CHAPTER 3:
LOCALISM, POPULAR SOVEREIGNTY, AND SLAVERY IN THE TERRITORIES

“The tap root from which popular sovereignty grew and flourished was the instinctive attachment of the western American to local government; or, to put the matter conversely, his dislike of external authority.”

—Allen Johnson

“I ask attention to the fact that in a pre-eminent degree these popular sovereigns are at this work: blowing out the moral lights around us; teaching that the negro is not longer a man but a brute, that the Declaration has nothing to do with him, that he ranks with the crocodile and the reptile, that man, with body and soul, is a matter of dollars and cents.”

—Abraham Lincoln

In this chapter I present a novel interpretation of the debates of the antebellum era over the extension of slavery into the territories of the United States. Heretofore, scholars have offered numerous explanations of the origins, development, and consequences of the debate, attending to ideology, psychology, economic development, legal and constitutional discourse, climate, and of course, politics. Rather than contesting these existing interpretations, I propose to illustrate the neglected spatial dynamics of the controversy. Paying special attention to the political dynamics of spatiality renders explicit certain aspects of the controversy that remain implicit in existing readings.

The organization of territories in the American West provoked a bitter conflict over the geographical extent of the institution of slavery. Northerners with antislavery sympathies (e.g. Abraham Lincoln and David Wilmot) favored prohibiting slavery in all new territories.

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Proslavery southerners (e.g. John C. Calhoun and Jefferson Davis) favored extension of the institution into all new territories. Finally, moderates (e.g. Stephen A. Douglas, James K. Polk, and Henry Clay) favored compromise in various forms. For reasons explored in this chapter, this battle over slavery in the territories was waged simultaneously as battle over “scalar hierarchy” and the “scale division of labor.”

The organizing concept of this chapter is popular sovereignty—but not popular sovereignty as one might expect in a work of political theory. In the Western political tradition, popular sovereignty has been understood as “the idea that the ruler’s power derives from the people,” “that law is legitimate insofar as it is the product of the people’s decision making,” the idea of “giving the putative people a commanding voice outside the government they created and embodying their rights as subjects in the commands they thereby gave to their government,” “rule by the people, the exercise of political authority by the many or the majority rather than by

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4 By “spatial hierarchy” I mean a hierarchy of governmental scale, e.g. urban, state, national-state. By “scale division of labor,” I mean the division of political power and authority between spatial scales. I explain this terminology in greater detail elsewhere. See Brenner, "The Limits to Scale? Methodological Reflections on Scalar Structuration; Cox and Mair, "From Localised Social Structures to Localities as Agents," 200.

5 Geneviève Nootens, *Popular Sovereignty in the West: Polities, Contention, and Ideas* (London: Routledge, 2013), 12. Childers argues that “Popular sovereignty became linked to the larger debate over states’ rights versus nationalism that intensified during the antebellum era. Different interpretations of the nature of the Union prevailed between the sections; northerners believed that the people themselves had created the Constitution, while southerners insisted that the states had created the federal government as their common agent, leaving the states with ultimate authority. Likewise, Americans could not agree on the correct interpretation of popular sovereignty, the doctrine designed to settle the issue of slavery in the territories, for precisely the same reason.” "Interpreting Popular Sovereignty: A Historiographical Essay," *Civil War History* 57, no. 1 (2011): 50. For a perceptive recent article on popular sovereignty in the broader sense, see Paulina Ochoa Espejo, "Paradoxes of Popular Sovereignty: A View from Spanish America," *Journal of Politics* 74, no. 4 (2012). On “the people” as a “keyword” in American political thought, see Rodgers, *Contested Truths: Keywords in American Politics since Independence*, ch. 3. On the people in yet another sense, see Giorgio Agamben, "What Is a People?,” in *Means without End: Notes on Politics*, trans. Vincenzo Binetti and Cesare Casarino (Minneapolis: University of Minnesota Press, 2000).

6 Morgan, *Inventing the People*. Robert R. Russel has argued that “squatter sovereignty” is actually a better label for what I have in mind than either “popular sovereignty” or “nonintervention.” This is because, according to Russel, “popular sovereignty” and “nonintervention” could apply to existing states as well as to territories. Additionally, “nonintervention,” i.e. Congressional non-interference, could be restricted to a single issue (e.g. slavery), unlike both “popular sovereignty” and “squatter sovereignty” which were broader and applied to all rightful domestic issues. Robert R. Russel, "The Issues in the Congressional Struggle over the Kansas-Nebraska Bill, 1854," *Journal of Southern History* 29, no. 2 (1963): 194.
a monarch or an aristocratic council,”

“the contention that the unified will of the people is the supreme authority in a state,”
or in the nationalistic tenor of Article 3 of the Declaration of the Rights of Man and of the Citizen, “The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.” Instead, the subject of this chapter is “popular sovereignty” as understood by the antebellum Illinois Senator Stephen A. Douglas: “the right of the people of the Territories to govern themselves in respect to their local affairs and internal polity.”

The apparent peculiarity of Douglas’s conception of popular sovereignty is no mere product of historical distance. Many of his southern critics, including John C. Calhoun, called it “squatter sovereignty.” Abraham Lincoln referred to it—derisively—as “Douglas Popular Sovereignty,” presumably to indicate that it was sui generis. This discrepancy between Douglas’s conception of popular sovereignty—a conception tailored to a particularly American problem—and what we might call, following Lincoln, “genuine popular sovereignty” constitutes a puzzle—a puzzle which, I argue, can be solved by applying the concept of localism, as described in previous chapters. “Douglas popular sovereignty” was a form of localism as activity, in which authority over slavery was to be transferred from the national legislature to the peoples of the territories, geographically defined.

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11 Speech at Columbus, Ohio, September 16, 1859, Collected Works of Abraham Lincoln, 3:405.
The literature on genuine popular sovereignty rarely acknowledges its paradoxical nature. Even if one accepts that “the people” ought to rule, or that “the people” are the ultimate source of authority, it is hardly clear who constitutes “the people.” In an exception to the claim above, Paulina Ochoa Espejo argues, “one cannot establish the boundaries of an electorate democratically, because an electorate would have to be previously established. The procedure presupposes a people to determine who are the people, and so on, ad infinitum. The vicious circle and infinite regress, taken together, yield the paradox of popular sovereignty.”12 This is a well-known problem in political theory.13

Ochoa Espejo advances our understanding of the paradox—in ways especially applicable to the antebellum era in the United States—by considering two different conceptions of the people—el pueblo and los pueblos—in nineteenth century Spanish America. El pueblo “refers to a collection of individual consociates under law” whereas los pueblos “referred to ‘the towns’: a collection of geographically bound corporations with specific institutions and delimited population.”14 According to Ochoa Espejo, the conception of the people as los pueblos “dissolves”15 the paradox of popular sovereignty because “the community is originally conceived

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15 Ochoa Espejo suggests that in political theory paradoxes of this sort are dealt with in four different ways: by asserting the paradox, circumventing the paradox, solving the paradox, or dissolving the paradox. Paulina Ochoa Espejo, "People, Territory, and Legitimacy in Democratic States," American Journal of Political Science 58, no. 2 (2014): 473-476.
as a political unit.”¹⁶ Because “pueblos have a concrete physical boundary… it is not necessary to decide democratically who is part of the people, and thus one need not have a prior people to determine who counts as the people.”¹⁷ In other words, Ochoa Espejo has isolated a geographical or spatial response to the “boundary problem” in democratic theory.¹⁸ If a particular geographical entity contains an already constituted political community (or one represented as such), that community may be accorded the rights of popular sovereignty without falling victim to the “vicious circle” and “infinite regress.”¹⁹

One might then say that Douglas’s approach to the dispute over slavery in the territories was, through organic legislation drafted as chairman of the Committee on Territories,²⁰ to constitute political communities that could then exercise legitimate authority over slavery within their geographical boundaries. Put differently, Douglas (implicitly) used the geographical response to the paradox of popular sovereignty in order to define peoples, peoples that could then accept authority over slavery transferred from the national government. This is why “Douglas popular sovereignty” is better understood as an example of localism as activity rather than an offshoot of “genuine” popular sovereignty.

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¹⁸ Whether the geographical “response” constitutes a “solution” to the paradox is a further question.
¹⁹ This solution was arguably anticipated by the Spanish Jesuit Rodrigo de Arriaga (1592-1667): “the human community is most of all constituted by living together in one place that belongs to the community: for they must have some sort of common bond, but they have none other than common residence in a common place.” Quoted in Annabel S. Brett, Changes of State: Nature and the Limits of the City in Early Modern Natural Law (Princeton: Princeton University Press, 2011), 178.
By building on the analytical framework developed in the introduction, I contend that the debate over the extension of slavery in the antebellum United States can be usefully understood as a conflict in the politics of space. The doctrine of popular sovereignty, introduced by Lewis Cass and more famously developed and promoted by Stephen A. Douglas, is an especially illuminating example of localism as legitimation because it attempted to legitimate the policy under which authority over slavery would be transferred downward in the scalar hierarchy from the national to the territorial government.\(^2\)

Additionally, I argue that Douglas’s thought on popular sovereignty developed over time. Initially, Douglas supported the popular sovereignty as a policy because it had the potential to quell the heated debate over slavery in the territories, a debate that threatened the Union. Throughout the 1850s, however, Douglas developed a doctrine of popular sovereignty that appealed to the values of local control and local self-government. In so doing, he fell prey to a common mistake: the assumption that local decision-making is necessarily superior (normatively speaking) to decision-making at other spatial scales.

Finally, attention to implicit spatiality provides a compelling answer to an enduring question in Douglas scholarship: was Douglas proslavery or antislavery? My answer—that Douglas was moderately antislavery personally—is in no way meant to get him off the hook. Unlike Lincoln, who was what I will call a first-order moral universalist, Douglas was a second-order moral universalist. Lincoln thought there were first-order universal moral principles—e.g. slavery is wrong. In contrast, Douglas thought there were second-order universal moral

principles—e.g. every distinct political community has the right to decide what is right and wrong. Another way to put the point is that Douglas thought that collective political rights were foundational, whereas Lincoln thought that individual natural rights were foundational.

The chapter proceeds as follows. First, I survey the relevant historical background, covering the period from the passage of the Virginia cession in 1784 to the Missouri Compromise of 1820. Second, I describe the four main positions in the debate over slavery extension, and show how the four positions were simultaneously positions in the politics of space. Third, I show how the debate developed in the Compromise of 1850 and the Kansas-Nebraska Act of 1854. Fourth, I analyze Stephen A. Douglas’s thinking on popular sovereignty, showing how popular sovereignty developed from a policy into a doctrine. Fifth, I briefly discuss Lincoln’s response to Douglas’s doctrine of popular sovereignty.

Background: Slavery in the Territories, 1784-1820

“On March 1, 1784, Congress accepted the second Virginia cession of the Old Northwest and thereby,” in the words of Merrill Jensen, “became the owner of a national domain.” This meant that the general government (first under the Articles of Confederation and then the Constitution) owned land, belonging to none of the original states, with which to organize new territories. Article IV, section 3 of the Constitution of 1787 gave Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

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22 On this matter I disagree, though not deeply, with George Kateb’s recent claim that “Douglas’s doctrine of popular sovereignty was not a relativist idea, but a racist one.” It was simultaneously relativist and racist. See George Kateb, Lincoln's Political Thought (Cambridge: Harvard University Press, 2015), 26.


belonging to the United States[.]" The same section gave Congress the power to admit new states to the Union.

The new nation’s first territorial organic act, which is a piece of “legislation that geographically created and politically organized new lands within the United States,” (passed by the Continental Congress) was the Northwest Ordinance of 1787. The first Congress under the new Constitution reaffirmed the ordinance in “An Act to provide for the Government of the Territory North-west of the river Ohio” (1789). As Brenden Rensink notes, with the Ordinance (and the subsequent act) “the idea of federal control over spatial organization, whether political or territorial boundaries, is established.” This set an important precedent. For the sixth article of the Ordinance declared: “There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted[.]” The general government therefore exercised, though it did not explicitly assert, the authority to regulate slavery in the territories.

The subsequent closing of the transatlantic slave trade in 1808 and the opening of the (old) Southwest (e.g. Mississippi, Alabama, Arkansas) to cotton cultivation significantly

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25 The meaning of this clause was the subject of constant debate in the later antebellum period. Some believed that the Constitution gave Congress broad powers with which to govern the territories. Others argued that “Territory or other Property” meant that the Constitution gave Congress authority over property qua land, and not the people who settled on it.


27 Act of August 7, 1789, ch. 8, 1 Stat. 50-53.


increased the market price of slaves.\textsuperscript{32} Tobacco cultivation became less profitable and the slave-owners of this region supplemented their income by selling their slaves, and the children of their slaves (“natural increase”), to cotton cultivators. These slave-owners, therefore, benefited economically from the extension of slavery into new territories. Meanwhile, the northern states increasingly resented the political power of the southern states (and vice-versa). The three-fifths compromise had given the slave-holding states extra representation in the House of Representatives. Concurrently, equal representation in the Senate meant that the less populous South had disproportionate power in the upper chamber. The admission of Alabama in 1819 gave the slave and free states twenty-two senators each, furnishing the united South the opportunity to block national legislation.\textsuperscript{33}

Earlier in 1819, Representative James Tallmadge of New York proposed two amendments placing conditions on the admittance of Missouri to the Union. The first, “That the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes, whereof the party shall have been duly convicted” passed the House 87-76. The second, “And that all children born within the said State, after the admission thereof into the Union, shall be free at the age of twenty-five years” passed 82-78. Both amendments were carried with northern votes.

\textsuperscript{32} My account in this paragraph and the two following draws on Howe, \textit{What Hath God Wrought}, 147-160.\textsuperscript{33} Mark Graber argues that bisectionalism was part of the original constitutional order. See Mark A. Graber, \textit{Dred Scott and the Problem of Constitutional Evil} (Cambridge: Cambridge University Press, 2006).
Table 6: Vote on Tallmadge Amendments by Section (House)

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<thead>
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<th>Prohibition</th>
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<th>Emancipation</th>
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<tr>
<td></td>
<td>Aye</td>
<td>Nay</td>
<td>Aye</td>
<td>Nay</td>
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<tr>
<td>North</td>
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<td></td>
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<tr>
<td></td>
<td>86</td>
<td>10</td>
<td>80</td>
<td>14</td>
</tr>
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<td></td>
<td>(89.58%)</td>
<td>(10.42%)</td>
<td>(85.11%)</td>
<td>(14.89%)</td>
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<tr>
<td>South</td>
<td>1</td>
<td>66</td>
<td>2</td>
<td>64</td>
</tr>
<tr>
<td></td>
<td>(1.49%)</td>
<td>(98.51%)</td>
<td>(3.03%)</td>
<td>(96.97%)</td>
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<tr>
<td>Total</td>
<td>87</td>
<td>76</td>
<td>82</td>
<td>78</td>
</tr>
<tr>
<td></td>
<td>(53.37%)</td>
<td>(46.63%)</td>
<td>(51.25%)</td>
<td>(48.75%)</td>
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Southerners, including “conditional terminators” like Thomas Jefferson, objected to the imposition of emancipation without the consent of the Missourians. In a letter to John Holmes, Jefferson argued, “abstinence…from this act of power, would remove the jealousy excited by the undertaking of Congress to regulate the condition of the different descriptions of men composing a State. This certainly is the exclusive right of every State, which nothing in the constitution has taken from them and given to the General Government.”

Southerners argued that “the fundamental principles of civil and religious liberty” required “admission to a share in the federal Councils on an equal footing with the original states.”

This “equal footing” doctrine would be the first glimpse of localism in the debate over slavery in the territories. Emancipation, if the South was to have its way, would be a local decision, with no interference from outside (i.e. national) forces. During the debate over the admission of Missouri, Philip Barbour of Virginia said “the proposed amendment…would be an act of supererogation or of downright injustice, to the people of Missouri…if they were disposed to establish slavery, then it would be an act of injustice, because we should be legislating directly against the wishes of a people who were competent to legislate for themselves; and who must

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34 Thomas Jefferson to John Holmes, April 22, 1820, in *Political Writings*, 497.
better understand their own happiness and welfare, than we can possibly do.”36 With the two chambers at odds, the admission of Missouri was tabled, and a sectional crisis was at hand.37 Thomas Cobb of Georgia, “with a fixed look at [Tallmadge], has told us, ‘we have kindled a fire which all the waters of the ocean cannot put out, which seas of blood can only extinguish.’”38

Between sessions of the sixteenth Congress, Henry Clay and others organized the infamous Missouri Compromise. Southerners effectively threatened to exclude Maine from statehood unless northerners accepted Missouri statehood without the Tallmadge amendments. This alone was not enough to get northerners to drop the Tallmadge plan. To sweeten the deal, Senator Jesse Thomas of Illinois proposed, in the eventual language of the bill, that “in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state, contemplated by this act [Missouri], slavery and involuntary servitude … shall be, and is hereby, forever prohibited[.]”39 This promise of freedom in all territory (Missouri excepted) north of 36°30′ generated enough northern support to pass the bill. It is nevertheless important for the understanding of future developments to note that “the South felt much better satisfied with the Missouri Compromise than the North. The South had got what its leaders felt was essential: preservation of the principle that there could be no emancipation against the wishes of the local white majority.”40 The principle, a territorial analogue of the equal footing doctrine, said that emancipation was an entirely local matter, at least south of 36°30′.

36 *Annals of Congress*, House of Representatives, 15th Congress, 2nd Session, 1191. Thomas Cobb of Georgia remarked, “there was a vast difference between moral impropriety and political sovereignty” (p. 1437).
37 “The adherence of the two Houses to their respective opinions, precluding any further propositions or compromise on the subject, the bill was of course lost.” *Annals of Congress*, House of Representatives, 15th Congress, 2nd Session, 1438.
39 Act of March 6, 1820, ch. 22, 3 Stat. 548.
The implied permanence (“forever prohibited”) of the Compromise was especially significant. The law came to be viewed (by some) as a piece of higher law—not constitutional per se—but a compact between the states superior to ordinary statute.41 This was in part because the Compromise kept a divisive issue outside the halls of Congress. Reverend Charles Beecher later called the Missouri Compromise a “sacred compact.”42 Stephen Douglas attributed to the 36°30' line itself special importance; in fact, he, along with others, “understood the Missouri Compromise to be the Missouri Compromise line.”43 Douglas would return to the Missouri Compromise line repeatedly as a solution in future conflicts.

Four Positions on Slavery in the Territories

Reflecting on the Missouri Compromise, the aging Thomas Jefferson, in the same letter to John Holmes referenced above, wrote these ominous words: “This momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the union. It was hushed, indeed, for the moment. But this is a reprieve only, not a final sentence.”44 Jefferson was right, for the Mexican War, “regarded [by many] as a war of unjustified aggression on behalf of the evil institution of slavery” reopened the question.45

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45 Potter, The Impending Crisis, 4.
The Wilmot Proviso

On August 8, 1846, in the midst of debate over a bill authorizing $2 million with which to negotiate for Mexican land, David Wilmot offered an amendment: “that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico…neither slavery nor involuntary servitude shall ever exist in any part of said territory[.]”46 What became known as the Wilmot Proviso would have applied the same slavery exclusion as then in effect in the Northwest Territory and the Louisiana Territory north of 36°30’ to any and all territory acquired from Mexico. The House defeated an alternative amendment, introduced by William W. Wick of Indiana, which would have applied the Missouri Compromise line (36°30’) to the Mexican lands, and ultimately approved the bill with the Wilmot Provisio attached, 85 to 79, along sectional lines (northerners voting aye, southerners voting nay).47

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The Senate failed to consider the bill (the session ended before it could act), but with greater southern influence therein, it would have surely failed had it been considered. According to David Potter, with the introduction of the Wilmot Proviso, “The slavery problem, which had been so carefully diffused and localized, could not now be kept from coming into sharp focus as a national issue when it was presented in terms of a question of whether the American flag would carry slavery to a land which had been free under the flag of ‘benighted’ Mexico.”\footnote{Potter, \textit{The Impending Crisis}, 48, emphasis added.} Although by “localized” Potter means that the slavery question had been kept out of national politics, it should be noted that the Wilmot Proviso thrust the slavery question back into national politics precisely by proposing to \textit{prevent} local territorial populations from deciding the question themselves.
As James Oakes observes, virtually no one, prior to the Civil War, “doubted that the Constitution put slavery in the states beyond the reach of federal power. This was the federal consensus.” However, by the 1830s, antislavery radicals began to argue that “the Constitution recognized slavery as a state institution, but only as a state institution.” Slavery was local and freedom was national, according to this radical view. In subsequent decades the radical idea slowly entered mainstream northern opinion. By 1844, the Liberty Party platform claimed, “the General Government has, under the Constitution, no power to establish or continue slavery anywhere.” In 1848, the Free Soil Party platform required that the federal government “relieve itself from all responsibility for the existence or continuance of slavery.” The Wilmot proviso was consistent with this line of thought (Wilmot later become a Free Soiler and Republican). As antislavery ideas entered the mainstream, northern politicians attempted to implement “freedom national,” in part by prohibiting slavery in newly acquired territories and the District of Columbia.

Nevertheless, it has rarely been noticed that northerners were attempting to denationalize the institution of slavery by nationalizing the slavery question. The Missouri Compromise had been a national decision insofar as it was made by the national government, but it transferred decision-making authority over the slavery question from the national government to local

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51 Radicals could appeal to the U.S. Constitution, art. 4, sec. 2, cl. 3: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due” (emphasis added).
52 Quoted in Oakes, *Freedom National*, 27.
(white) populations south of 36°30′ (while retaining it north of 36°30′). The Wilmot proviso asserted national authority over the territories (as in the Northwest Ordinance) and proposed to exercise that authority by prohibiting slavery in all territories acquired from Mexico. In effect, the strategy behind the Wilmot Proviso was to preempt the extension of the Missouri compromise line and to declare that the national majority (through its representatives in Congress), rather than local (white) majorities, should decide the slavery question. The Wilmot Proviso proclaimed that “the people” authorized to permit or abolish slavery in the territories was defined by the nation’s territorial borders and not the borders of individual proto-states.

In another context, E.E. Schattschneider has argued that the “most important strategy of politics is concerned with the scope of conflict.” The Wilmot Proviso can be interpreted as an attempt to widen the scope of conflict by allowing national opinion (with a growing northern majority) to determine the outcome of the conflict over slavery in the territories. In the terminology developed in the introduction, the Wilmot Proviso proposed to transfer authority over the institution of slavery upward in the scalar hierarchy. In contrast to the extension of the Missouri Compromise line, the Proviso would have placed the authority to decide the slavery question entirely with the national government.

Missouri Line Extension

The second approach to slavery in the territories (the Wilmot Proviso being the first), following the Wick amendment (see above, p. 98) was that of Presidents Polk and Buchanan, southern Democrats, and for a time, Stephen A. Douglas. This group wanted to simply extend the Missouri Compromise line into the Mexican Cession. They reasoned that since the Missouri

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55 In the Arkansas Territory, for example.
Compromise line had effectively quelled conflict over slavery in the Louisiana Territory, it could do the same for the territory acquired from Mexico. This proposal was also national in scope, but not to the same degree as the Wilmot Proviso, because it would have granted decision-making authority on the slavery question to local populations in new territories south of 36°30′. Whereas the Wilmot proviso claimed for the national government the authority to establish or prohibit slavery in all former Mexican territory, the extension of the Missouri compromise line would have transferred authority over slavery from the national government to the settlers of each territory, at least south of 36°30′. The territory south of 36°30′ includes most of modern Arizona, New Mexico, and Southern California, as well as Las Vegas, Nevada.

The Missouri Compromise extension proposal was popular because it was seen as an extension of the status quo, and therefore moderate. However, if Polk and his fellow expansionists (including Douglas) had had their way, the territory open to slavery would have been much larger. The extension of the line combined with additional acquisitions to the south (and into the Caribbean) would have greatly expanded the territory open to slavery. The spatial perspective adopted in this chapter reveals the radical potential of what was portrayed as the mere extension of the status quo. Proslavery expansionists who agreed with Douglas that "the more degrees of latitude and longitude embraced beneath our Constitution the better" could

57 The original Missouri Compromise (1820) was also considered a moderate extension of the status quo, as it merely extended the boundary between freedom and slavery formed by the Ohio River. See Christopher Childers, *The Failure of Popular Sovereignty: Slavery, Manifest Destiny, and the Radicalization of Southern Politics* (Lawrence: University Press of Kansas, 2012), 14-16.

58 "Well, perhaps the time has not yet come for us to want Central America, but the time is coming. We are bound to extend and spread until we absorb the entire continent of America, including the adjacent islands, and become one grand ocean-bound republic. I do not care whether you like it or not; you cannot help it! It is the decree of Providence." Speech of Stephen A. Douglas at Columbus, Ohio, September 7, 1859 in Harry V. Jaffa and Robert W. Johannsen, eds., *In the Name of the People: Speeches and Writings of Lincoln and Douglas in the Ohio Campaign of 1859* (Columbus: Ohio State University Press, 1959), 149-150.

59 For example, this point is missed by Childers, *The Failure of Popular Sovereignty*.

60 Quoted in Jaffa, *Crisis of the House Divided*, 100.
accept the extension of Missouri compromise line, even with its restriction north of 36°30′, and get much of what they wanted. Indeed, overwhelming success in the Mexican War led President Polk to contemplate annexing the entire Mexican Republic. If the politics of space (put crudely) is using space, and its conceptualization, to get what you want, those who proposed to extend the Missouri Compromise line into the Mexican cession were shrewd practitioners of the politics of space, appeals to the status quo notwithstanding.

*Douglas Popular Sovereignty*

It is in contrast to the Wilmot Proviso (the first position) and the extension of the Missouri Compromise line (the second position) that popular sovereignty (the third position) should be understood as a strategy of localism—of transferring political authority downward in a spatial hierarchy, a “downshift.” In his famous Nicholson letter, announcing his bid for the Democratic nomination in 1848, Lewis Cass of Michigan introduced what would become known as popular sovereignty. Commenting directly on the Wilmot Proviso, Cass remarked: “I am strongly impressed with the opinion, that a great change has been going on in the public mind upon this subject—in my own as well as others; and that doubts are resolving themselves into convictions, that the principle it involves should be kept out of the national legislature, and left to the people of the confederacy in their respective local governments.” In this passage, Cass offers an instrumental justification of localism. He supports transferring authority over the

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slavery question downward in political space, from the national government to the territories, *in order* to prevent national conflict. Cass argues further that “the principle of interference...should be limited to the creation of proper governments for new countries, acquired or settled, and to the necessary provision for their eventual admission into the Union; leaving, in the meantime, to the people inhabiting them, to regulate their internal concerns in their own way.”

Toward the end of the letter, Cass shifts ground and offers a more principled argument for his policy stance:

Wilmot Proviso seeks to take from its legitimate tribunal a question of domestic policy, having no relation to the Union, as such, and to transfer it to another created by the people for a special purpose, and foreign to the subject-matter involved in this issue. By going back to our true principles, we go back to the road of peace and safety. Leave to the people who will be affected by this question, to adjust it upon their own responsibility, and in their own manner, and we shall render another tribute to the original principles of our government, and furnish another guaranty for its permanence and prosperity.

It is important to notice that Cass is making claims in the politics of space, even if he does not say so explicitly. He is advancing a particular conception of the “scale division of labor.” By asserting that slavery is “a question of domestic policy” and that the territories and states

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65 He gives several reasons for his position. First, he doubts that the Constitution gives Congress the power to regulate slavery in the territories (note that this impugns both the Northwest Ordinance and the Missouri Compromise, reflecting shifting opinion on the constitutional question). Cass later states this position explicitly: “in my opinion, there was no power in the Constitution of the United States giving the right to Congress to govern the Territories.” *Cong. Globe*, 33rd Cong., 1st Sess. 450 (1854). Second, the adoption of the Wilmot Proviso would provoke sectional discord. Third, it would lead “to a dishonorable termination of the war.” Fourth, any treaty with Mexico would be defeated (treaties are ratified by the southern dominated Senate). Fifth, Cass implicitly endorses the “equal footing doctrine” by arguing that since the territories, upon becoming states, would have the sovereign power to legalize slavery, it makes little sense to exclude slavery in the intervening period. The equal footing doctrine said that Congress should not “pass on the propriety and expediency of clauses of the constitutions of the new states. The people of each state are to form their constitution in their own way and in accordance with their own views; subject to one restriction only; and that was, it should be republican in character.” *Cong. Globe*, 28th Cong., 2nd Sess. 284 (1845). Quoted in Quitt, *Douglas and Antebellum Democracy*, 108-9. The equal footing doctrine is derived from language in the Northwest Ordinance, which resolved “to provide also for the establishment of States and permanent government therein, and for their admission to a share in the federal Councils on an equal footing with the original States, at as early periods as may be consistent with the general interest.” Worthington C. Ford, ed. *Journals of the Continental Congress, 1774-1789* (Washington, D.C.: 1904-37), 32:339. James Oakes does not say so explicitly, but the “equal footing doctrine” is a plausible corollary to the “federal consensus.” Finally, since the Mexican lands are not conducive to slavery, Cass believes the Wilmot exclusion is redundant. Christopher Childers covers some of the same ground in *The Failure of Popular Sovereignty*, 139.
constitute its “legitimate tribunal” Cass aims to discredit the Wilmot Proviso’s alternative conceptualization of the division of authority between spatially defined jurisdictions. The Proviso is depicted as an illegitimate “upward” shift within the scalar hierarchy.

That Cass frames his argument in constitutional terms does not undermine my argument, for his constitutional arguments address recognizably spatial questions. By claiming that Congress did not have the constitutional authority to regulate slavery in the territories, Cass was rejecting the constitutionality of both the Northwest Ordinance and the Missouri Compromise. And by arguing that the Constitution does not give Congress the authority to regulate slavery in the territories, Cass is implying that the Constitution stakes out a position in the politics of space, granting decision-making authority on the slavery question to the local territorial governments. He invokes the Constitution in order to legitimate his spatial position. I have previously argued that localism can be understood as both the attempt, in the rough and tumble of politics, to transfer political powers and functions from higher to lower jurisdictional entities, as well as the discourse aimed at justifying such activity. According to this understanding, to transfer decision-making authority from the national to the territorial government is an example of the former. Cass’s attempt to use the Constitution to legitimate his position is an example of the latter. Curiously, when Cass suggests that localizing authority over the slavery question is “going back to our true principles,” he is utilizing both spatial and temporal legitimation strategies. Not only is Cass arguing that the legal status of slavery ought to be decided in a particular spatially defined jurisdiction (the territory), he is also claiming that this had been true at some normatively privileged moment in time.66

The Common-Property Doctrine

It would be remiss of me to fail to mention a fourth position in the debate over the extension of slavery. It is the most difficult to place in the politics of space for it denied that any ordinary spatial entity (state, territory, nation) had the authority to determine the legality of slavery in the territories. Known as the common-property doctrine, this position effectively denied the doctrine of *Somerset v. Stewart* (1772), that slavery was a creature of positive law—that slavery “must be recognized by the law of the country where it is used.” As Oakes might put it, the fourth position reversed the “freedom national, slavery local” position of anti-slavery radicals, instead advocating “slavery national and freedom merely local.”

According to the common-property doctrine, advanced by southern radicals, the territories were a “common treasure” obtained by the collective efforts of the states (e.g. the Mexican War). Therefore, according to the doctrine, no citizen or his property could be fairly excluded from the territories. The advocates of slavery were perfectly comfortable claiming, as odd as it might sound, that slaveholders were *excluded* from the territories if they could not take their slaves with them. Since the Constitution protected property rights and made no distinction between property in persons and other forms of property, any restriction on slavery in the

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69 The absurdity of the doctrine is demonstrated in Lewis Cass’s February 20, 1854 speech. See *Cong. Globe*, 33rd Cong., 1st Sess, app. 270-279 (1854). Even Stephen Douglas recognized this: “The Constitution places all kinds of property on an equal footing. The Northern and Southern man enter the Territory on an exact equality, and carry their property with them, and hold it there subject to the local law. If that local law is for them, then they will be protected; if it is against them, they had better keep their property somewhere else.” Speech at Columbus, p. 135.
territories was claimed to be unconstitutional. Chief Justice Taney embraced this view in *Dred Scott v. Sanford* (1857).⁷⁰

Furthermore, according to this view, the right of slave-owners to enter the territories with their slaves was considered a Constitutional right, immune to popular decision-making procedures at any spatial scale. Except, perhaps, if one considers the individual and his sphere of authority to be an intelligible spatial scale.⁷¹ The common-property doctrine would have shifted decision-making authority on the slavery question down from the national government, down from the territorial government, all the way down to the individual (white) person. The doctrine was therefore radical in ordinary constitutionalism, by denying both the national and territorial governments (prior to statehood) the authority to prohibit slavery, and in its conceptualization of political space, by inserting the (white) individual into its proposed scalar hierarchy. Put differently, the common-property doctrine denied that the territories constituted a “people” with accompanying collective rights. The proposal pushes localism, understood as political activity, nearly to its logical limit; only by granting to the slaveholder decision-making authority over slavery for himself *and his slaves* does the common-property doctrine stop short. The ultimate limit, as other scholars have recognized, is individualism.⁷²

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⁷⁰ "And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government." *Dred Scott, Plaintiff in Error, v. John F. A. Sanford* 60 U.S. 393 (1857) at 451.

⁷¹ Cf. G. F. Gaus, "Recognized Rights as Devices of Public Reason," *Philosophical Perspectives* 23, no. 1 (2009). “On this jurisdictional view moral rights are individualized spheres of moral authority or sovereignty, in which the rightholder’s judgment about what is to be done provides moral directions for others” (p. 112).

⁷² See Lockridge, *Settlement and Unsettlement in Early America*, 51. Previously, I had been disposed to treat the common-property doctrine as a despatialization and depolitization of the slavery question. I thank Gwynne Evans Latimer for correcting my mistake.
To reiterate, these four positions on slavery in the territories, the Wilmot Proviso, Missouri Compromise line extension, popular sovereignty, and the common-property doctrine, each articulated in the 1840s, were simultaneously positions in the politics of space. The Wilmot Proviso position held that the nation as a whole (allowing the North to outvote the South) should determine the legality of slavery in the territories. The Missouri line extension position would have allocated decision making authority (with respect to slavery) to the national government for any territories formed north of 36°30′ and to local white populations in new territories south of 36°30′. The popular sovereignty position, as articulated by Cass, would have given the authority to determine the legality of slavery to the people of the territories within their own borders, both north and south of 36°30′. Both Missouri line extension and popular sovereignty were considered “moderate” positions. Finally, the common-property position would have given authority over the slavery question in the territories to individual slaveholders, at least in the crucial period between the creation of a territory and its admittance into the Union as a state.

The Compromise of 1850

David Wilmot had introduced his Proviso before the Mexican War was even over—before the United States had acquired new lands to organize. But the debate raged on nonetheless, in part because the Oregon territory remained unorganized, and any decision with respect to Oregon had implications for any land acquired from Mexico. Polk and Buchanan

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73 It should be noted that none of these positions, perhaps with the exception of the common-property doctrine, would have permanently entrenched its preferred scale division of labor. Although Missouri line extension and popular sovereignty shifted authority over slavery to local populations, conceivably the shift was reversible—the national government retained authority over whether to grant authority to local majorities. The phenomenon of path dependency, however, suggests that undoing a downward shift might be more difficult than shifting authority downward in the first place. For shifting political authority downward in a spatial hierarchy creates new interests plausibly opposed to any policy reversal. On path dependency, see Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004), ch. 1.

74 Johannsen, *SAD*, 202, 222.
(and even Douglas, as late as August 11, 1848) continued to favor the extension of the Missouri Compromise line. Free-soilers continued to push for the Wilmot Proviso. In December 1847, with both Oregon and the Mexican cession under consideration, Daniel Dickinson of New York introduced resolutions applying popular sovereignty, but they lacked broad support and were tabled. In August 1848, the Oregon Territory was finally organized with slavery excluded, so as to respect the decision of Oregon’s provisional government. Polk signed the measure, but indicated (so as not to capitulate to the popular sovereignty position) that he did so only because slavery would have been excluded there under the terms of the Missouri Compromise (the solution he favored).

When the war ended, focus shifted to the Mexican Cession, but the debate continued and tensions mounted. In an attempt to avoid the territorial issue altogether, Douglas proposed, in December 1848, to admit the entire Mexican Cession as a single state. According to the federal consensus, states, unlike territories, had unquestioned authority to decide the slavery question without interference from the national government. Nationalizers on the slavery question were nationalizers with respect to the territories, not the states, so admitting the entire Mexican

75 Cong. Globe, 30th Cong., 1st Sess. 54 (1857). Dickinson’s second resolution read: “That, in organizing a Territorial Government for territory belonging to the United States, the principles of self-government upon which our federative system rests will be best promoted, the true spirit and meaning of the Constitution be observed, and the Confederacy strengthened, by leaving all questions concerning the domestic policy therein in the Legislature chosen by the people thereof.” Potter says, “What may have gone on behind the scenes is not clear, but the readiness with which the advocates of popular sovereignty gave up their fight suggests that they knew they lacked strength to adopt Dickinson’s resolutions.” The Impending Crisis, 72. Childers suggests that Dickinson’s resolutions were tabled because by specifically granting authority over slavery to the territorial legislatures, they removed the ambiguity that had allowed both North and South to endorse popular sovereignty. The Failure of Popular Sovereignty, 131.


77 Potter, The Impending Crisis, 76.

Cession as a state would have bypassed the contentious territorial phase. Likewise, President Zachary Taylor, in his first message to Congress, proposed to admit California and New Mexico as states, but southerners balked at the proposal. The Union was again threatened.

Enter Henry Clay, the Great Compromiser, and Douglas, the Little Giant. An early version of the famous Compromise of 1850, proposed by Clay, resolved “that appropriate Territorial governments ought to be established by Congress in all of the said territory, not assigned as the boundaries of the proposed State of California, without the adoption of any restriction or condition on the subject of slavery.” This language embodied the popular sovereignty position. Douglas supported the same proposal in his capacity as chairman of the Committee on Territories. In an exchange with several southern Senators, Douglas claimed that he “opposed the Wilmot Proviso” in part because “it was in violation of the great fundamental principle of self-government; that it was a question which the people should be left to decide themselves.” However, as James Huston argues, “Popular sovereignty had not yet become for Douglas the sole healing salve for the nation’s sectional wounds” for he “continued to rely upon multiple solutions to the territorial dilemma.” He was still thinking instrumentally, desperately searching for a solution to the crisis.

A second version of the Compromise, the product of a Senate select committee chaired by Clay, removed the popular sovereignty provision favored by Douglas, and replaced it with a provision prohibiting the territory from legislating on slavery. This would have undermined Douglas’s conception of popular sovereignty because the territorial settlers would have been

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79 Potter, The Impending Crisis, 91-94.  
prohibiting from passing laws to either protect or prohibit the institution of slavery. This “default” position was closer to the common-property doctrine than to popular sovereignty, for it at least allowed slaveholders to bring their slaves into the territory prior to statehood. The relevant portion of the bill reads: “no law shall be passed interfering with the primary disposal of the soil, nor in respect to African slavery[.]” This version of the bill was killed, and the disheartened Clay left the Senate, leaving the matter in Douglas’s capable hands.

The final version of the Compromise, shepherded into law by Douglas, admitted California as a free state and organized the New Mexico and Utah territories without applying the Wilmot Proviso. But the clause “nor in respect to African slavery” from the previous version of the bill was removed, perhaps implying that the territories could legislate on slavery, consistent with popular sovereignty. However, the relevant section of the law establishing the Utah Territory states: “the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act.” This language is thoroughly ambiguous because it is consistent with both popular sovereignty and the common-property doctrine. If the southern radicals were correct in their contention that the Constitution recognized the right of slave-owners to enter any United States territory with their slaves, the law would not have given the territorial government the authority to exclude slavery, because slavery would not be among the “rightful subjects of legislation consistent with the Constitution of the United States.” If the southern radicals were wrong, the language of the relevant section would secure popular sovereignty. The question was whether slavery was a “rightful subject of legislation,” consistent with the Constitution. The Compromise

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84 Act of September 9, 1850, ch. 51, 9 Stat. 454.
didn’t resolve anything because this was precisely the question at issue between supporters and opponents of the common-property doctrine. A Potter suggests, “there was really no compromise—a truce perhaps, an armistice, certainly a settlement, but not a true compromise.”

The ninth section of the Utah law muddied the waters even further by potentially pushing the slavery question into the hands of the United States Supreme Court:

in all cases involving title to slaves, the said writs of error or appeals shall be allowed and decided by the said Supreme Court, without regard to the value of the matter, property, or title in controversy; and except, also, that a writ of error or appeal shall also be allowed to the Supreme Court of the United States, from the decision of the said Supreme Court created by this act, or of any judge thereof, or of the District Courts created by this act, or of any judge thereof, upon any writ of habeas corpus involving the question of personal freedom[

The upshot here is that the laws organizing the Utah and New Mexico territories gave the United States Supreme Court the authority to decide whether popular sovereignty or the common-property doctrine was to govern the slavery question in the territories. The sixth section subjected the territory’s legislative authority to constitutional interpretation and the ninth section granted the Supreme Court jurisdiction over titles to slave property and claims of personal freedom. In short, the Compromise of 1850 was anything but an unambiguous statement of popular sovereignty.

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85 Potter, The Impending Crisis, 113.
87 The language of section 6 of the Utah Law corresponds to section 7 of the law organizing the New Mexico territory (as well as settling its boundary with Texas). Act of September 9, 1850, ch. 49, 9 Stat. 449. The language of section 9 of the Utah Law corresponds with the language of section 10 of the New Mexico law. Act of September 9, 1850, ch. 49, 9 Stat. 450.
88 According to Childers, “scholars have argued persuasively that the Compromise of 1850 did not provide an unqualified endorsement of popular sovereignty. Instead, it merely resurrected the inherent ambiguity of Cass’s initial popular sovereignty formula in order to appease North and South. David M. Potter and Don E. Fehrenbacher both qualified [Robert R.] Russel’s conclusion by contending that the compromise’s territorial provisions, in Fehrenbacher’s words, ‘were open-ended—adaptable either to popular sovereignty or to the Calhoun property-rights doctrine, but legitimizing neither on an exclusive basis.’” “Interpreting Popular Sovereignty,” 63. Childers is referring to Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (New York: Oxford University Press, 1978), 175; Robert R. Russel, "What Was the Compromise of 1850?", Journal of Southern History 22, no. 3 (1956).
Nor did the Compromise ultimately determine the spatial jurisdiction in which the slavery-extension question would be decided. The popular sovereignty provision (as in section 6 of the Utah law) was a clear attempt to *localize* the decision. It contemplated a downshift in the spatial hierarchy as well as an attempt to limit—*spatially*—who would ultimately decide. However, the laws as written left open the possibility that the Supreme Court might deny the people of the territories the authority supposedly granted to them. The issue was still in flux.\(^89\)

That the Compromise measures were ambiguous apparently did not dampen the mood in Washington. The principals considered the matter settled; Douglas “resolved never to make another speech upon the slavery question in the Houses of Congress[.]”\(^90\) But the respite was to last less than four years.

**The Kansas-Nebraska Act (1854) and the “Local Trap”**

As a zealous expansionist,\(^91\) Stephen A. Douglas took his position as chairman of the Committee on Territories very seriously.\(^92\) He saw himself as an informal delegate for the territories in the Senate.\(^93\) Douglas thought the “organization of a territory was a necessary and proper step in the establishment of state governments”\(^94\) and wanted to regularize the process for organizing territories and admitting them as states. As part of his ordinary duties, Douglas had

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\(^89\) The ambiguity in the Compromise of 1850 is an example of the phenomenon described by Keith E. Whittington, ""Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 99, no. 4 (2005).

\(^90\) Quoted in Potter, *The Impending Crisis*, 114.

\(^91\) Historians have noted that Douglas’s expansionism always came with a commitment to American-style federalism. E.g. Huston, *Stephen A. Douglas and the Dilemmas of Democratic Equality*, 94.

\(^92\) My account of the passage of the Kansas-Nebraska Act is centered on Douglas; note, however, that Roy Nichols thinks existing accounts attribute too much agency to Douglas in the affair. Nichols instead attributes the Kansas-Nebraska Act to party factionalism. Roy. F. Nichols, "The Kansas Nebraska Act: A Century of Historiography," *Mississippi Valley Historical Review* 43, no. 2 (1956).


been trying to organize the Nebraska Territory since 1844. He was also a strong proponent of a Pacific railroad and had been prodded by western congressmen to move the project along. When he introduced a bill to organize Nebraska in March 1853, southerners objected to adding a new free state under the terms of the Missouri Compromise (the proposed Nebraska Territory was north of 36°30’).

Over the next several months, Douglas lost the critical support of Senator Atchison of Missouri. Atchison, who was attempting to attract proslavery votes in his battle with Thomas Hart Benton, changed his mind and refused to support the organization of Nebraska under the terms of the Missouri Compromise. He told Douglas that to get the votes he needed to pass the bill he would need to find a way “to permit slaveholders to go with their property into the new territory at its opening.” Many scholars attribute Douglas’s subsequent strategy to his presidential ambitions. Whatever his motivations, the need for southern support put Douglas in an awkward position. He needed to weaken southern opposition, which was based on the supposed odiousness of the Missouri Compromise restriction, without repealing the Missouri Compromise, which was treated with reverence by many in the North.

As David Potter points out, Douglas made his “concessions in a series of steps.” First, on January 4, 1854, he offered to organize Nebraska without mentioning the status of slavery in the territory. This was clearly not enough to get southerners on board. Then on January 10 came the famous “clerical error” in which it was “discovered” that Douglas’s popular sovereignty provision had been mistakenly omitted from the bill. The missing piece said: “all questions

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95 Potter, THE IMPENDING CRISIS, 153.
99 Potter, THE IMPENDING CRISIS, 156.
pertaining to slavery in the Territories, and in the new states to be formed therefrom are to be left to the people residing therein, through their appropriate representatives.”

This version of the popular sovereignty proposal was crucially different from the corresponding section of the Compromise of 1850. The Compromise left open that slavery might not be among the “rightful subjects” of legislation in the territory whereas Douglas’s Nebraska bill, at this stage, explicitly stated that the territory had authority over slavery within its borders.

Although this version of the bill clarified the popular sovereignty policy, because it gave the people of Nebraska the authority to allow slavery, it conflicted with the Missouri Compromise, which prohibited slavery in the Louisiana Territory north of 36°30’. To avoid the appearance of contradiction, Douglas claimed (dubiously) that the Compromise of 1850, by establishing popular sovereignty in the Mexican Cession, had superseded the Missouri Compromise governing the Louisiana Territory. He was trying to argue that the principle of popular sovereignty adopted in the Compromise of 1850, which dealt with the Mexican Cession, also applied to the Louisiana Territory.

But the supersession argument would not convince the southerners. They noticed that without outright repeal, slavery would be prohibited under the Missouri Compromise until the territorial legislature acted to legalize the institution. With slavery initially prohibited, slaveowners would not make the risky journey to Nebraska, and consequently legalization would lack the crucial support of slaveholders. Douglas’s bill, in southern eyes, was de facto exclusion. In essence, for the slaveholding South, popular sovereignty was only an acceptable alternative to the common-property doctrine when it operated with a stacked deck.101

100 Quoted in Potter, The Impending Crisis, 159.

101 Indeed, “Southerners rejected the doctrine [of popular sovereignty] when northerners proposed a version of the doctrine that the South believed would halt the expansion of slavery.” Childers, The Failure of Popular
In a curious way, the southern response to popular sovereignty reveals the profundity of
development scholars Mark Purcell and J. Christopher Brown’s “local trap” thesis:

It is the agenda(s) of those who are empowered, rather than the inherent qualities
of the scale itself, that will determine social and environmental outcomes. In each
local context, the specific combination of empowered groups and agendas will
vary, depending on the specific way localization unfolds in that instance. Localization will therefore lead to a range of different social and environmental
outcomes, depending on the specifics of each case.\footnote{Purcell and Brown, "Against the Local Trap," 286. Additionally, “Embedded in the local trap’s assumptions about localization is a set of assumptions about democracy and popular sovereignty.” Purcell and Brown, "Against the Local Trap," 282.}

Indeed, southern legislators were keenly aware of the dynamics suggested by Purcell and Brown. They opposed Douglas’s January 10 version of popular sovereignty (i.e. localization) because its choice of scale would empower free-soilers, not slave-owners. They supported popular sovereignty only when “the specific combination of empowered groups and agendas” favored the extension of slavery.

The southern reaction to this version of popular sovereignty provides important historical
evidence that the local trap is indeed a trap, and applies beyond contemporary development
scholarship: “More local control can lead to greater democracy, but it can also lead to a [sic] more authoritarian, patriarchal or ecologically destructive outcomes, depending on who is empowered by localization.”\footnote{Sovereignty, 6. Note, however, that for free-soilers, popular sovereignty was never an acceptable alternative, not even with a stacked deck. See Robert W. Johannsen, ed. The Lincoln-Douglas Debates of 1858 (New York: Oxford University Press, 1965).} To fall into the local trap is to assume that decision-making at any particular scale is intrinsically superior (normatively) to decision-making at some other spatial scale. A blind endorsement of the normative value of localism can easily lead to patently
unjust outcomes, with the institutionalization of slavery in new territories as a conspicuous example.\textsuperscript{104}

Of course it is easy, in hindsight, to recognize the moral deficiencies of the southern argument. Yet plenty of northerners at the time objected to popular sovereignty because it might lead to the extension of slavery. The objection was made on both straightforward moral grounds and on free-soil grounds. For example, the \textit{Appeal of the Independent Democrats}, written in opposition to the Kansas-Nebraska bill, closed with the following exhortation: “Do not submit to become agents in extending legalized oppression and systematized injustice over a vast territory yet exempt from these terrible evils.”\textsuperscript{105}

After conferring with Senator Archibald Dixon of Kentucky, Douglas made a final set of concessions. The latest version of the bill split Nebraska into two territories, Kansas to the south, and Nebraska to the north. According to James McPherson, “This looked like a device to reserve Kansas for slavery and Nebraska for freedom, especially since the climate and soil of eastern Kansas were similar to those of the Missouri River basin in Missouri, where most of the slaves in that state were concentrated.”\textsuperscript{106}

Additionally, and more importantly, the new version of the bill explicitly repealed the ban on slavery north of 36°30’:

That the Constitution, and all Laws of the United States which are not locally applicable, shall have the same force and effect within the said Territory of Nebraska as elsewhere in the United States, except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which, being inconsistent with the principle of non-

\textsuperscript{104} Elsewhere, I show how the Supreme Court fell into the local trap in its desegregation decisions in the 1970s, especially in Milliken, Governor of Michigan v. Bradley, 418 U.S. 717 (1974). See chapter 4.

\textsuperscript{105} S.P. Chase, Charles Sumner, J.R. Giddings, Edward Wade, Gerritt Smith, and Alex de Witt, \textit{Appeal of the Independent Democrats in Congress to the People of the United States: Shall Slavery Be Permitted in Nebraska?} (Washington: Towers’ Printers, 1854), 7.

intervention by Congress with slavery in the States and Territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the Compromise Measures, is hereby declared inoperative and void.\textsuperscript{107}

In place of the Missouri Compromise exclusion, the Act stipulated a policy of popular sovereignty: “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{108} Thus, the Kansas-Nebraska Act specifically mentioned slavery, but included the phrase “subject only to the Constitution of the United States” as well as language identical to that of the Compromise of 1850 concerning writs of error and \textit{habeas corpus}.\textsuperscript{109} In the end, the Kansas-Nebraska Act repealed the Missouri Compromise restriction and adopted popular sovereignty with all of the ambiguities of the Compromise of 1850.

After the passage of the Kansas-Nebraska Act, Douglas came under fierce attack.\textsuperscript{110} The Act (and by association, Douglas) was “objectionable to antislavery men because it abrogated a policy of disapproval of slavery and established the policy that slavery was a local issue, not a subject of any national preference one way or another.”\textsuperscript{111} Notice how these words of an eminent historian capture, albeit more simply, the phenomenon of “scale jumping” mentioned in the introduction: “Sociospatial struggle and political strategizing, therefore, often revolve around scale issues, and shifting balances of power are often associated with a profound rearticulation of scales or the production of an altogether new gestalt of scale.”\textsuperscript{112} A shifting balance of power, in favor of what its critics called “the slave power” (and facilitated by Douglas’s presidential

\begin{footnotes}
\item[110] The attack on Douglas actually began well before the bill was signed into law. See, for example, Chase et al., \textit{Appeal of the Independent Democrats}.
\item[111] Potter, \textit{The Impending Crisis}, 172.
\item[112] Swyngedouw, "Neither Global nor Local," 160.
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ambitions and railroad interests), did in fact generate a profound alteration of the scale division of labor, i.e. the policy of popular sovereignty. It would take a great civil war to restore the balance of power and return the slavery question to the national arena, a process that culminated in the Thirteenth Amendment.

The repeal of the Missouri Compromise in the Kansas-Nebraska Act would eventually splinter the Whigs and open the door to a new Republican party. Yet Douglas still hoped to unite the Democratic Party on a popular sovereignty platform. In his mind, it was the only conceivable way to keep northern and southern factions together. In a letter to Douglas, P.M. Johnston, suggested, “Popular Sovereignty will win, if it is thoroughly & properly discussed & understood.” It is in this vein that I proceed to analyze the development of Douglas’s thinking on popular sovereignty, showing how, in his mind, it transformed from a policy into a doctrine.

Douglas on Popular Sovereignty: From Policy to Doctrine

“He did it in order to make an account of himself, I suppose, as most of us do.”
—Marilynne Robinson

I focus here on the development of Stephen Douglas’s arguments for popular sovereignty because they provide an illuminating example of localism as the attempt to justify or legitimate the practice of transferring powers and functions from higher to lower governmental entities in a scalar hierarchy. Douglas’s arguments usually refer to localism in its dynamic form because he is frequently attempting to legitimate a change in territorial policy. However, as a states’ rights Jeffersonian and Jacksonian, he sometimes makes arguments in favor of an alternative,

**protective**, form of localism, in which powers and functions are maintained at a particular spatial scale, rather than being transferred upward in the scalar hierarchy. Douglas advocates both dynamic and protective localism at various points because he thinks the _states_ ought to retain the authority they have within the federal system but that authority over internal affairs in the _territories_ ought to be transferred from the national to the territorial governments.

Douglas’s political attachments were fixed early in his life (age 15), while serving as an apprentice to a cabinetmaker in Middlebury, Vermont in 1828.116 In his 1838 “Autobiographical Sketch,” he wrote, “At this time politics ran high in the presidential election between General Jackson and J.Q. Adams. My associate apprentices and myself were warm advocates of Gen. Jackson’s claims, whilst our employer was an ardent supporter of Mr. Adams and Mr. Clay. From this moment my politics became fixed, and all subsequent reading, reflection and observation have but confirmed by early attachment to the cause of Democracy.”117

Whereas Douglas became a committed Democrat in 1828, he became a committed westerner in 1833, mere weeks after arriving in Illinois. To his brother-in-law Julius N. Granger, he wrote, “your Easter[n] cities for as far as any division can be said to exist between the East and West I have become a Western man have imbibed Western feelings principles and interests and have selected Illinois as the favorite place of my adoption, without any desire of returning to the land of my fathers except as a visitor[.]”118 Before he reached twenty-one years of age, Douglas was both a loyal Democrat and a devoted westerner. These commitments must be kept in mind, for they strongly influenced his later thinking on the policy and doctrine of popular sovereignty.

117 September 1, 1838, Johannsen, ed. _Letters of SAD_, 58.
118 December 15, 1833, Johannsen, ed. _Letters of SAD_, 2-3, emphasis in original.
Douglas was undoubtedly the antebellum era’s most zealous advocate of popular sovereignty. Nevertheless, his views developed over time and in response to changing circumstances. Moreover, it is not entirely clear whether Douglas was ever fully committed to the policy or the doctrine. However, I argue that although Douglas initially supported popular sovereignty as a matter of policy, he eventually committed himself to popular sovereignty as a doctrine. He became irreversibly dedicated to the doctrine during the debate over Kansas’s Lecompton constitution in 1858.119

Some of the difficulty in discerning Douglas’s true position is attributable to his practically oriented political philosophy. In early 1852 Douglas gave a brief statement of his principles, clearly identifying a problem for future interpreters: “Measures of policy are in their nature temporary, and liable to be abandoned whenever the necessity ceases which called them into existence; but democratic principles are immutable, and can never die so long as freedom survives.”120 Accordingly, in some moments of his career, popular sovereignty appears to be, for Douglas, a mere measure of policy, and at other moments, a matter of immutable democratic principle. Douglas developed his more principled stance with successive additions from the—readily available, in the American political tradition—stock of localist arguments.

Perhaps surprisingly, Douglas’s support for popular sovereignty was critically linked to his expansionism. As Harry Jaffa argues, “Expansion was the keynote of Douglas’s foreign policy, popular sovereignty of his domestic policy, but they were related as the obverse and

120 Quoted in Johannsen, SAD, 357.
reverse of single coin.”¹²¹ The connection between foreign and domestic policy, between expansionism and popular sovereignty, was rooted in Douglas’s particular conception of federalism. Douglas saw the United States as a bastion of freedom and republicanism, and he thought these values were best promoted by extending the reach of American institutions. This is why Douglas was almost always in favor of adding new territory to the United States.¹²² He thought “different confederacies might be organized into the same republic, divided into States with sovereign powers for local and domestic purposes, but united together for general power and common defence.”¹²³ Hence, Douglas’s expansionary federalism is consistent with, and clearly anticipates, his later popular sovereignty views. Douglas seems to have taken special pride in the fact that American federalism could absorb diverse peoples under a single federated republic. He was never a fan of institutional uniformity.¹²⁴

Douglas’s inchoate commitment to popular sovereignty remained submerged, at least as late as 1845. At the end of his first term in the House of Representatives, during a debate over the admission of Iowa and Florida, Douglas espoused the equal footing doctrine but clearly rejected popular sovereignty:

The father may bind the son during his minority; but the moment he attains his majority, his fetters are severed, and he is free to regulate his own conduct. So with the Territories; they are subject to the jurisdiction and control of Congress during their infancy, their minority; but when they attain their majority, and obtain admission into the Union, they are free from all restraints and restrictions,

¹²¹ Jaffa, Crisis of the House Divided, 48.
¹²² Though he toyed with the idea of a customs union later in his career. See Johannsen, SAD, 832.
¹²⁴ Douglas’s preference for diversity over uniformity is repeatedly mentioned in his debates with Lincoln: Johannsen, ed. Lincoln-Douglas Debates, e.g., 29-31, 44-45, 126-127.
except such as the constitution of the United States has imposed upon each and all the States.\textsuperscript{125}

Popular sovereignty and the equal footing doctrine are distinct because the equal footing doctrine says that the residents of United States territories “are free from all restraints and restrictions” only when they enter the Union as a state. (Northern) popular sovereignty, on the other hand, says that the residents of the territories ought to be free to form and regulate their own domestic institutions in the territorial condition, prior to statehood.\textsuperscript{126} In this passage, Douglas does not distinguish between propriety and expediency with respect to Congressional control over the territories, but his metaphor indicates that he sees the federal government as father and the territories as its children.

By 1848 (only three years later), with the territorial crisis in full swing, Douglas had begun to change his mind. According to Robert W. Johannsen, Douglas’s preeminent biographer, “one of his earliest clear statements in support of popular sovereignty” came in a speech, given in New Orleans, supporting Lewis Cass for the presidency: “I hold that control of this subject [slavery] belongs entirely with the State or Territory which is called upon to determine upon what system or basis its institutions and society shall be organized. The general government cannot touch the subject without a flagrant usurpation. [...] Such are my sentiments. Such is the democratic creed.”\textsuperscript{127} Unfortunately, since Douglas was always a dedicated party man while on the stump, the statement provides no clear evidence of his own views. The loyal Douglas is merely reiterating the position of Cass’s Nicholson letter.

\textsuperscript{125} Cong. Globe 28th Cong., 2nd Sess. 284 (1845). Quitt contends that Douglas’s argument for popular sovereignty developed out of the equal footing doctrine: “For Douglas, then, the Constitution recognized the sovereignty of states over their internal affairs and, therefore, Congress should not deprive the people of new states their equal rights by interfering in their domestic matters while they prepared for statehood as territories.” Douglas and Antebellum Democracy, 125.

\textsuperscript{126} See Glossary of Key Doctrines, p. 141.

\textsuperscript{127} Johannsen, SAD, 233. Washington Union, June 24, 1848.
At this stage in his career (during the controversy over the Mexican Cession), Douglas appears to have cared more for a peaceful resolution of the conflict over slavery in the territories than for the popular sovereignty solution in particular. He was willing, at various moments, to admit the entire Mexican Cession as a single state, to support Clayton’s proposal to leave the slavery question to the Supreme Court, to add part of the Mexican Cession to Texas, as well as to extend the Missouri Compromise line to the Pacific. All he wanted was a moderate solution that would allow for the orderly settlement and development of the territories. Only the Wilmot Proviso and the common-property doctrine were completely unacceptable—unacceptable not because they were morally unacceptable but because they would split the Democratic Party and undermine the Union.

Yet at about the same time Douglas gave a more principled defense of popular sovereignty. Still referring to the rights of states to enter the Union on their own terms (the equal footing doctrine), he declared:

Bring those territories into this Union as States upon an equal footing with the original States. Let the people of such States settle the question of slavery within their limits, as they would settle the question of banking, or any other domestic institution, according to their own will. Neither the North nor the South have any right to enforce their peculiar notions upon the people of those territories. I do not speak of constitutional rights. I do not choose to go into abstractions and metaphysical reasoning, but I speak of those moral rights which are violated when we go dictating forms of government to a people who are about ready to assume the position of an independent State.

Only twelve days later, he shifted ground—from the equal footing doctrine to popular sovereignty—by referring to

the great fundamental principle that the people are the source of all power; that from the people must emanate all government; that the people have same right in these Territories to establish a government for themselves that we have to

128 Johannsen, SAD, 242-244.
overthrow our present Government and establish another if we please, or that any other government has to establish one for itself. And it is this great principle that lies at the foundation of my action here in resisting encroachments from the North or from the South.\(^{130}\)

Thus Douglas supported popular sovereignty both as one of several moderate solutions to the sectional crisis as well as a “great fundamental principle” grounded (with an allusion to the Declaration of Independence) in natural and moral rights. That the two positions are inconsistent is clear enough: popular sovereignty is either a “measure of policy” and therefore “liable to be abandoned” or a “democratic principle” and therefore immutable, but it cannot be both.

It was not until the debate over the Compromise of 1850 that Douglas made “his first forceful declaration of popular sovereignty.”\(^{131}\) In the Senate, he said that he opposed the exercise of Congressional power on the subject of slavery in the territories, on the ground that to do it was a violation of the great and fundamental principle of free government, which asserts that each community shall settle this and all other questions affecting their domestic institutions by themselves, and in their own way; and for the Congress of the United States to interfere and do it for them when they were unrepresented here, was a violation of their rights, of which they would have reason to complain.\(^{132}\)

In contrast to many southerners, Douglas believed that Congress had the authority to legislate on the subject of slavery in the territories, but that it should not exercise it. It had done so in the Northwest Territory and with the Missouri Compromise. Congress had the power, according to Douglas, but to exercise it would be a violation of “the great and fundamental principle of free government.” Douglas refused to repudiate the authority of Congress to legislate for the territories because to do so would grant too much to the South. Indeed, some years later,

\(^{130}\) Cong. Globe, 30th Cong., 2nd Sess. 314-315 (1849); Johannsen, SAD, 249. Earlier in the same speech Douglas said, “I see in a southern State that a resolution was adopted a day or two ago taking the other side of this question, and expressing opinions in favor of the Missouri compromise—a measure which I once had the honor to introduce to this body, and a measure by which I would be willing to settle this question.”

\(^{131}\) Johannsen, SAD, 275, emphasis added.

\(^{132}\) Cong. Globe, 31st Cong., 1st Sess. 343 (1850), emphasis added.
southerners would argue that since Congress had no authority to legislate on slavery for the territories, neither could the territories.\footnote{133}{E.g. [Jeremiah Sullivan Black], Observations on Senator Douglas's Views of Popular Sovereignty, as Expressed in Harpers' Magazine, for September, 1859 (Washington: Thomas McGill, 1859).}

About a month later, in a two-day speech in favor of the admission of California into the Union, Douglas outlined a rudimentary predecessor of what would become known as the Freeport Doctrine. These comments are relevant because they suggest a more general prudential argument for popular sovereignty. Until this point I’ve argued that Douglas’s practical argument for popular sovereignty was simply that it would resolve the conflict between the sections and allow for the organization of new territories. In the speech of March 13-14, however, Douglas argues that popular sovereignty is the wisest policy because Congressional laws contrary to the wishes of the people of the territory would be ignored.

Following his discussion of Illinois’s creative defiance of the (Congressional) prohibition of slavery in the Northwest Territory (a system of indentures), Douglas said:

> These facts furnish a practical illustration of that great truth, which ought to be familiar to all statesmen and politicians, that a law passed by the national legislature to operate locally upon a people not represented, will always remain practically a dead letter upon the statute book, if it be in opposition to the wishes and supposed interests of those who are to be affected by it, and at the same time charged with its execution.\footnote{134}{Cong. Globe, 31st Cong., 1st Sess. appendix 369-370.}

Put differently, according to Douglas, popular sovereignty is the wisest policy because Congressional imposition on any matter of importance, contrary to local views, would be ineffective. With the claim that free governments, to remain free, require the confidence of the people, Douglas was echoing a claim of Anti-Federalist localism, as discussed in chapter 2. Nevertheless, Douglas’s language is no ringing endorsement of the doctrine of popular
sovereignty. It is more of an argument that a policy of popular sovereignty is prudent because governments waste resources attempting to enforce laws lacking local support.

Later in the same speech, however, Douglas argued that the Congressional prohibition on slavery in the Oregon Territory, because it confirmed the prohibition enacted by the provisional government, “was done in obedience to that great Democratic principle, that it is wiser and better to leave each community to determine and regulate its own local and domestic affairs in its own way.” Only here does popular sovereignty become a great Democratic principle.

Thus far, I have shown Douglas vacillating between two kinds of prudential arguments, (1) that popular sovereignty is a solution to the sectional crisis and (2) that outside imposition without local assent is futile, and a set of nebulous, but more principled, arguments: (1) that popular sovereignty is a “great principle of free government,” (2) that it is a moral right of the people to regulate their domestic institutions in their own way, and (3) that popular sovereignty is a great democratic principle. At this point neither the policy nor the doctrine is predominant.

As the debate over the compromise measures stretched into May, Douglas offered a further epistemic argument in favor of popular sovereignty. Responding to Jefferson Davis’s attempt to amend the bill so as to allow slaves to be brought into the territories as property, Douglas argued, “We ought to be content with whatever way they may decide the question, because they have a much deeper interest in these matters than we have, and know much better what institutions suit them than we, who have never been there, can decide for them.” Douglas is once again echoing an Anti-Federalist argument. Centinel had argued, “If one general

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135 Cong. Globe, 31st Cong., 1st Sess. app. 370 (1850)
136 Douglas’s capital “D” should not be taken to imply that popular sovereignty is a great principle of the Democratic Party, and not democracy as an ideal. Douglas thought that the Democratic Party embodied democratic ideals (the party was often referred to as “the Democracy”), in contrast to the aristocratic Whig party.
137 Quoted in Johannsen, SAD, 287.
government could be instituted and maintained on principles of freedom, it would not be so competent to attend to the various local concerns and wants, of every particular district; as well as the peculiar governments, who are nearer the scene, and possessed of superior means of information[.]”

Both Douglas and Centinel grounded their localism (at least in part) on the idea that “closeness” to the scene has epistemic advantages. Yet it is not entirely clear whether the epistemic argument corresponds to popular sovereignty as policy or popular sovereignty as doctrine.

The passage of the Compromise of 1850 delayed further development of Douglas’s thought on popular sovereignty, for at last, the country turned to other issues. Interestingly, despite Douglas’s hatred of the agitation over slavery in the territories, it was Douglas himself who was probably most responsible for raising the issue once again in 1853. Unlike a previous generation of Democrats, and as a westerner committed to economic development, Douglas was not wholly opposed to so called “internal improvements.” His pet project was a railroad to the Pacific. But for any such project to get off the ground, the territory west of Missouri and Iowa would need to be organized. Settlement and the rule of law were necessary for the successful completion of the railroad. Douglas’s commitment to the Pacific railroad project provides a persuasive explanation for his unrelenting efforts to organize the Nebraska Territory, and perhaps even his willingness to waver on popular sovereignty.

During the debate over the Kansas-Nebraska bill, Douglas expanded on his previous argument that popular sovereignty was a democratic principle and reformulated his view of the federal government’s role in organizing new territories. In his committee’s report, Douglas argued, “When Congress has organized a Territory—erected and set into motion the machinery

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138 Centinel I, Philadelphia Independent Gazetteer, 5 October 1787
of its government—its duties have been performed and its legitimate powers are exhausted. Thenceforth the people are their own rulers in respect to all their domestic affairs, and interference from any other power is anti-democratic and arbitrary.”139 This is a slightly more forceful statement of his previous (1850) view: now interference with territorial popular sovereignty is anti-democratic (lower-case “d”) and arbitrary.

Before moving on to Douglas’s attempt to justify the Kansas-Nebraska Act after its passage, I note two features of the bill that expanded the powers of the territorial governments, consistent with Douglas’s new conception of the relationship between the territories and the federal government. These features altered the existing scalar hierarchy in a nuanced way, resulting in increased discretion for the territorial governments. In previous organic acts, territorial governors (appointed by the President) were given an absolute veto and Congress was empowered to review territorial legislation. The Kansas-Nebraska Act, on Douglas’s recommendation, replaced the territorial governor’s absolute veto with a qualified veto and eliminated Congressional review of territorial legislation.140 Therefore, compared to territories organized previously, the Kansas and Nebraska territories more closely resembled the institutional structure of existing states. A notable exception is that the governor of each territory was still appointed by the President. Johannsen interprets these changes as a significant move “in the direction of self-government.”141 They do so via a more intensive localism and a more extensive revision of the scalar hierarchy and the scale division of labor.

Even before the bill passed, Douglas felt the need to respond to mounting criticism. In a letter to the editor of the New Hampshire State Capitol Reporter, Douglas added, to his usual

141 Johannsen, SAD, 427.
argument stressing “the great fundamental principle of self-government,” the claim that popular sovereignty “presupposes that the people of the Territories are as intelligent, as wise, as patriotic, as conscientious as their brethren and kindred whom they left behind them in the States, and as they were before they emigrated to the Territories.” Furthermore, he said, it would be foolish to “violate the great principle of self-government…by constituting ourselves the officious guardians of a people we do not know, and of a country we never saw.” This statement is an unequivocal break with his claim, in 1845, that the federal government was the parent and the territories its children.

In response to the objections of the “Twenty-five Chicago Clergymen,” Douglas reiterated his views on popular sovereignty and previewed arguments he would make in greater detail in his 1859 Harper’s “copyright essay.” He claimed that popular sovereignty is the “principle upon which the thirteen colonies separated from the imperial government. It is the principle in defence of which the battles of the Revolution were fought.” He places popular sovereignty at the very center of American political life. It is the principle on “which all our free institutions rest,” and “upon which our entire republican system rests.” It is “the corner-stone in the temple of our liberties,” and most importantly, it is the principle upon which slavery is prohibited in the free states.

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142 Johannsen, ed. Letters of SAD, 284.
143 Johannsen, ed. Letters of SAD, 289.
144 See above, p.122.
If Douglas’s popular sovereignty doctrine was nearly solidified in the debates and aftermath of the Kansas-Nebraska Act, it was irrevocably confirmed in the debate over Kansas’s Lecompton constitution. In the battle between the free-soil and pro-slavery settlers in Kansas, the doctrine of popular sovereignty faced a practical test. It was in this period that Douglas became an unswerving adherent of the doctrine.

Following the organization of the Kansas territory, Missouri “border ruffians” took control of the state’s government in Lecompton by rigging elections and intimidating free-soil voters. An alternative but illegally constituted government formed in Topeka. When the pro-slavery government called an election for delegates to a constitutional convention, free-soil voters, knowing that the election would be rigged against them, refused to participate. The convention produced a radically pro-slavery document, and nearly sent the constitution to Washington without submitting the plan to a vote of the people. At the very last moment, the convention was persuaded to submit the choice between “constitution with slavery” and “constitution without slavery” to the people. The problem was that even if Kansans voted for the “constitution without slavery,” the odious features of the Lecompton constitution would remain, and any slaves brought to Kansas prior to the adoption of the constitution would have been permitted to stay (bound to their masters). Thus, according to free-soilers, there was actually no way to reject the Lecompton constitution or to prevent slavery from taking root in Kansas.

To Douglas, this was a flagrant violation of the doctrine of popular sovereignty. Lecompton’s supporters in Congress claimed that the convention was legally constituted and the constitution therefore valid. Douglas claimed (consistent with the facts) that the Lecompton constitution did not embody the will of the people. It was opposed by a majority of the settlers.

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147 My brief description of the issues in Kansas follows Potter, *The Impending Crisis*, ch. 12.
Douglas thought it obvious that the Lecompton constitution should be sent back to Kansas for full submission: “If it be the will of the people freely & fairly expressed it is all right, if not it must be rebuked.”

Douglas’s stand against the Lecompton constitution indicates that, at least by 1857, he was a steadfast and consistent adherent of the doctrine of popular sovereignty. It is of course impossible to determine the exact content of Douglas’s mind and his motives. However, as Quentin Skinner has argued, “innovating ideologists” “will generally find it necessary to claim that their actions were in fact motivated by some accepted principle. A further implication is that, even if they were not motivated by any such principle, they will find themselves committed to behaving in such a way that their actions remain compatible with the claim that their professed principles genuinely motivated them.” By 1857, Douglas was acting as though his actions were indeed constrained by his professed principles.

He went toe-to-toe with the Buchanan administration and Buchanan Democrats over the application of his conception of popular sovereignty in Kansas. It was widely believed at the time that Douglas was sacrificing his presidential ambitions (which, ironically, many scholars believe had led to his support for the Kansas-Nebraska Act in the first place) by opposing the Lecompton constitution. Buchanan made it a party test, which, in an era of strict party discipline, jeopardized Douglas’s position in the party. In a speech in the senate, Douglas exclaimed,

If this constitution is to be forced down our throats, in violation of the fundamental principle of free government, under a mode of submission that is a mockery and an insult, I will resist it to the last. I have no fear of any party associations being severed. I should regret any social or political estrangement,

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148 Quoted in Johannsen, *SAD*, 581. But is that really what popular sovereignty requires? If popular sovereignty is about leaving to the people, within specified geographical boundaries, to regulate their domestic institutions in their own way, why ought Congress intervene in the affairs of the Territory? Is it because the U.S. Constitution (Article IV, Section3) gives Congress the power to admit states?

149 *Visions of Politics*, 153.
even temporarily, but if it must be, if I cannot act with you and preserve my faith and my honor, I will stand on the great principle of popular sovereignty, which declares the right of all people to be left perfectly free to form and regulate their institutions in their own way. I will follow that principle wherever its logical consequences take me, and I will endeavor to defend it against assault from any and all quarters.  

A short while later, Douglas acknowledged the curious trajectory of his own views: “it is a matter of gratification to me that I feel each year that I am a little wiser than I was the year before; and I do not know that a month has ever passed over my head in which I have not modified some opinion in some degree, but I am always frank enough to avow it.”

Douglas faced a final test of his resolve with the so-called English bill. That bill indirectly submitted the Lecompton constitution to the voters by allowing them to accept or reject a land grant in a popular referendum. If the Kansans accepted the grant, they would enter the Union as a state under the Lecompton constitution. If they refused, they would be denied statehood until their population met the minimum threshold. Kansas was to be rewarded for accepting a pro-slavery constitution and punished for rejecting it. As a moderate, and as a compromiser, the English bill tempted Douglas. Ultimately, however, Douglas decided that the bill undermined the doctrine of popular sovereignty as he understood it and voted accordingly. Douglas now accepted popular sovereignty as an “immutable democratic principle” rather than a mere “measure of policy.”

Douglas Meets His Match: 1858-1861

In his great debates with Abraham Lincoln during the 1858 campaign for senator from Illinois, Douglas reiterated many of his views in their mature form. The two opening speeches

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152 This “minimum threshold,” though certainly not a hard and fast rule, was the population of the least populous existing state.
and seven join debates can be read as a pitched battle of ideas in the politics of space. Douglas’s doctrine of popular sovereignty required transferring control over slavery from the national government to the local territorial governments. Lincoln disagreed with Douglas that slavery was purely a domestic (i.e. territorial/state) institution, and therefore argued that the national government could and should prevent its expansion into the territories.  

Throughout his career, Douglas seemed puzzled that free-soilers like Lincoln would demand Congressional prohibition of slavery in the territories when popular sovereignty was predicted to have the same effect. This was because, at the time, it was commonly thought that slavery was adapted to a particular climate, and that it could not take root in the “desert” of the West. Douglas thought that popular sovereignty, in practice, would generate free territories and free states.

It should be mentioned that, following his defense of popular sovereignty in Kansas, the Republican Party in Illinois briefly courted Douglas. If Douglas were pro-slavery at heart, this overture would have made little sense. Indeed, it would be difficult to argue that Douglas was ever proslavery. In an essay dedicated to precisely this question, Graham A. Peck observes that “virtually all” Douglas scholars agree that “Douglas was antislavery.” Peck disagrees, arguing that Douglas was “moderately proslavery” but also had a “preference for freedom.”

This apparent contradiction can be resolved by recognizing the uncomfortable nature of Douglas’s commitment to popular sovereignty. When Douglas said that he did not care whether slavery was voted up or voted down, he really meant it. He really thought his own moral views

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154 See Jaffa, Crisis of the House Divided, 30, for a succinct summary of the disagreement.  
155 For a powerful rebuttal of this view, see Jaffa, Crisis of the House Divided, ch. 18.  
on slavery had no bearing in politics because the “great principle is the right of every community to judge and decide for itself, whether a thing is right or wrong, whether it would be good or evil for them to adopt it[.]”\textsuperscript{159} This is what I mean by the claim that Douglas was a second-order moral universalist and believed that collective political rights took precedence over individual moral rights (see above, p. 91).

In response to a question from the crowd during a speech in 1859—“Is slavery a Christian institution?”—Douglas said, “I do not know of any tribunal on earth that can decide the question of the morality of slavery or any other institution. I deal with slavery as a political question involving questions of public policy. I deal with slavery under the Constitution, and that is all I have to do with it.”\textsuperscript{160} We can of course condemn Douglas for this view, but it does not make him proslavery.

Seen as a clash in the politics of space, the disagreement between Lincoln and Douglas is easily understood. They disagreed over two main points, one normative and one factual. First, they disagreed about which spatial entity, i.e. which spatial scale, ought to have the authority to determine the legality of slavery. Second, they disagreed about the spatial reach of the institution of slavery. Lincoln’s position on the first point, until the Civil War, was that existing states had authority over slavery in the states, and the national government had authority over slavery in the territories.\textsuperscript{161} I need not repeat Douglas’s position on the first point here.

\textsuperscript{159} Johannsen, ed. \textit{Lincoln-Douglas Debates}, 27, emphasis added.
\textsuperscript{160} Speech of Stephen A. Douglas at Wooster, Ohio, September 16, 1859 in Jaffa and Johannsen, eds., \textit{In the Name of the People}, 226.
\textsuperscript{161} Here is how Douglas characterized the positions of the two parties: “The great question which separates the Democratic party from the Opposition party at the present time involves the slavery question, the Opposition party contending that the slavery question is a federal question to be determined and controlled by the federal authority, and the Democratic party holding that the slavery question is a local question, a State question, depending on local authority and to be determined by the people in it in the several States and Territories of this Union.” Speech of Stephen A. Douglas at Cincinnati, Ohio, September 9, 1859 in Jaffa and Johannsen, eds., \textit{In the Name of
On the second point, Douglas really believed that slavery was a local institution, in law and in fact. Lincoln, on the other hand, along with the whole free-soil movement, thought the spread of slavery to the territories would have toxic effects elsewhere. Slavery could not be contained in the states and territories in which it was legally authorized.\footnote{First Debate with Stephen A. Douglas at Ottawa, Illinois, August 21, 1858 in Lincoln, \textit{Collected Works of Abraham Lincoln}, 3:18. Originally published as Abraham Lincoln, \textit{The Collected Works of Abraham Lincoln}, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953). He also said (reading from a previous speech): “I think, and shall try to show, that [the repeal of the Missouri Compromise] is wrong; wrong in its direct effect, letting slavery into Kansas and Nebraska—and wrong in its prospective principle, allowing it to spread to every other part of the wide world, where men can be found inclined to take it. Speech at Peoria, Illinois, October 16, 1854 in \textit{Collected Works of Abraham Lincoln}, 2: 255. Quoted in Jaffa, \textit{Crisis of the House Divided}, 36.}{162} In Ottawa, Lincoln charged that Douglas, “and those acting with him, have placed that institution on a new basis, which looks to the \textit{perpetuity} and \textit{nationalization of slavery}.”\footnote{As François Guizot put the general point, “Do not think, Gentlemen, that it is easy to separate local interests from general interests; this distinction is not as real as some imagine.” Quoted in Lucien Jaume, \textit{Tocqueville: The Aristocratic Sources of Liberty}, trans. Arthur Goldhammer (Princeton: Princeton University Press, 2013), 25.}{163}

It is revealing that Douglas repeatedly accused Lincoln of desiring legal uniformity and once suggested that the only way to achieve the uniformity Lincoln supposedly desired was by “blotting out State sovereignty, merging the rights and sovereignty of the States into one consolidated empire, and vesting Congress with the plenary power to make all the police regulations, domestic and local laws, uniform throughout the limits of the Republic.”\footnote{Quoted in the \textit{People}, 152-153. For Lincoln’s position after the firing on Fort Sumter, see Eric Foner, \textit{The Fiery Trial: Abraham Lincoln and American Slavery} (New York and London: W.W. Norton & Company, 2010).}{164} For Douglas, legal uniformity was incompatible with diversity of conditions. Furthermore, according to Douglas, the framers knew “that in a country as wide and broad as this, with such a variety of climate, production and interest, the people necessarily required different laws and institutions in different localities.”\footnote{Johannsen, ed. \textit{Lincoln-Douglas Debates}, 44. Also see above, chapter 2.}{165}
Lincoln agreed with these points about uniformity and diversity advanced by Douglas, but also believed that the wrong of slavery was of such gravity that its regulation could not be left to the people of the territories. In the fifth debate, at Galesburg, Lincoln said:

And from this difference of sentiment—the belief on the part of the one that the institution is wrong, and a policy springing from that belief which looks to the arrest of the enlargement of that wrong; and this other sentiment, that it is no wrong, and a policy sprung from that sentiment will tolerate no idea of preventing that wrong from growing larger, and looks to there never being an end of it through all the existence of things,—arises the real difference between Judge Douglas and his friends on the one hand, and the Republicans on the other.  

Lincoln persistently attacked Douglas for his claimed indifference as to the rightness or wrongness of slavery. For instance, “When Judge Douglas says that whoever and whatever community wants slaves, they have a right to them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that any body has a right to do wrong.”  

This is what I mean by the claim that Lincoln was a first-order moral universalist and believed that individual moral rights took precedence over collective rights.  

Douglas flatly disagreed. He believed that the residents of the appropriate spatial entity had to determine whether the institution was right or wrong; for Douglas, the appropriate spatial entity was the local community. In contrast, Lincoln believed that the nation was the final moral tribunal, and that the nation-state was the spatial entity rightly empowered to answer the slavery question. Douglas, on the other hand, held “that the people of the slaveholding States are civilized men as well as ourselves; that they bear consciences as well as we, and that they are accountable to God and their posterity, and not to us.”  

An ambiguity remains in Lincoln’s thought. Did he consider slavery wrong because it violates natural law? Or did he believe it was wrong because the national majority judged it so? I think the answer is both: for Lincoln, slavery was wrong because it violated natural law, and because the majority of the national people believed it was wrong, they were justified in prohibiting its extension. Put differently, Lincoln believed slavery was wrong, but as a politician, he relied on an accommodating national majority.

There is some direct evidence for the claim that Lincoln considered the nation as a whole the proper tribunal on the slavery question. In 1857, Lincoln remarked, “I am for the people of the whole nation doing just as they please in all matters which concern the whole nation; for those of each part doing just as they choose in all matters which concern no other part; and for each individual doing just as he chooses in all matters which concern nobody else. This is the principle.” At Peoria in 1858: “Whether slavery shall go into Nebraska, or other new territories, is not a matter of exclusive concern to the people who may go there. The whole nation is interested that the best use shall be made of these territories. […] Finally, I insist, that if there is ANY THING which it is the duty of the WHOLE PEOPLE to never entrust to any hands but their own, that thing is the preservation and perpetuity, of their own liberties, and institutions.” And at Cincinnati: “we know that in a government like this, in a government of the people…what lies at the bottom of all of it is public opinion.” What I am suggesting is that although Lincoln believed slavery violates fundamental moral principles, he also believed that

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171 Speech at Cincinnati, Ohio, September 17, 1859 in Collected Works of Abraham Lincoln, 3:442.
only the authority of “the people,” specifically the national people, could give political and legal
force to universal moral principles.

After winning re-election to the Senate in 1858, and looking ahead to the presidential
election, Douglas took to the pages of Harper’s New Monthly Magazine to clarify his
understanding of the doctrine of popular sovereignty. Although he dealt with the constitutional
issues related to the territories and the Dred Scott decision, the article mostly covered old
ground. Most interestingly, Douglas compared, in vivid language, his doctrine of popular
sovereignty to the American Revolution:

Thus it appears that our fathers of the Revolution were contending, not for
Independence in the first instance, but for the inestimable right of Local Self-
Government under the British Constitution; the right of every distinct political
community—dependent Colonies, Territories, and Provinces, as well as sovereign
States—to make their own local laws, form their own domestic institutions, and
manage their own internal affairs in their own way, subject only to the

This was to attempt the simultaneous spatial-temporal legitimation strategy I first mentioned in
my discussion of Cass’s Nicholson letter. It was also to assimilate the American Revolution to
popular sovereignty and not, as one might expect, popular sovereignty to the American
Revolution. Douglas made the American patriots out to be practitioners of the politics of space,
and advocates of localism \emph{par excellence}. Perhaps most importantly, for my claim about the
relationship between localism \emph{as activity/policy} and localism \emph{as theory/legitimation}, Douglas
takes a wider view of the applicability of the doctrine. Although initially motivated by the
slavery question, his view was now that the popular sovereignty doctrine applied \emph{across} policy
domains.
Douglas reiterated his commitment to the doctrine of popular sovereignty in the 1860 Democratic Convention in Charleston (later reconvened in Baltimore). He could have easily won the presidential nomination (which he had sought in both 1852 and 1856) had he sacrificed popular sovereignty and accepted the radical southern platform. Ironically, radical southerners and Republicans agreed, contra Douglas, on the need for a national slavery policy for the territories. Republicans wanted to exclude slavery from the territories altogether; radical southerners (e.g. Yancey) wanted a Congressional slave code in order to implement the common-property doctrine, thereby protecting slave property in the territories. The radical southern demand was a direct response to Douglas’s Freeport doctrine.

Douglas would not budge; in fact, he publicly refused to accept the nomination unless the platform embraced popular sovereignty. Radical southerners ended up walking out of the convention and the Democratic Party nominated two candidates: Douglas in the North, Breckenridge in the South. Douglas Democrats became advocates of localism surrounded by nationalizers, in both the North and the South. Douglas would support popular sovereignty until his death in 1861, only wavering in his desperate attempts to avoid the Civil War.

Concluding Remarks

In this chapter, I have reinterpreted the debate over slavery in the territories as a dispute in the politics of space, arguing that Douglas’s popular sovereignty proposal was an example of localism as policy and that the arguments constituting the doctrine are an example of localism as a strategy of justification. More importantly, the battle in the politics of space to determine which spatial entity had authority over the legality of slavery in the territories was simultaneously a battle to define the people. This the Missouri border ruffians knew all too well.
Glossary of Key Doctrines

Alabama platform, fourth plank: radical version of the common-property doctrine: “the federal government [ought] to actively establish and protect slavery in any of the territories acquired from Mexico” (Walther 2006: 103).

Cass doctrine: “I am in favor of leaving to the people of any territory, which may be hereafter acquired, the right to regulate [slavery] for themselves, under the general principles of the constitution” (Nicholson Letter). Also see: northern popular sovereignty.

Clayton compromise: let the federal courts decide the slavery question for the territories.

common-property doctrine: since the territories are the common treasure of the United States, slaveholders may take their slave property into the territories (e.g. John C. Calhoun, William Lowndes Yancy).

equal footing doctrine: Congress should not or could not dictate the terms of the constitution of a potential new state (Annals of Congress, House of Representatives, 15th Congress, 2nd Session, 1170; Childers 2012: 46; Quitt 2012: 109).

federal consensus: the federal government cannot interfere with slavery in the states (Oakes 2013: 3).

federal consensus, corollary to: new states can amend their constitutions, enabling them to prohibit or allow slavery after becoming states (Childers 2012: 46). Also see: equal footing doctrine.

Freeport doctrine: “if the people are opposed to slavery they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst” (Stephen A. Douglas; Johannsen, ed. 1965: 88; Fehrenbacher 1961).
Missouri compromise: “in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state, contemplated by this act [Missouri], slavery and involuntary servitude…shall be, and is hereby, forever prohibited” (Act of March 6, 1820, ch. 22, 3 Stat. 548).

Missouri compromise line extension: extend Missouri Compromise line at 36°30’ through the Mexican Cession to the Pacific Ocean (e.g. James Buchanan, James K. Polk, Stephan A. Douglas).

popular sovereignty, northern: “the right of the people of the Territories to govern themselves in respect to their local affairs and internal polity” (Douglas 1859: 519).

popular sovereignty, southern: “the right of a prospective state to draft its constitution without interference” (Childers 2012: 64). Also see: equal footing doctrine.

territories clause: “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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State” (U.S. Constitution, Art. 4, sec. 2).

Wilmot Proviso: “an express and fundamental condition to the acquisition of any territory from the Republic of Mexico…neither slavery nor involuntary servitude shall ever exist in any part of said territory” (Cong. Globe, 29th Cong., 1st Sess. 1217).