States Rights, Southern Hypocrisy, and the Crisis of the Union

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On December 20 we marked -- I cannot say celebrated -- the sesquicentennial of South Carolina's secession. By the end of February, 1861 six other states would follow South Carolina into the Confederacy. Most scholars fully understand that secession and the war that followed were rooted in slavery. As Lincoln noted in his second inaugural, as he looked back on four years of horrible war, in 1861 "One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war."[1]

What Lincoln admitted in 1865, Confederate leaders asserted much earlier. In his famous "Cornerstone Speech," Alexander Stephens, the Confederate vice president, denounced the Northern claims (which he incorrectly also attributed to Thomas Jefferson) that the "enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically." He proudly declared: "Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his

[1] Abraham Lincoln, Second Inaugural Address, March 4, 1865.

natural and normal condition. " Stephens argued that it was "insanity" to believe that "that the negro is equal" or that slavery was wrong.[2]

Stephens only echoed South Carolina's declaration that it was leaving the Union because "A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the common Government, because he has declared that that 'Government cannot endure permanently half slave, half free,' and that the public mind must rest in the belief that slavery is in the course of ultimate extinction."[3] In other words, South Carolina was leaving the Union because the leaders of that state believed that the incoming Lincoln administration threatened slavery.

Shortly after South Carolina left the Union, Georgia did the same. Beginning with the second sentence of its Declaration of Secession, Georgia made it clear that slavery was the force behind secession: "For the last ten years we have had numerous and serious causes of complaint against our non-slave-holding confederate States with reference to the subject of African slavery. They have endeavored to weaken our security, to disturb our domestic peace and tranquility, and persistently refused to comply with their express constitutional obligations to us in reference to that property, and by the use of their power in the Federal Government have striven to deprive us of an equal enjoyment of the common Territories of the Republic. This hostile policy of our confederates has been pursued with every circumstance of aggravation which could arouse the passions and excite the hatred of our people, and has placed the two sections of the Union for

[2] Alexander Stephens, "Cornerstone Speech," March 21, 1861. Henry Cleveland, *Alexander H. Stephens, in Public and Private: With Letters and Speeches, Before, During, and Since the War* (Philadelphia, 1886), pp. 717-729.

[3] "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union," Adopted December 24, 1860. This was adopted four days after the state officially seceded. The Declarations of Secession for Georgia, Mississippi, and South Carolina, Texas are conveniently found at http://avalon.law.yale.edu/subject_menus/csapage.asp

many years past in the condition of virtual civil war."[4] Mississippi made the point even clearer, starting with the second sentence of its Declaration: "Our position is thoroughly identified with the institution of slavery-- the greatest material interest of the world."[5]

Despite the almost universal understanding of serious scholars that slavery was at the root of secession and the Civil War -- and the almost endless statements of Confederate leaders on this point -- a considerable number of American cling to the belief that secession was about "states' rights," and that southerners left the Union to escape a tyrannical national government that was trampling on their rights. Advocates of this old fashioned, and simultaneously modern, neo-Confederate, ideology, rarely discuss the substance of southern states' rights claims, because they will either lead to an intellectual dead end, or lead back to slavery.

I:

Ironies of the States' Rights Interpretation of Secession

The notion that secession was rooted in states' rights is correct in only one way. The southern states claimed that they had the "right" to seceded, and that this right was rooted in the inherent sovereignty of the states. South Carolina noted that the Federal Government's "encroachments upon the reserved rights of the States, fully justified" the state in "withdrawing from the Federal Union" and that the "now the State of South Carolina" had "resumed her

[4] Georgia Declaration of Secession, January 29, 1861.

[5] A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union," Journal of the State Convention (Jackson, MS: E. Barksdale, State Printer, 1861), pp. 86-88.

separate and equal place among nations."[6] Thus, the right to secession was rooted in a particular view of states' rights that most of the states of the Union had never accepted.

However, the substantive reasons for secession there not the rights of the states. While rhetorically South Carolina and other seceding states may have claimed that the national government had "encroached" on their "reserved rights," none of the seceding states offered any examples of this, because in fact there were none. Instead, all of their examples -- the reasons they offered to justify secession -- were about national policy involving slavery in the territories, the admission of new slave states, John Brown's raid at Harpers Ferry, northern opposition to slavery; the refusal of northern states to aggressive help in the return of fugitives slaves, and the other actions by northern state government that were hostile to slavery. Most of these complaints were not in fact about the national government impinging on southern states' rights, rather they were demands that the national government *ought to* impinge on northern states' rights. Thus, there are in fact, four significant ironies to the states rights issue and secession.

First, because the Constitution of 1787 was deeply protective of slavery, and the Supreme Court enhanced this protection, there was directly tie to nationalism and slavery. This meant that before 1861 the slave states did not need to have a states' rights ideology to protect their most important social and economic institutions. A nationalist position did that for them. Most of the complaints about the national government and slavery in the secessionist documents were not about the national government impinging on southern states rights. For example, South Carolina complained that the northern states were not helping to enforce the Fugitive Slave Law of 1850, and thus "laws of the General Government have ceased to effect the objects of the Constitution."[7]

[6] South Carolina Declaration

[7] Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union," Adopted December 24, 1860.

Second, because the Constitution was proslavery, and supporters of slavery controlled the national government almost continuously from 1801 until 1861, the most important proponents of states' rights in the antebellum period were northern opponents of slavery. Northerners need to assert states' rights in order to protect their free blacks from kidnapping and protect their fugitive slave neighbors from being returned to bondage. Thus, starting in the 1820s most free states passed personal liberty laws which frustrated the implementation of the Fugitive Slave Law of 1793. In the 1830s courts in Pennsylvania, New York, and New Jersey upheld state personal liberty laws that undermined the 1793 law and effectively held that the 1793 law was unconstitutional, in part on states' rights grounds.[8] In the early 1840s Governor William H. Seward of New York and three successive governors of Maine refused to surrender blacks wanted in the South for helping slaves escape. Just before the Civil War Governors Salmon P. Chase and William Dennison also refused to surrender a free black who had helped a slave escape.[9] These northern governors rested their actions on states rights arguments.[10] Finally, after the Supreme Court struck down the first wave of northern personal liberty laws, in *Prigg v. Pennsylvania* (1842) [11] many northern states responded with new laws, which simply withdrew all northern cooperation in the return of fugitive slaves.[12] This was a variant of states' rights philosophy. In these laws, passed in the 1840s and more so in the 1850s after the adoption of the

[8] See Jack v. Martin, 14 Wend 507 (NY 1835); State v. Sheriff of Burlington, No 36286 (NJ 1836) (also known as Nathan, Alias Alex. Helmsley v State). This unreported case is discussed in Paul Finkelman, State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law of 1793, 23 Rutgers L J 753 (1992). The Pennsylvania Supreme Court upheld its state personal liberty law in an unreported opinion in Prigg v. Pennsylvania.

[9] See Kentucky v. Dennison, 24 How. 66 (1861).

[10] Paul Finkelman, States Rights North and South in Antebellum America, in Kermit Hall and James W. Ely, Jr., eds, An Uncertain Tradition: Constitutionalism and the History of the South 125-58 (Athens, Ga, 1989); Paul Finkelman, The Protection of Black Rights in Seward's New York, 34 Civil War History 211-34 (1988); and Paul Finkelman, States' Rights, Federalism, and Criminal Extradition in Antebellum America: The New York-Virginia Controversy, 1839-1846, in Hermann Wellenreuther, ed, German and American Constitutional Thought: Contexts, Interaction, and Historical Realities 293-327 (Berg, 1990).

[11] Prigg v. Pennsylvania, 16 Pet (42 U.S.) 539 (1842).

[12] See generally Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780-1861 (Baltimore: Johns Hopkins University Press, 1974).

fugitive slave law of 1850, the northern states took the position that their states did not have to cooperate with the federal government. In doing so, they made enforcement of the 1850 law difficult, or in some places, nearly impossible, to implement.

Third, the most aggressive states rights arguments of the antebellum decade came from northerners, particularly judges in Ohio,[13] New York[14] and most of all Wisconsin.[15] In response to the Oberlin-Wellington rescue in Ohio, that state's supreme court came within one vote causing a confrontation with the federal government by issuing a writ of habeas corpus directed at the U.S. marshal in Cleveland. This Wisconsin Supreme was not so circumspect and in fact issued a writ of habeas corpus that forced U.S. Marshall Stephen Ableman to surrender the abolitionist Sherman Booth after he had been arrested for helping rescue a fugitive slave. In New York, in *Lemmon v. The People* (1860) the state's highest court rejected any measure of comity towards visiting southerners. Here the states emancipated eight Virginia slaves who were brought into the state for just one night, while their owners waited for a steamboat to take them to New Orleans. They were in the city only because New York was the only east coast port that had direct transit to New Orleans. The decision in *Lemmon* was a legitimate within the context of American constitution law and state police powers. But, southerners believed this decision, and similar ones in other states, violated the spirit of the Union and the comity that should be given to citizens of other states. In addition, some southerners believe the decision in *Lemmon* actually violated the Commerce Clause or the Privileges and Immunities Clause of the Constitution because it denied southerners the right to travel in their United States with their constitutionally protected property *and* it interfered with interstate commerce.

[13] Ex parte Bushnell, Ex parte Langston, 9 Ohio St. 77 (1859).
[14] Lemmon v. The People, 20 New York 562 (1860).
[15] In re Booth and Rycraft, 3 Wis. 157 (1854); reversed, Ablemen v. Booth, 21 How. 506 (1859).

Finally, while southerners proclaimed their support for states rights, they insisted that road to states' rights ran in only one direction. They denied that northerners had a right to assert *their* states' rights when it came to slavery. Thus for example, South Carolina complained that the northern states "assume the right of deciding upon the propriety of our domestic institutions; and have denied the rights of property established in fifteen of the States and recognized by the Constitution; they have denounced as sinful the institution of slavery; they have permitted open establishment among them of societies, whose avowed object is to disturb the peace and to eloign the property of the citizens of other States."[16] In other words, South Carolina opposed the idea that the free states could have their "states' rights" to allow antislavery organizations to operate. Similarly, South Carolina denounced the *Lemmon* decision as violation of comity without any sense of the irony that it was actually opposing states' rights. Significantly, since the 1820s, South Carolina had successfully refused to allow northern free black sailors to enter its ports. Almost every other southern state with a ocean port passed a similar black seamen's law. Under these laws free black sailors were jailed while their ships were in southern ports and were only released when the ship was about to sail, *if* the ship captain paid the jailer of the feeding and housing these sailors. Although believing such laws violated the commerce clause, the supremacy clause, the treaty power, Justice William Johnson, while riding circuit, refused to interfere with the enforcement of these laws.[17] The southern states insisted that states' rights empowered them to arrest free black sailors (or any other free blacks) entering their jurisdiction. In the 1840s Massachusetts sent commissioners to South Carolina and Louisiana to negotiate

[16] Declaration of South Carolina
[17] Elkison v. Deliesseline, 8 Fed. Cas. 493 (1823).

some accommodation for free black sailors from the North, but both states refused to meet with the commissioners, and basically expelled them.[18]

Ironically then, the southern states argued that states' rights allowed them to decide who they would let into their states. But, when northerners applied the same logic to visiting southerners with slaves, South Carolina suddenly rejected its support for states rights, and argued this was grounds for secession.

II

States' Rights and Fugitive Slaves

The most important states' rights activities of the antebellum period came out of the northern opposition to the return of fugitive slaves. The Fugitive Slave Law of 1793 provided almost no protection against kidnapping of free blacks or mistaken seizures of free blacks by southern slave catchers. The northern personal liberty laws were a states' rights response to this federal law. They supplemented the federal law by guaranteeing that there would a due process hearing for fugitive slaves. In *Prigg* the Supreme Court struck down all these laws on the grounds that the 1793 law preempted state laws, and that the fugitive slave clause of the Constitution, gave the national government exclusive jurisdiction in this area. In *Prigg* Justice Story held that in absence of a federal law, the states were barred from passing legislation under the dormant powers of Congress. The Court held that the states *ought* to help enforce the federal law, but they would not be required to. In the court's first use of the concept of unfunded mandates, the Story held that since state officials were not paid by the federal government, they could not be compelled to enforce or implement a federal law.

[18] Paul Finkelman, States Rights North and South in Antebellum America, in Kermit Hall and James W. Ely, Jr., eds, An Uncertain Tradition: Constitutionalism and the History of the South 125-58 (Athens, Ga, 1989).

Southerners complained that without state help, it would be impossible to recover fugitive slaves because there were very few federal officials to aid them. Thus, they demanded a new and stronger fugitive slave law, which federal enforcement. This resulted in the Fugitive Slave Law of 1850, which created the first federal law enforcement bureaucracy in American history. By providing for the appointment of a federal commissioner in every county in the nation, the 1850 law vastly expanded the reach of the federal government. Southerners wrote this law and pushed it through Congress. The law had no place for state participation. At most, states might provided jail space that federal marshals could use to incarcerate fugitive slaves or provide back up police to prevent riots that might lead to freeing fugitives from federal custody. Enforcement was placed entirely in the hands of the federal government. Most of the northern states responded to this law by simply withdrawing any support for the law. This was constitutionally permissible under *Prigg* and did not in any way violate the law of 1850. This was a moderate states' rights response to a deeply oppressive and unfair federal law.[19]

In explaining their reasons for secession, southern states complained that the northern states did not voluntarily cooperate with the return of fugitive slaves. South Carolina asserted that "The States of Maine, Vermont, New Hampshire, Connecticut, Rhode Island, Massachusetts, New York, Pennsylvania, Ohio, Wisconsin, Michigan and Iowa, by solemn legislative enactments, have deliberately, directly or indirectly violated the 3rd clause of the 2nd section of the 4th article of the federal constitution, and laws passed in pursuance thereof; thereby annulling a material provision of the compact, designed by its framers to perpetuate the amity between the members of the confederacy and to secure the rights of the slave-holding States in their domestic institutions-- a provision founded in justice and wisdom, and without the enforcement of which

[19] The 1850 law denied an alleged slave a jury trial, access to the writ of habeas corpus, or even the right to testify in his own behalf.

the compact fails to accomplish the object of its creation. Some of those States have imposed high fines and degrading penalties upon any of their citizens or officers who may carry out in good faith that provision of the compact, or the federal laws enacted in accordance therewith." This was of course a grotesque overstatement of what the free states had done. Moreover, it was a complete denial of their states' rights. Under historic notions of states' rights, the states were in fact free to prohibit their officials from enforcing federal laws. The Supreme Court agreed in *Prigg*.

They only "nullification" of the Constitution in the North came from Wisconsin, where the Supreme Court declared the 1850 law unconstitutional. This was the most extreme northern states' rights position, and one that no other northern states took. Ohio refused to return a free black, Willis Lago, to Kentucky where he was charged with theft for helping a slave escape. But, gubernatorial discretion in the rendition of fugitives from justice was also consistent with states' rights theory, and the Supreme Court correctly upheld this position in *Kentucky v. Dennison*.

Thus, by 1861 the states' rights claims were no longer southern. The South denied the viability of states' rights arguments and instead moved to a position of demanding northern fidelity to southern values. Thus, the southern states seceded because Northern states were using their states' rights to protest slavery, protect abolitionists, and to denounce the injustice of slaveholding. The South no longer wanted states' rights -- it just wanted its own way. In the classic move of "my way, or the highway," South Carolina marched down the road of secession and war.