]

It is to this issue of negro status, presumably, that Governor Stevenson refers when he says that the publication of "Created Equal?" will do much to clarify an issue that has lost none of its urgency in a hundred years." On this issue Douglas, not Lincoln, is the "white supremacists' " man. For taking Lincoln whole, we can easily believe that to him the inequalities which seemed permissible in 1858 would be indefensible when the negroes were a century further removed from the jungle and had all been free men for ninety-five years. We cannot easily believe the contrary.

The question of slavery in the territories has no counterpart today, but the question of judicial supremacy has. And here Lincoln's position is, on the whole, less comparable than Douglas's to the segregationists' present viewpoint. True enough, Lincoln criticized the decision. True, too, he looked forward to it being "peaceably" overruled by the Supreme Court.[18] He even implied that some courtpacking might be desirable, in order to achieve this result.[19] But in several respects his stand was sharply different from the present position of those segregationists who are bitter about *Brown* v. *Board of Education.*[20]

Lincoln believed, with good reason, that the Supreme Court in 1858 was the judicial arm of a political faction. The southern planters had captured the Democratic party in the forties, and the executive and legislative branches in the fifties. Lincoln viewed the *Dred Scott* decision as evidence that the Supreme Court was also now committed to furthering this faction's economic and political interests, and was doing so by needlessly laying down a "political" rule ensuring the expansion of slavery. Today, whatever malcontents may say about the Court, they cannot complain that it is sectional or politically partisan or factional. Nor can they criticize the *Brown* decision as going beyond the necessity of deciding the case. In *Brown* the Court had to construe the equal protection clause; it could not have decided the case otherwise. Its holding was, inevitably, a "judicial" rule.[21]

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17. Reply at Ottawa, August 21, 1858, p. 117.

18. Speech at Chicago, July 10, 1858, p. 36.

19. Reply at Ottawa, August 21, 1858, p. 129.

20. 347 U.S. 483 (1954).

21. Respectable critics of Brown v. Board of Education do not assert that that decision is a "political rule," nor can they claim that it is merely dicta. There has been objection to the Court's use of sociological materials, implying that this is a departure from the judicial function; but it is hard to sustain the view that courts must shut their eyes to relevant data, sociological or otherwise.

These are two major differences. The clincher, however, is that Lincoln believed in abiding by the *Dred Scott decision* (as distinguished from the "political" *dicta* in the opinion) until it might be overruled, and said further that those who thought that the Court's "political rule" was actually a judicial holding were duty bound to implement it by legislative action. This is a far cry from interposition and nullification. It is the opposite of Douglas's "Freeport heresy." And it is very different, too, from the position of most southern school boards today, a position permitted and even tacitly made respectable by the Supreme Court. For what have we in the South right now, but the "Freeport heresy" in modern guise? The responsible governing bodies disregard the *Brown* decision. They refuse to take the steps needed to implement it. Thus they deprive it of effect, and flout the Constitution—just as Douglas suggested that anti-slavery territorial legislatures could render nugatory the *Dred Scott* decision a hundred years ago. Lincoln denounced the "Freeport heresy": "There can be nothing in the words [in an oath of office] 'support the constitution,' if you may run counter to it by refusing support to any right established under the constitution."[22] Today countless schools boards are "refusing support" to an established right—the right to unsegregated education. If they read "Created Equal?" (the question mark seems designed to make the title acceptable) they might then decide, with all deliberate speed, which spirit they really would wish to invoke today—Lincoln or Douglas? The answer, it seems to me, can only be Douglas.

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CITADEL, MARKET AND ALTAR. By Spencer Heath. Baltimore: The Science of Society Foundation, 1957. Pp. xix, 259. $6.00.

This is an unusual book. An engineer has tried to develop a framework for analyzing society. The reviewer does not find the result very fruitful. This, of course, may be due to the shortcomings of the book or the inability of the reviewer to fully grasp its significance.

The author's attempt to create an "authentic science of society, founded on the same measurements and analyses, with the same methods of observation and formulation as the natural sciences"[1] and to use an analysis that "describes the societal structure as it operates and exists, in terms of its mass, motion and duration content, and

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22. Reply at Jonesboro, September 15, 1858, p. 219.

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1. Pp. 7-8.