The Issues in the Congressional Struggle
Over the Kansas-Nebraska Bill, 1854

By ROBERT R. RUSSEL

It is the purpose in this article to discuss only the public issues in the congressional struggle over the Kansas-Nebraska bill. It is not proposed to discuss the personal or political motives of Stephen A. Douglas, Salmon P. Chase, Franklin Pierce, Jefferson Davis, and other central figures. It is intended to imply, however, that one can not write satisfactorily on these latter matters unless he understands what the public issues were, what the provisions of the Kansas-Nebraska bill were in its successive versions, and how those provisions were calculated to affect the resolution of the issues involved.

The struggle over the Kansas-Nebraska bill involved other important matters besides slavery in the territories, namely, territorial government in general, public lands policy, Indian policy, and the choice of a route or routes for railroads to the Pacific coast. But here we shall be concerned only with the paramount matter of slavery. On the final passage of the bill probably not as many as five votes in both houses together turned principally or even largely on the bearing the bill might be expected to have on any issue other than slavery.

All of the territory proposed to be organized by the Kansas-Nebraska bill lay north of the parallel of 36° 30', and nearly all of it lay within the limits of the Louisiana Purchase. And by the eighth section of the Missouri Enabling Act of 1820, commonly called the Missouri Compromise, slavery had been “forever prohibited” in all the Louisiana Purchase north of the parallel of 36° 30' except within the limits of the contemplated state of Missouri. The general issue in the Kansas-Nebraska struggle was, accordingly: Should the Missouri Compromise settlement be disturbed and, if so, what other provisions with regard to slavery should be substituted?

The debates and the voting in Congress on the Kansas-Nebraska bill make it abundantly clear who in that body wanted what with regard to slavery in the territory involved and why. And, as a

1 The southwest corner west of the 100th meridian and south of the Arkansas River was not a part of the Louisiana Purchase.
matter of fact, Douglas and every other knowledgeable politician knew in advance what various leaders, factions, and groups wanted, for they had all been through the long struggle over slavery in the Mexican Cession, the bitter contests over whether the Compromise measures of 1850 should be accepted in various parts of the country, and more recently the Presidential campaign of 1852.

Southern state rights Democrats and a considerable faction of Southern Whigs had come to hold what may, perhaps, best be denominated the common-property doctrine of the powers of the federal government in the territories. This doctrine or view was briefly as follows: The territories are the common property of the several states, not of the United States as an entity. The federal government necessarily governs the territories but only as agent of or trustee for the common owners, the states. As agent or trustee, it may not discriminate among the states and, accordingly, must allow citizens of the several states to enter the territories freely and on equal terms and take with them any property—slaves, for example—of which they had been lawfully possessed in the respective states from which they had come and must afford such property owners due protection in their property while in the common territories. People who subscribed to the common-property doctrine considered the slavery prohibition of the Missouri Compromise and all similar restrictions to be unconstitutional. They also considered it unconstitutional to leave the decision as to slavery to the territorial governments, for, as they pointed out, a principal—the federal government in this case—could not delegate to its creature, a territorial government, a power of which it was not itself possessed. The only power with regard to slavery Congress might confer upon territorial governments was the power, indeed the obligation, to protect slave owners in their property rights.2

2 Among the best reasoned statements of the common-property doctrine in the Thirty-Third Congress were those of Senators Robert M. T. Hunter of Virginia and Andrew P. Butler of South Carolina and of Representative William T. S. Barry of Mississippi. Congressional Globe, 33 Cong., 1 Sess., app., 221-26, 232-40, and 612-19. In an earlier article (to which I intend this to be a sequel), I denominate the doctrine, the "property-rights doctrine." That term now seems ill chosen, for it suggests reliance on the protection of property under the due-process-of-law clause of the Fifth Amendment. See R. R. Russel, "What Was the Compromise of 1850?" Journal of Southern History, XXII (August 1956), 292-309. See also Arthur Bestor's critique of the common-property doctrine—which he calls "the extra-jurisdictional principle"—in "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1840-1860," Illinois State His-
If Southern state rights senators and representatives could have had their way entirely, they would have written into the Kansas-Nebraska Act and into every other territorial measure a declaration of the validity of the common-property doctrine and a requirement that the territorial courts and legislatures afford slaveowners due protection in their property. Such a provision, if enforced in the territories, for, say, ten or twenty years, might well have resulted in several of them developing into slave states. The common-property doctrine was no mere abstraction. As has been true with many constitutional contentions, it had no doubt been invented because of the practical advantages that might follow its application. Strongly proslavery people had been striving to get new slave states into the Union so as to maintain strength enough in the United States Senate to ward off the passage of legislation inimical to the peculiar institution.

Southern Jacksonian Democrats, of whom there were still many left, especially in the Upper South, did not accept the common-property doctrine. But such had been the shifts and fortunes of politics in recent years that of the large Democratic delegation in the Thirty-Third Congress only one senator, Sam Houston of Texas, was a Jacksonian, and only one representative, Thomas Hart Benton, now in the House after thirty years in the Senate, can be clearly recognized as belonging to that faction. Of thirteen Southern Whig senators at least three, Archibald Dixon of Kentucky, Robert Toombs of Georgia, and John M. Clayton of Delaware, held constitutional views difficult to distinguish from those of the state rights Democrats, and of the twenty-three Southern Whig representatives at least one, John R. Franklin of Maryland, was of the same persuasion.4

Not one Northern senator or representative who spoke on the Kansas-Nebraska bill accepted the common-property doctrine or was willing to write it into a piece of legislation. All but a few from the North took the position that Congress had the power to legislate for the territories in all matters and accordingly to

---

3 The doctrine had first been clearly stated by Robert Barnwell Rhett of South Carolina in the House of Representatives, January 5, 1847; and John C. Calhoun had presented it in a set of resolutions in the Senate, February 19, 1847. Congressional Globe, 29 Cong., 2 Sess., app., 244-46, 455.

4 So was Thomas L. Clingman of North Carolina who had long been a Whig but now claimed to belong to no party. Ibid., 33 Cong., 1 Sess., app., 489. The party affiliations in the Thirty-Third Congress are taken from ibid., 33 Cong., 1 Sess., 1-2.
delegate to a territorial legislature the power to legislate on slavery and other rightful subjects of legislation.5 Senator Lewis Cass of Michigan was one of the exceptions. He argued with much learning that Congress had no power whatever to legislate for the territories in matters of local concern except to give each a frame of government and start it on its way.6 A few other Northern Democrats in Congress, of whom Douglas was not then one, agreed with Cass.7 All that Cass’s view and the common-property doctrine had in common was that according to each the slavery prohibition of the Missouri Compromise was unconstitutional; they differed widely in supporting reasoning. Senator Salmon P. Chase of Ohio presented but did not press the idea, later popular with the new Republican party, that it would be a violation of the due-process-of-law clause of the Fifth Amendment for the federal government to permit slavery in any of the territories.8

The large majority of Southern Whigs agreed with the great majority in the North in their view as to the constitutional powers of Congress over slavery in the territories, although they agreed with their state rights colleagues in wanting the Missouri Compromise repealed and the territories opened to slavery.

Next to congressional acceptance and implementation of the common-property doctrine the state rights people wanted most the repeal of the slavery restriction in the Missouri Compromise; and in wanting this they were joined by nearly all other Southerners. The debates on the Kansas-Nebraska bill make it starkly clear that a principal reason Southerners wanted the restriction repealed was that they had come to regard it as an insult and a reproach to their section, a stigma implanted on their institutions by an act of the Congress of their own country. Southerners’ denunciations of the Missouri restriction in 1854 were as bitter as their denunciations of the Wilmot Proviso had been in its time. Senator Andrew P. Butler of South Carolina termed it “a festering thorn” in “the side of the South.”9 Senator David R. Atchison of

5 The best statement of the majority view was that of Senator John Pettit of Indiana, a former judge. Ibid., app., 212-21.
6 Ibid., 33 Cong., 1 Sess., 456-58; app., 270-79.
7 Senators Augustus C. Dodge of Iowa, Moses Norris, Jr., of New Hampshire, and Isaac Toucey of Connecticut took the same line. Ibid., 375-83, 305-310, 313-21. Lewis Cass said Jesse D. Bright of Indiana, who was absent because of illness, also agreed. Ibid., 279.
8 Ibid., 138. Those familiar with Chief Justice Roger B. Taney’s opinion in Dred Scott v. Sanford, 19 U. S. 393 (1856) will remember that Taney also relied on the due-process clause but used it to protect the master in his “property” rather than the Negro’s “liberty,” as Chase would have done.
9 Congressional Globe, 33 Cong., 1 Sess., 1309; app., 240.
Missouri called it "infamous" and Representative Philip Phillips of Alabama, a "miserable line, containing as it does a congressional imputation against one half the states." Some Northerners could understand the Southern feeling. Cass said that if he were a Southerner he would regard the restriction as "invidious." "And certainly to remove this bar sinister from the national escutcheon," he continued, "may well furnish a more powerful motive of action to a great community jealous of its honor, than any hope or expectation that its accomplishment will lead to the introduction of slavery into these territories." Senator Truman Smith of Connecticut, who made the most powerful speech against repeal, said, "We know that legislation like the act of 1820 has ever been to them a stumbling block and an offense."

Those Northern senators and representatives who opposed the repeal of the Missouri Compromise restriction or its weakening in any way also made its proposed repeal a matter of conscience but in the opposite way. Slavery was such a violation of the rights of man, they said, such a moral and social evil, that they could not in good conscience vote to permit it to enter or even vote to give it indirectly a chance to enter a territory in which it was not already established. They further said that slavery was so degrading to the dignity of labor that, if slaves should be taken into the territory, even in comparatively small numbers, free workers from the North and immigrants from Europe would shun it and in effect be excluded. The "Appeal of the Independent Democrats" asserted that opening the territory to slavery would "exclude from a vast unoccupied region immigrants from the Old World and free laborers from our own States, and convert it into a dreary region of despotism inhabited by masters and slaves." Of the many Northern members of Congress who for the sake of

10 Ibid., 33 Cong., 1 Sess., 1303.
11 Ibid., app., 533.
12 Ibid., 278.
13 Ibid., 173.
14 Ibid., 155, 162, 262-70. In a long teaching career in Northern colleges I have presented the substance of this and the preceding paragraph to thousands of students. A rough estimate is that half understood how it might be a matter of conscience with many congressmen to vote to exclude slavery from the territories and one in ten could believe that Southern congressmen might regard exclusion by law as an insult and a reproach and understand how and why they could do so. Yet no one who can not understand both of these conflicting attitudes and the reasons why people maintained them can understand the causes of secession and civil war.
national and party harmony were willing to make concessions to the South, not one was willing to vote for any provision of law that would directly establish or protect slavery in a territory.

The legislative history of the Kansas-Nebraska Act may be characterized briefly as the territorial aspects of the great congressional slavery struggle of 1846-1850 all over again, but compressed into five months and with most of the bargaining and compromising done in closed committee meetings, conferences of leaders, and caucuses instead of on the floors of the Senate and House, as had been true of the Compromise of 1850.

On December 14, 1853, early in the first session of the Thirty-Third Congress, Augustus C. Dodge of Iowa introduced a bill in the Senate to organize a territory of Nebraska embracing all of the then unorganized territory of the United States lying between the parallels of 36° 30' and 43° 30' north latitude. The bill made no mention of slavery, and it was assumed that if enacted it would leave the slavery prohibition of the Missouri Enabling Act in force. Dodge's bill was properly referred to the Committee on Territories, of which Douglas was chairman.

On January 4, 1854, Douglas on behalf of the committee reported the Dodge bill back to the Senate with important amendments and submitted a committee report which explained provisions likely to be controversial and gave or purported to give the reasons why the committee had included those provisions. One amendment pushed the northern boundary of the proposed territory up to the forty-ninth parallel, the national boundary. Other amendments gave the bill provisions with regard to slavery that were all but identical with those of the Utah and New Mexico acts of 1850, provisions which, in those acts, embodied a very significant part of the Compromise of 1850. Putting these provisions in the Nebraska bill, of course, represented considerable concessions to the South.

The most significant slavery provision of this first version of the committee Nebraska bill was as follows: "The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act . . . ." A few matters were excluded from

16 For a description of the Dodge bill, see Congressional Globe, 33 Cong., 1 Sess., 221-22.
18 For a description of the bill, see Congressional Globe, 33 Cong., 1 Sess., 222.
this sweeping grant but slavery was not one of them. This provision remained unchanged in the later versions of the bill.\textsuperscript{19} It meant that the territorial legislature would have power to legislate on the subject of slavery, either to establish it, exclude it, or make other provision regarding it, unless perchance such legislation should be held unconstitutional by the courts. That this was the meaning of the provision was made unmistakably clear by an explicit statement to that effect in the committee's report and by another section of the bill itself, the germane portion of which reads as follows:

That in order to avoid all misconstruction, it is hereby declared to be the true intent and meaning of this act, so far as the question of slavery is concerned, to carry into practical operation the following propositions and principles, established by the compromise measures of \ldots{} [1850], to wit: First, that all questions pertaining to slavery in the Territories, and in the new States to be formed therefrom are to be left to the decision of the people residing therein, through their appropriate representatives.\textsuperscript{20}

The provisions just described, be it noted, would not have repealed or abrogated the slavery prohibition of the Missouri Compromise but would have left it in effect, enforceable in the courts, until the time, if that should ever come, when the territorial legislature should have superseded it with other legislation or the courts should have held it unconstitutional. The said provisions, if enacted, would have left the Missouri Compromise in precisely the same legal position that the Utah and New Mexico acts left the Mexican laws prohibitive of slavery which were in effect in those territories at the time of cession to the United States. These acts left the Mexican laws in effect but gave the territorial legislatures the power to change them and recognized that their constitutionality might be tested in the courts.

The provisions just cited, insofar as they related to territories,
not states, provided, in short, for squatter sovereignty. The term squatter sovereignty, which has come to be respectable, is the most satisfactory term in use to designate the thing it designated for both popular sovereignty and nonintervention applied to states as well as to territories. Furthermore, nonintervention applied to slavery only, not to all “rightful subjects,” as did the other two terms, and, as applied to slavery in the territories, it had in 1854, as we shall see, a different connotation in the South from what it had in the North.

Another provision in the committee Nebraska bill relating to slavery was, “and when admitted as a State or States, the said Territory, or any portion of the same, shall be received into the Union, with or without slavery, as their [sic] constitution may prescribe at the time of their admission . . . .” This provision did not mean, as so many history books have implied, that the committee was proposing that Congress waive a constitutional power to decide whether a new state should be a free state or a slave state, for only a very few congressmen believed that Congress possessed such a power.21 Its enactment would simply represent an attempt on the part of the Thirty-Third Congress to pledge future congresses not to refuse to admit a new state from the region involved either because it would be a slave state or because it would be a free state, as the case might be. This provision remained unchanged in the later versions of the bill.22 It occasioned little controversy.

A third slavery provision in the committee Nebraska bill, copied verbatim from the Utah and New Mexico acts, was designed to insure that any sort of court case that might arise in the proposed territory “involving title to slaves” or “any writ of habeas corpus, involving the question of personal freedom” might be appealed to the Supreme Court of the United States; the stock judiciary provision in earlier territorial acts did not insure that a slave case, even though it might involve a constitutional issue, could go any higher than the supreme court of the territory in which it might arise. The more careful appeals provision had been put in the Utah and New Mexico acts to insure that, if the constitutional issue of the powers of Congress over slavery in the territories should be decided in a court, that court would be the highest in

21 The only identifiable ones are Senator William H. Seward of New York and Representative E. Wilder Farley of Maine. Congressional Globe, 33 Cong., 1 Sess., app., 154, 679.
22 See sections 1 and 19 of the Kansas-Nebraska Act.
the land.\textsuperscript{23} This provision also remained unchanged in later versions of the Nebraska bills, and it also occasioned no controversy.\textsuperscript{24}

The explanation the Committee on Territories gave in its accompanying report for proposing to disturb the settlement of the slavery question embodied in the Missouri Compromise and substitute the provisions we have just described was to this effect: The "prevailing sentiment" in the South is that the slavery restriction of the Missouri Compromise is unconstitutional and that under the Constitution "every citizen [has] a right to remove to any territory of the Union, and carry his [slave] property with him under protection of the law . . . ." Some "eminent statesmen" in the North hold that "Congress is invested with no rightful authority to legislate on the subject of slavery in the territories" but must leave it to the people of the territories. (This last plainly was a bid for the support of Cass and probably for that of President Pierce.)\textsuperscript{25} The prevailing view in the North is that the Missouri restriction is constitutional. "These controverted questions . . . involve the same grave issues which produced the agitation, the sectional strife, and the fearful struggle of 1850." The Compromise measures of that year provided a solution then and were intended to be applied in similar circumstances in the future. Both national political parties have endorsed the Compromise of 1850 "with singular unanimity." So let us adopt the slavery provisions of that compromise as the best solution in the present crisis.

If Douglas and his collaborators had ever expected that the committee bill in its original form would be acceptable to a majority in Congress or to a majority of the Democratic members, they were quickly disillusioned. On January 16, Senator Dixon gave notice that he would introduce an amendment providing that the eighth section of the Missouri Compromise Act shall not be so construed as to apply to the Territory contemplated by this act, or to any other Territory of the United States; but that the citizens of the several States or Territories shall be at liberty to take and hold their slaves within any of the Territories of the United States,

\textsuperscript{23} Russel, "What Was the Compromise of 1850?" 292-309.

\textsuperscript{24} See sections 9 and 27 of the Kansas-Nebraska Act. The bill also contained provision for the return of fugitive slaves. It caused no debate.

\textsuperscript{25} Pierce's views seem not to have been well known. Roy F. Nichols gives only a few hints in his \textit{Franklin Pierce, Young Hickory of the Granite Hills} (Philadelphia, 1958), 139 especially. Another eminent Northern statesman who held the Cass view was former Senator Daniel S. Dickinson, leader of the New York Hards, a faction of the Democratic party of the state which at the time was warring on the Pierce administration over patronage matters.
or of the States to be formed therefrom, as if the said act . . . had never been passed.28

It is not likely that Dixon had been authorized to act as spokesman for any faction or group. But, it will be noted, except that he did not demand a congressional declaration of the validity of the common-property doctrine, he had voiced the extreme Southern demands. If his proposed amendment had been adopted in toto (it was not), it would not only have repealed the Missouri Compromise but would also have nullified the main feature of the committee bill, namely, squatter sovereignty, and the laws of Oregon, Minnesota, Utah, New Mexico, and Washington territories prohibitive of slavery in addition; for it would have estopped any territorial legislature from prohibiting slaveowners to bring their slaves into that territory and hold them there.

Just what other pressures were applied upon Douglas and his committee off the Senate floor by proslavery representatives does not clearly appear. But that such pressures were applied is evident from what happened later, was freely charged at the time by opponents of the Kansas-Nebraska bill, and was more or less frankly acknowledged by Southern leaders. Said Senator R. M. T. Hunter, of Virginia, for one, “Was it not then an inevitable consequence of the course of events I have depicted that the South should make this request for the repeal of the Missouri Compromise?”27

At any rate, on January 23, and still before debate on the bill had formally begin, Douglas on behalf of the Committee on Territories reported a substitute for its first bill that was distinctly more favorable to the proslavery views. The substitute would create two territories (instead of one) in the Nebraska region, one, Kansas, lying between the thirty-seventh and fortieth parallels, the other, Nebraska, extending from the fortieth parallel to the forty-ninth. Except for the names and boundaries, the slavery and other provisions relating to the one territory were identical with those for the other. The substitute retained intact, for each of the proposed territories, the slavery provisions already described, including squatter sovereignty. But a new provision stated that the eighth section of the Missouri Enabling Act “was superseded by the principles of the legislation of 1850, commonly called the compromise measures, and is declared inoperative.”28

26 Congressional Globe, 33 Cong., 1 Sess., 175.
27 Ibid., app., 221.
28 For a description of the substitute, see ibid., 33 Cong., 1 Sess., 222.
The inclusion of the provision declaring the Missouri Compromise inoperative was a great concession to the sensibilities of Southern people and an added shock to those of antislavery folk. But with squatter sovereignty left intact, it is highly questionable that the virtual repeal of the Missouri Compromise would in actual practice increase the likelihood that Kansas and Nebraska or the one or the other would become slaveholding. Under the original committee bill, had it been enacted, a slaveowner presumably would have been afraid to migrate into either territory and take slaves along until and unless the territorial legislature first legalized slavery, for otherwise territorial judges might set their slaves free under the eighth section of the Missouri Act. People from the free states, presumably hostile to slavery, and nonslaveholders from slave states, who might prove also to be opposed to the establishment of the institution, would not be taking such property risks in coming to the territory and would, therefore, be less likely to be deterred from coming. This difference in risks would militate against the legalization of slavery by the very important first legislature or by any subsequent one. Under the committee substitute, if it should be enacted, slaveowners might well be just as hesitant about moving into the territory with their property until and unless the legislature should have first legalized slavery; for until then they could have little assurance that the territorial legislature would not prohibit slavery when it should come to act on the subject or that meanwhile the judges would protect them in their property in the absence of any statute law on the subject—as the majority in Congress certainly assumed would be the case. Indeed, the judges might even enforce the common law principle that slavery can not exist where there is no statute positively establishing it. In short, squatter sovereignty with the Missouri Compromise repealed would have about the same practical result as squatter sovereignty without repeal. In either case squatter sovereignty would weight the scales considerably in favor of freedom. However, the creation of the two territories instead of one, as proposed in the first committee bill, whether designed for that purpose or not, would greatly improve the chances that the South would eventually get another slave state. The proposed Territory of Kansas would lie directly west of Missouri, and it might well be that people friendly to slavery would move into the new territory from that state in sufficient numbers to dominate the early legislatures and get slavery firmly established. But, if the district lying west of Mis-
Missouri should be included for a time with that lying west of Iowa in a single territory, that single territory almost certainly would choose to be free. Free state people moving into the upper district from and through Iowa would certainly overbalance any majority of slave state people that might enter the lower portion from or through Missouri, and accordingly the critically important early legislatures would almost certainly have free state majorities.  

Formal debate on the Kansas-Nebraska bill, as it now was, began in the Senate on January 30. The next day, William A. Richardson of Illinois, chairman of the House Committee on Territories, introduced in the House of Representatives a Kansas-Nebraska bill almost identical with the one before the Senate. Neither bill came regularly before the House until May 8, but many members managed to speak on the bills while other less exciting measures were technically before the House. The House debates were about as long and as able as those in the Senate.

The debates soon revealed that the provision in the bills that virtually repealed the Missouri Compromise was unfortunately worded to say the least. If declaring the Compromise "inoperative" was equivalent to repealing it, why not say "repealed"? And how could a specific prohibition in an act of 1820 have been superseded by the "principles" of the legislation of 1850? Opponents of disturbing the Missouri Compromise had a field day in showing by long quotations from the speeches of the framers of the Utah and New Mexico acts of 1850 that not one of them had at the time believed or even suggested that anything in those acts would supersede, or render inoperative, or weaken the slavery prohibition of the Missouri Compromise. And the influential Senator Cass and other supporters of the bill were unwilling to countenance what they considered a misrepresentation. Furthermore and more serious, Southern state rights members were far from satisfied with the squatter-sovereignty feature of the bills and the lack of any recognition of the common-property doctrine other than the minor provision for insuring a test in the Supreme Court if a case should ever arise in one of the territories involving the constitutionality of an act of its legislature iminical to slavery.

At this critical juncture, the senators favorable in general to the Kansas-Nebraska bill, both Democrats and Whigs, now caucused

29 Ibid., 1238; app., 645, 871.
30 Ibid., 33 Cong., 1 Sess., 294-97.
31 Ibid., 280-81, 337-45; app., 133-45.
several times and worked out a rewording of the troublesome sections. Douglas moved the revised version in the Senate on February 7, with, so he said, "the general concurrence of the friends of the measure."\textsuperscript{32} We know next to nothing of what was said in the caucuses. John Pettit of Indiana and Cass were the chief talkers among the Northern Democrats; Albert G. Brown of Mississippi, state rights Democrat, seems to have talked a lot.\textsuperscript{33} But "by their fruits ye shall know them." The caucus amendment bears all the earmarks of having been the product of hard bargaining between Northern Democrats and Southern state rights Democrats and Whigs. Other Southern Whigs probably exercised a moderating influence on their state rights colleagues.

For the clause in the pending bill that ran "which [the Missouri Compromise] was superseded by the principles of the legislation of 1850, commonly called the compromise measures, and is hereby declared inoperative," the caucus amendment would substitute, "which being inconsistent with the principle of nonintervention by Congress with slavery in the States and Territories, as recognized by the legislation of 1850, commonly called the compromise measures, is hereby declared inoperative and void." The caucus amendment did not modify the sections of the pending bill giving the territorial legislatures the power to legislate on "all rightful subjects," slavery included. But for the sections saying it was the true intent and meaning to carry into effect the principle, "that all questions pertaining to slavery in the Territories, and in the new States to be formed therefrom, are to be left to the decision of the people residing therein, through their appropriate representatives," the caucus amendment would substitute the following: "it being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom; but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."\textsuperscript{34}

Declaring the Missouri Compromise "inoperative and void" would appear more decisive to Southern minds than "inoperative" alone but still would not grate as harshly on Northern ears as "repeal." Declaring the Missouri Compromise void because it

\textsuperscript{32} Ibid., 33 Cong., 1 Sess., 353.
\textsuperscript{34} Congressional Globe, 33 Cong., 1 Sess., 353.
was "inconsistent with" the Compromise of 1850 instead of because it had been "superseded by" the Compromise would satisfy the scruples of Cass and others with regard to historical accuracy but would still carry the injunction to the faithful that they were under some sort of moral compulsion to apply the solution of 1850 to the problem of 1854. The assertion in the caucus amendment that the Compromise of 1850 recognized the principle of "nonintervention by Congress with slavery in the States and Territories" was plainly, insofar as it applied to territories, a sop to the state rights wing. While to Northern men and the majority of Southern Whigs "nonintervention in the territories" meant permitting squatter sovereignty—which the Utah and New Mexico acts did plainly permit— to state rights men it meant recognizing a constitutional right of slaveholders to take their slaves into the territories and hold them and to be protected in their property therein. Another concession to the state rights group was the insertion of the phrase, "subject only to the Constitution of the United States," qualifying the grant of squatter sovereignty. This phrase, if enacted, would mean that Congress was admitting that its power to prohibit slavery in the territories or to grant territorial legislatures the power to do so was questionable and that it was not trying to influence a prospective decision of the Supreme Court by asserting or even assuming the constitutionality of its action. No such admission was in the Utah and New Mexico acts.

Northern Whigs and anti-Nebraska Democrats had not attended the caucuses that framed the compromise amendment just described. The Northern Democrats in the caucuses had been outnumbered by Southern Democrats and Whigs approximately two to one. There can be only one reason, therefore, why the Southerners had not forced more concessions, namely, the understanding that to do so would result in the defeat of the bill in the House, if not also in the Senate, and the disruption of the Democratic party. The caucus amendment was approved in the Senate, February 15, 35 to 10.

On the Senate floor, Chase, the most active leader of the opposition, promptly jumped on the principal concession the caucus amendment would make to the South: the qualifying clause, "subject only to the Constitution of the United States." To this he proposed to add, "under which the people of the Territory, through their appropriate representatives, may, if they see fit, prohibit the existence of slavery therein." Several Northern Demo-

35 See Russel, "What Was the Compromise of 1850?"
crats and Southern Whigs friendly to the bill indicated a willingness to support Chase's amendment provided the words "or introduce" were inserted after "prohibit." The amendment thus changed would have amounted to an assertion by Congress of its constitutional power to legislate on the subject of slavery in the territories and of the constitutionality of squatter sovereignty. The state rights people would have none of that; those friends of the bill who had indicated an inclination to support the change shied away; and, when Chase's amendment came to a vote, in its original form, caucus lines held and it was defeated 36 to 10.36

Even after the caucus agreement, in both houses state rights members continued to expound their common-property doctrine at every turn. Their objects probably were to try to persuade themselves and the public that the Missouri Compromise was being repealed because a majority in Congress believed it to be unconstitutional—which was not so—and to influence the thinking of Supreme Court justices against the day of decision.

There was naturally some speculation in the course of the struggle as to how the Supreme Court would decide when and if a case involving the constitutional issue should come before it. A few on each side expressed misgivings.37 But the remarkable thing is how confident most members seemed to be that the Court would sustain their particular views. Neither faction or group tried to exact a pledge from the others to abide by the expected decision. A few members declared that the bill would pledge Congress to accept the decision whatever it might be, and a few promised to abide by it.38

The opponents of the Kansas-Nebraska bill employed as their chief talking point the contention that the substitution for the Missouri Compromise of another settlement of the slavery question was a gross violation of a "sacred" sectional compact. According to that compact, ran the argument, the North was to consent to Missouri entering the Union as a slave state and allow Arkansas to remain open to slavery, and in return the South agreed that

36 Congressional Globe, 33 Cong., 1 Sess., 421-22, 519. Similar amendments were also defeated in the House. Ibid., 1238-39.

37 Representatives John R. Franklin of Maryland, Laurence M. Keitt of South Carolina, Wiley P. Harris of Mississippi, and Henry Bennett of New York did. Ibid., app., 419, 467, 549, 692.

38 Taking the position that the bill would pledge Congress to accept the decision were Senator Charles E. Stuart of Michigan and Representatives Laurence M. Keitt and Wiley P. Harris; promising to abide by the decision were Representatives William H. English of Indiana and William T. S. Barry of Mississippi. Ibid., 286, 467, 549, 606, 618.
forever after slavery should be excluded from all of the Louisiana Purchase north of the line 36° 30' excepting Missouri. The North had lived up to its agreement. Missouri had been admitted as a slave state. Arkansas had remained a slave territory and in due time had been admitted as a slave state. Now that Kansas and Nebraska are ready for settlement and organization as territories, the South demands that the prohibition on slavery be repealed. How can Southern senators and representatives honorably make such a demand?

Southerners were very sensitive to the charge of broken faith, but their spokesmen were at no loss for a reply. One reasoned reply was that the Missouri Compromise had never been a compact between the sections in any proper sense of the term. The South had been forced by a numerically superior North to accept an unconstitutional and discriminatory prohibition of slavery in the remainder of the Louisiana Purchase in order to prevent a palpably unconstitutional limitation from being imposed on the new state of Missouri as a condition of admission, namely, the gradual abolition of slavery. The most effective Southern reply, however, to the charge of broken faith was *tu quoque*. If, ran this reply, division along a parallel of latitude was a fair settlement for the Louisiana Purchase, it was also a fair settlement for the acquisitions farther west. The South had repeatedly offered to extend the line to the Pacific. President Polk had proposed it. Even John C. Calhoun, Jefferson Davis, and the Nashville Convention had been willing to make such a division, in spite of their view that exclusion of slaveholders with their property from the common territories was clearly unconstitutional. But Northerners would not agree. They had insisted for four years on applying the hateful Wilmot Proviso to all the territory acquired from Mexico, that part south of the line 36° 30' as well as that north of it, and in the end they had forced the South to accept another compromise which admitted all of California as a free state without its ever having gone through the territorial stage and left the South only the barest chance of ever introducing slavery into Utah or New Mexico. Therefore, the South had been released by the actions of the North from any obligation it may ever have had to regard the Missouri Compromise as a binding contract.39

It is not likely that the extended arguments as to whether the Missouri Compromise had been a solemn compact or not and, if so, which side had first broken faith changed directly a single vote in Congress. But that the South was guilty of a breach of faith certainly gained wide acceptance in the North and contributed powerfully to the outburst of righteous indignation there, and that outburst, in turn, caused many Northern Democrats in Congress, especially in the House, to withdraw their support from the Kansas-Nebraska bill and a small number of cautious Southern members to draw back in dismay.

Another issue in the Kansas-Nebraska debates was, of course, the merits of squatter sovereignty. Few senators or representatives from either section showed any enthusiasm for squatter sovereignty as a proper principle for governing territories. A few supporters extolled it as being in accord with American principles of democracy and contended that the people, native born and foreign born, who would settle the territories were just as capable of choosing their "domestic institutions" as people in the states were and had as good a right to do so. Some Northern Democrats who were supporting the Kansas-Nebraska bill admitted that they were choosing squatter sovereignty only as a way of taking the accursed subject of slavery in the territories out of Congress and, thus, relieving themselves of the necessity of voting for exclusion. To vote for outright exclusion would give deep offense to their Southern brethren and might well result in disrupting the Democratic party and endangering the Union. Douglas added the argument, not very flattering to the efficacy of our federal government, that in our history the people of the several territories had always in actual practice decided the slavery question to suit themselves so Congress might as well give them authority to do so in the first place.

Northern Whigs and free soil Democrats exposed the weaknesses and hypocrisies of squatter sovereignty unmercifully. How would it quiet slavery agitation to transfer the controversy from Congress to territorial legislatures? What would supporters do in the event Utah, or Kansas, or Nebraska should legalize polygamy? Marriage was certainly a "domestic institution." Furthermore, it was only a pretense that the bill granted squatter sovereignty, for

---


41 Ibid., 278-79. Those familiar with Douglas' career will recall that he continued to take this line even after the Dred Scott decision.
it contained the stock governmental provisions making the territorial governor, secretary, and principal judges appointive by the President, giving the governor an absolute veto of bills passed by the legislature, requiring that the laws enacted be reported to Congress, and stipulating that legislation disapproved by Congress would be null and void. The supporters of the bill met these sallies in silence for the most part. But they did finally amend the bill by giving the Kansas and Nebraska legislatures power to override governors’ vetoes by a two-thirds majority and by striking out the requirement that laws passed by the legislatures be submitted to Congress. Pettit explained that, while Congress could not divest itself of the power to disallow territorial laws, the amendment would “show . . . what our intention is.”

To state rights Democrats and some of the Southern Whigs, squatter sovereignty was a bitter pill, for reasons already explained. When they were called upon by opponents of the Kansas-Nebraska bill to explain how they could support a measure containing a feature so distasteful to them, they replied variously: The territorial legislatures would recognize their constitutional duty and provide for the protection of slave property (even though Congress was not meeting its obligation!). If the legislatures should fail to meet their constitutional obligation, surely the territorial courts would meet theirs. The bill would give the South a “chance” to get a new slave state. If it would accomplish nothing but the removal of the intolerable stigma of the eighth section of the Missouri Enabling Act, it would be justified. “Our honor is saved,” said Senator James M. Mason of Virginia. “Nothing is saved but our honor; and yet we agree to it.” After all, said some, we can not press the Northern Democrats too far lest we disrupt the party and endanger the Union. A number of state rights men who were supporting the bill simply refused, in the face of all the evidence, to recognize openly that squatter sovereignty was in it.

The tendency of some Southern senators to refuse to recognize that the squatter sovereignty provisions of the bill meant what they said exasperated some Northern Democrats, and in the last days of the Senate debate Charles E. Stuart of Michigan demanded with some asperity that his Southern colleagues state in

---

42 Ibid., 175, 154-55, 662, for examples.
43 Ibid., 33 Cong., 1 Sess., 423, 520.
44 Ibid., app., 212.
45 Ibid., 239-40; 33 Cong., 1 Sess., 1303, 1309, 1311.
46 Ibid., app., 299.
unequivocal language that they had the same understanding of the provisions that Northern Democrats had.\textsuperscript{47} Under catechism most of the Southern leaders admitted, although not all in unequivocal language, that under the bill the territorial legislatures would have the power to exclude slavery.\textsuperscript{48} But some, notably Senators Toombs and Dixon, avoided making the unpleasant admission.\textsuperscript{49} And in the House a number of members persisted in asserting that, if squatter sovereignty was in the bill, they could not find it.\textsuperscript{50}

Apparently because of just such avoidances and intransigencies and because of the efforts of opponents of the bill to take advantage of them to foment dissension in the ranks of the bill’s supporters, some historians have concluded that the terms of the bill were understood one way in the North and another in the South and, even, that the terms had been deliberately made ambiguous to maintain unity among the bill’s supporters.\textsuperscript{51} Now this simply can not be true, in the light of the terms of the bill, the extended debates on the merits of squatter sovereignty, and the admissions of Southern leaders. Even men in the street understood the squatter-sovereignty feature. Witness the well-known fact that even before the final passage of the bill arrangements were being made in the North and in Missouri to contest the control of the first legislature in Kansas.

It is obvious that the votes of members whose consciences were not too strict or principles too doctrinaire might turn on whether they believed that, under the provisions of the bill and other factors which would operate, the territories or the one or the other would more likely become a free state or a slave state. The recorded debates in Congress are about the last place one should look to try to find out what the beliefs of individual members were on this score. When supporters of the bill, Northern and Southern, were appealing to Northern waverers, they argued that

\textsuperscript{47} Ibid., 285.
\textsuperscript{48} Among these were state rights Democrats R. M. T. Hunter, A. P. Butler, Albert G. Brown, James M. Mason, and James A. Bayard and Whigs George E. Badger, John M. Clayton, Thomas G. Pratt of Maryland, John Bell of Tennessee, and William C. Dawson of Georgia. \textit{Ibid.}, 289, 239, 292, 228-32, 299, 776, 286, 291, 937, 939, 303; 33 Cong., 1 Sess., 691.
\textsuperscript{49} Ibid., 1311, 240; app., 346-51, 140-45.
\textsuperscript{50} At least Representatives W. T. S. Barry of Mississippi and James F. Dowdell of Alabama did so. \textit{Ibid.}, 618, 704.
\textsuperscript{51} Allan Nevins, for example, says, “Supporters of the bill were themselves bitterly divided as to the point at which popular sovereignty was to be applied . . . . Only by a sharp suppression of debate on this vital point was unity maintained.” \textit{Ordeal of the Union}, II, 101.
both territories would become free states. When they were appealing for the votes of Southern waverers, they asserted that under the bill there was a good prospect that Kansas, at least, would become a slave state. Northern opponents of the bill in appealing for Northern votes against it commonly asserted that, if the bill should pass, the territories would become slave states. But when Northern Whig leaders were trying to persuade Southern Whigs not to vote for the bill, they said, Why violate a compact and arouse antislavery passions when the territories will both become free states anyway? In a more or less unguarded moment Senator John Bell of Tennessee divulged to the Senate that Senator Atchison of Missouri had been assuring Southern colleagues privately that Kansas would become a slave state and that the Southern people were being told that such would be the case. At any rate senators and representatives remained uncertain enough and concerned enough about the outcome in the territories, especially Kansas, that they continued to the end to weigh carefully every proposed amendment that might affect the choice in the territories.

Opponents of the Kansas-Nebraska bill alleged that the Committee on Territories in its second version of the bill had divided the originally proposed Nebraska Territory into two with the deliberate purpose of improving the chances for the South to get a new slave state. They could offer only circumstantial evidence, namely, the fact that division would improve Southern chances. Dodge of Iowa and Douglas in the Senate and Richardson and Bernhart Henn of Iowa in the House explained that the division had been made at the request of the Iowa delegation and with the consent of the Missouri delegation. The former feared, they said, that with only one territory, the valley of the Kaw, being somewhat more accessible than the valley of the Platte, would be settled somewhat earlier and would get the seat of government and these advantages, in turn, would give the Kaw Valley route an advantage over the Platte Valley route in the struggle which was going on over the choice of route for the first railroad to the Pacific. There can be no doubt of the keenness of the rivalry over railroad routes and the extent of the interests involved. But whether the divi-

---

52 *Congressional Globe*, 33 Cong., 1 Sess., app., 162, 176.
54 *Ibid.*, 33 Cong., 1 Sess., 221; app., 382, 795, 886-88. See Frank Heywood Hodder, "The Railroad Background of the Kansas-Nebraska Act," *Mississippi Valley Historical Review*, XII (June 1925), 3-22; and Robert R. Russel, *Improve-
sion into two territories had been made originally for the one
purpose or the other or for both we may never know for certain.
However, we are certain that every senator and representative
understood that the division of the original Nebraska into two
would greatly increase the likelihood that the South would get a
new slave territory subsequently to become a new slave state;
and we can be reasonably certain that, whether a bargain had
been made in the first place or not, the friends of the bill who
met in the caucuses and conferences at least agreed to support
the proposed division. For, when Chase proposed in the Senate
to amend the bill by combining the two proposed territories into
one, every Southern senator present and every Northern senator
present who later voted for the bill voted to retain the division;
and every Northern senator present (with two exceptions) who
later voted against the bill voted to combine. When a similar
amendment was proposed in the House, the totals against and for
the amendment on a voice vote were so close to the totals for and
against the bill on its final passage that it is reasonable to con-
clude that practically all the friends of the bill had voted to retain
provision for two territories and practically all the opponents had
voted for only one.55

As the Senate debate neared its close, it developed that several
Southern senators believed that the abrogation of the Missouri
Compromise would have the effect of reviving in the proposed
territories the old Spanish laws of Louisiana; and these laws san-
tioned slavery. Northern supporters of the bill reacted sharply.
They had understood that the abrogation of the slavery restriction
of the Missouri Compromise would leave the proposed territo-
ries without any law on slavery or on anything else until the
legislatures should have filled the void. Revival of the old Spanish
laws might give a slight temporary advantage in Kansas to the
proslavery people, and, of more concern, it would have put
Northern men in the position of having voted positively to legal-
ize slavery in the territories, a position no Northern man dared
be caught in. In this minor crisis, George E. Badger of North
Carolina, the leader of the Southern Whigs, offered the following
amendment: "Provided, That nothing herein contained shall be
construed to revive or put in force any law or regulation which
may have existed prior to the act of . . . 1820, either protecting,

ment of Communication with the Pacific Coast As an Issue in American Politics,
1783-1864 (Cedar Rapids, Iowa, 1948).
55 Congressional Globe, 33 Cong., 1 Sess., 520, 1238.
establishing, prohibiting, or abolishing slavery.” This proviso was adopted without debate by a vote of 35 to 6, five of the six being state rights Democrats.56 Later there were bitter recriminations among Southern representatives over the proviso. Badger and some other good Southern lawyers said the proviso was no concession to the North, for the repeal of the Missouri Compromise would not otherwise revive earlier laws. Other Southern members disagreed and insisted the proviso was a concession to the North that should not have been made.57

On March 2 Senator Clayton of Delaware, up to then a supporter of the bill, moved to amend it by striking out a provision that would give the rights of suffrage and holding office to aliens who had declared their intention of becoming citizens of the United States. Striking this out would leave only citizens eligible. The Senate approved Clayton’s amendment 23 to 21 with every Southern senator present voting aye and every free state senator but one voting nay. Although the new Know-Nothing movement may have influenced a few votes, the alignment and the accompanying discussion make it clear that the main consideration was not the proper treatment of immigrants but how the suffrage requirements would affect the slavery question in the first territorial legislatures: Immigrants were predominantly strongly antislavery, and giving them the suffrage would strengthen the free state cause.58 In the House, where the Northern majority was large, Richardson in moving to substitute the Senate bill for the House bill omitted the Clayton amendment, and no one tried to restore it. After the bill without the Clayton amendment passed the House and was returned to the Senate, a large majority of those who had voted for the amendment now voted against restoring it lest insistence on the amendment kill the bill in the House, where the vote had been very close.59

In the Senate the final division on the Kansas-Nebraska bill, counting all who were paired and all who were absent but later indicated how they would have voted had they been present, was 41 to 17. Northern Democrats voted 15 for the bill, 5 against it; Southern Democrats, 15 for to 1 against. Northern Whigs voted none for, 7 against; Southern Whigs voted 11 for, 2 against. The two Free Soilers, of course, voted “Nay.” The lone Southern Dem-

56 Ibid., 520; app., 289-96, 836.
57 Ibid., 33 Cong., 1 Sess., 688-91; app., 488, 583, 419, 427-28, 549, 618, 796.
58 Ibid., 33 Cong., 1 Sess., 520, 1300 ff; app., 297-98.
59 Ibid., 33 Cong., 1 Sess., 1132, 1300-1309, 1321; app., 765 ff.
ocrat who voted against the bill was Sam Houston of Texas; his principal reason seems to have been that he thought the South was making a grievous mistake in making demands that were rousing antislavery passions while receiving so little practical advantage in return. The two Southern Whigs who voted against the bill were Bell and Clayton. Both had joined with other Southern senators in earlier votes. Bell voted "Nay" at the last because of the rising storm in the North and Clayton, ostensibly, because he could not swallow squatter sovereignty.

The House, counting as above for the Senate, passed the bill 115 to 104. Northern Democrats voted 44 to 44; Southern Democrats, 57 for, 2 against. Northern Whigs voted none for and 45 against; Southern Whigs, 14 for and 7 against. The six Free Soilers voted against, of course. The two Southern Democrats who voted against the bill were John S. Millson of Virginia and Thomas Hart Benton. Millson, a state righter of the strictest sort, could not stomach squatter sovereignty. At least three other Southern Democrats and one Whig who disliked this feature refused to vote. The seven Southern Whigs who voted against the bill in the House gave explanations similar to those of Senators Bell and Houston.

The slavery provisions of the Kansas-Nebraska bill were not the work of any one man or clique. They were a compromise, hammered out with great difficulty in committee, conferences, and caucuses and on the Senate floor, between a majority of the Northern Democratic senators and representatives on the one hand and nearly all the Southern senators and representatives, both Democratic and Whig, on the other. Although quite similar to the slavery provisions of the Utah and New Mexico Acts of 1850, the provisions of the Kansas-Nebraska Act included two new concessions to Southern sensibilities, principles, and interests. They abrogated the slavery prohibition of the Missouri Compromise, whereas the Utah and New Mexico acts did not abrogate

60 Ibid., 33 Cong., 1 Sess., 520, 521, 550, 1321, 1324; app., 788, 338-42, 550; 33 Cong., 1 Sess., 691-92; app., 383-93.
61 Ibid., 407-15.
62 Ibid., 33 Cong., 1 Sess., 1254-55.
63 Ibid., app., 425-29.
64 Democrats John McQueen and Laurence Keitt of South Carolina and Wiley Harris of Mississippi and Whig John R. Franklin of Maryland. Ibid., 419-22, 463-68, 547-50.
the Mexican laws prohibitive of slavery; and they admitted that the prohibition of slavery in a territory by Congress or by the territorial legislature was of questionable constitutionality. Considering that the region being organized had long been "dedicated to freedom" by a federal statute, the Northern Democrats who voted for the Kansas-Nebraska bill made great sacrifices of sentiment, interests, principles, and personal political advantage in their states and districts for the sake of party unity and sectional accommodation. But, and this is perhaps the point most frequently overlooked in accounts of the struggle, the Kansas-Nebraska Act fell far short of meeting what the great majority of Southern congressmen thought were the South's just demands.