STATES' RIGHTS, SOUTHERN HYPOCRISY, AND THE CRISIS OF THE UNION

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I. INTRODUCTION

On December 20, 2010 we marked—I cannot say celebrated—the sesquicentennial of South Carolina's secession. By the end of February 1861, six other states had followed South Carolina into the Confederacy. Most scholars fully understand that slavery was at the root of secession and the war that followed. As Abraham Lincoln noted in his second inaugural in 1865, "[o]ne-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. After secession but before the Civil War broke out, Alexander H. Stephens, the Confederate vice president and one of the two most perceptive and brightest men in the Confederate government,[2] forcefully set out the reasons for secession in his famous "Cornerstone Speech." Here, Stephens tied slavery to race, making clear that the cornerstone of the Confederacy was not merely chattel slavery, but the total

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1. ABRAHAM LINCOLN, *Second Inaugural Address*, *in* 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 332 (Roy P. Basler ed., 1953).

2. The other one was Judah P. Benjamin, who held a number of positions in the Confederate cabinet and then enjoyed a second career as one of the leading barristers in England.

subordination of black people for the benefit of white people. In this sense the Confederacy was the political grandparent of Nazi Germany and apartheid-era South Africa— regimes founded on the assumption of the racial and ethnic superiority of the ruling class and the utter inferiority and subordination of other races and groups. Thus Stephens declared that, "Our new government is founded upon . . . its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery —subordination to the superior race —is his natural and normal condition."[3]

Stephens denounced the northern claims (which he incorrectly 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."[4] He unabashedly asserted: "Our new government is founded upon exactly the opposite idea."[5] Stephens argued that it was "insanity" to believe "that the negro is equal" or that slavery was wrong.[6] He proudly predicted that the Confederate Constitution "has put at rest, *forever*, all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the proper *status* of the negro in our form of civilization."[7]

Stephens only echoed South Carolina's declaration, explaining 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.[8]

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3. Alexander H. Stephens, *The Corner Stone Speech* (Mar. 21, 1861), *reprinted in* HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE. WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 717, 721 (Philadelphia, National Publishing Co. 1886).

4. *Id.* (emphasis in original).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (1861), *reprinted in* J.A. MAY & J.R. FAUNT, SOUTH CAROLINA SECEDES 76-81 (1960), *available at* http://avalon.law.yale.edu/19th_century/csa_scarsec.asp (last visited Sept. 24, 2011). This was adopted four days after the state officially seceded. The Declarations of Secession for Georgia, Mississippi, South Carolina, and Texas are conveniently found at http://avalon.law.yale.edu/subject_menus/csapage.asp.

In other words, South Carolina was leaving the Union because Lincoln believed slavery was wrong and should one day—in the far distant future—be ended.

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 many years past in the condition of virtual civil war.[9]

Mississippi emphatically made the same point, 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."[10]

Despite the almost universal understanding of serious scholars that slavery and racial subordination were at the root of secession and the Civil War—and the almost endless statements of Confederate leaders supporting this analysis—a considerable number of Americans 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.

The relationship of secession to states' rights is often misunderstood, especially by those who argue that the slave states left

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9. *Georgia Secession* (1861), *reprinted in* 1 FRED C. AINSWORTH & JOSEPH W. KIRKLEY, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 81-85 (Ser. 4, 1900), *available at* http://ebooks.library.cornell.edu/cgi/t/text/pageviewer-idx?c=moawar;cc=moawar;q1=Georgia;rgn=full%20text;idno=waro0127;didno=waro0127;view=image;seq=0093.

10. *A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union* (1861), *reprinted in* JOURNAL OF THE STATE CONVENTION 86-88 (Jackson, E. Barksdale 1861), *available at* http://docsouth.unc.edu/imls/msconven/menu.html (last visited May 6, 2012).

the Union to protect their states' rights. The southern states did not leave the Union because the national government was trampling on their "rights." The states that left the union never asserted that they were being denied their "states' rights" —that the national government had obliterated the lines been between national power and state power. Nor did the southern states complain that the national government was too powerful and so it threatened the sovereignty of the state governments. On the contrary, as I set out below, the southern states mostly complained that the northern states were asserting *their* states' rights and that the national government was not powerful enough to counter these northern claims. Similarly, the secessionists did not complain that an oppressive national government was infringing on the civil liberties of southern citizens; rather the complaint was that the national government refused to suppress the civil liberties of northern citizens.

When considering federal law and policy in 1860, the southern states should have had almost no complaints. Since 1850, they had won almost every debate in Congress and almost every federal law dealing with slavery had benefited the South. A series of Supreme Court decisions on slave transit,[11] black citizenship,[12] the right of masters to take slaves into the territories,[13] and the constitutionality of the Fugitive Slave Law of 1850[14] had all favored the South. Significantly, two of these decisions were unanimous, even though throughout the period four of the nine Justices were northerners. Two of the northerners dissented in *Dred Scott v. Sandford*, the Court's most proslavery decision of the decade.[15] But, by 1860, one of these dissenters, Benjamin R. Curtis, had left the Court and been replaced by an adamantly proslavery northern Democrat, Nathan Clifford.

II. THE 1850S: THE HIGH POINT OF PROSLAVERY NATIONALISM

The 1850s was a remarkable decade for supporters of slavery. In three areas of law—involving the territories, the recovery of fugitive slaves, and the right to travel with slaves—all three branches of the national government expanded the rights of slave owners. At the same

11. Strader v. Graham, 51 U.S. (10 How.) 82 (1851).
12. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
13. *Id.*
14. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).
15. Arguably, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), was equally as proslavery. For a discussion of this point, see Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994).

time, in two other areas of law, the national government dramatically restricted the rights of free blacks.

By the end of the decade, slavery was legal in all the federal territories, the federal government was vigorously enforcing a draconian fugitive slave law that had enabled hundreds of masters to recover their runaways, and the Supreme Court had expanded the right of masters to travel in the free states with their slaves. Furthermore, the Court hinted that it would guarantee masters even greater rights of transit, when given the opportunity to do so.[16] Congress prohibited blacks from testifying on their own behalf at a fugitive slave hearing, suspended the writ of habeas corpus for alleged fugitives throughout the nation to remand them to slave catchers, and provided harsh punishments for anyone interfering with the return of a fugitive slave. Meanwhile, the Supreme Court ruled that blacks, even if free, and even if accorded equal rights of citizenship in their own states, would never be considered citizens of the United States, and in effect had no rights under the Constitution. At the same that it denied any constitutional rights to free blacks, the Court held that slavery was a specially protected institution under the Constitution. Under the Court's reasoning, Congress could, and should, protect slavery property in the territories, but could never restrict it.

A. Restrictions and Limitations on Slavery in 1850

In 1850, southerners could not have imagined they would be so successful in securing federal support for slavery over the next ten years. At the beginning of the decade, slave owners were closed out of virtually all of the existing federal territories. The United States had acquired vast amounts of land from Mexico, but the area was closed to slavery. During the Mexican War, the House of Representatives had passed the Wilmot Proviso, banning slavery from the new territories. The Proviso never made it through the Senate, where the South had a majority from early 1845 until mid-1848.[17] But, even after the North gained parity in the Senate, it was impossible to pass any law organizing the new territories. Thus, the new territories remained unorganized with no

16. *Dred Scott*, 60 U.S. at 468 (Nelson, J., concurring).

17. The admission of Florida on March 3, 1845 gave the South a one state majority in the Senate. Texas admission on December 29, 1845 gave the South a two state majority. The South maintained this two state majority until December 28, 1846 when Iowa entered the Union, and parity was not reached until Wisconsin became a state on May 26, 1848. This history undermines the notion, perpetuated by many scholars, that the admission of California ended a history of parity in the Senate. With the opening of the Mexican Cession to slavery it was perfectly possible to imagine new slaves states entering the Union in the southwest.

functioning government. Meanwhile, thousands of people poured into California after gold was discovered there. With no territorial government, there were no laws allowing slavery and the only existing law was that of Mexico, which prohibited slavery. Thus, slave-owners felt cut out of the gold rush and unable to move into what would later become Arizona, New Mexico, Utah, Nevada, and much of Colorado.

Slavery was also officially excluded in all of the land left over from the Louisiana Purchase except the Indian Territory, but white slave owners had little opportunity to move there. Nor was slavery allowed in the Oregon country—the present-day states of Oregon, Washington, and part of Idaho. Southerners believed they should be entitled to settle the new lands acquired from Mexico, especially because southerners had disproportionately fought in the Mexican War. Indeed the two heroes of the Mexican War were Zachary Taylor, a Kentuckian by birth who owned sugar plantations and many slaves in Louisiana,[18] and Winfield Scott, who was a slaveowner from Virginia.[19] Many southerners also believed that the Compromise of 1820, which banned slavery north of the southern boundary of Missouri, unconstitutionally deprived them of a right to settle land owned by all Americans.[20]

In 1850, masters had a constitutional right to recover slaves wherever they could find them. The Fugitive Slave Law of 1793 authorized federal judges and state and local magistrates at any level to hear fugitive slaves cases, and remand runaways to those who claimed them.[21] In *Prigg v. Pennsylvania*,[22] the Supreme Court had given masters a right of recaption to seize fugitive slaves wherever they found them and peacefully take them south without any judicial superintendence.[23] However, this right was mostly impossible to assert in taking slaves that had traveled far into the North. To recover slaves who were more than a day's ride from the South, masters needed the help of law enforcement officers. But, after *Prigg*, most northern states passed laws closing their jails and courtrooms to slave catchers and prohibiting states officials from helping to recover runaway slaves.[24]

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18. *See* JOHN S.D. EISENHOWER, ZACHARY TAYLOR (2008).

19. *See* JOHN S.D. EISENHOWER, AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT (1999).

20. JAMES A. DORR, JUSTICE TO THE SOUTH! AN ADDRESS 10 (New York, 1856).

21. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793).

22. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

23. For a full discussion of the proslavery implications of *Prigg*, see Finkelman, *supra* note 15. *See also* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 24 (1993).

24. Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIS. 5 (1979).

Typical of this state activity was Massachusetts's "Latimer Law," which prohibited any state judge from hearing a case under the Fugitive Slave Law of 1793, or any sheriff or other official from arresting a fugitive slave.[25] Any judge, sheriff, or other state or local official violating this law could be fined and imprisoned.[26] Thus, while southerners had a *right* to recover runaway slaves anywhere in the nation, they lacked the ability to easily do so. Without federal enforcement, southerners seeking runaways would be frustrated by northern states' rights.

By 1850, most of the free states had adopted the principle that no one could be held as a slave without positive law.[27] This principle was first articulated by Chief Justice Lord Mansfield in *Somerset v. Stewart*,[28] which was decided in Britain before the American Revolution and thus was part of the common law at the time of Independence. Under the *Somerset* principle, masters could not travel with their slaves through most of the North without the risk of losing them. During and after the Revolution, some of the northern states had made accommodations for visiting masters. Pennsylvania granted them a right of transit of up to six months[29] and New York gave them nine months.[30] But in 1841, New York repealed its law[31] and Pennsylvania did the same in 1847.[32] Thus, by 1850, southern masters felt deprived of their right to travel throughout the nation with their slaves. Similarly, under the Missouri Compromise, they were prohibited from taking their slaves into the western territories, even for a visit.[33]

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25. An Act Further to Protect Personal Liberty, 1843 Mass. Acts ch 69 at 33.

26. *Id.* For a full history of these laws, see THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861 (1974).

27. For detailed discussions of these laws and the common law evolution of this principle in the North, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

28. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.). For a discussion of this case, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

29. 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 492-96 (Philadelphia, 1810).

30. 1799 NY Laws, ch. 62., *reenacted in* 1817 N.Y. Laws, ch. 137.

31. 1841 N.Y. Laws, ch. 247.

32. Act of March 3, 1847, 1847 Pa. Laws 206. For detailed discussions of these laws and the common law evolution of this principle in the North, see FINKELMAN, *supra* note 27.

33. As the facts of *Dred Scott* show, some masters, like Captain John Emerson, did take their slaves into the area, especially those like Captain John Emerson, who were posted at military bases. Most masters, however, did not venture into the area with their property. For example, in an unreported case a court in Muscatine, Iowa emancipated the slave Jim White whose master brought him there before statehood. *The Negro Case*, BLOOMINGTON HERALD, Nov. 18, 1848. *See also* J.P. Walton, *Unwritten History of Bloomington (Now Muscatine)*, *in Early Days*, 1 Annals of Iowa 40-44 (1882).

Thus, as the 1850s began, slaveowners had reason to complain about the legal structure of the nation. In their own states, slaveowners were secure. Despite annoying denunciations of slavery by abolitionists and antislavery Senators and Congressmen, the national government had no constitutional power to interfere with slavery in the existing states. The states' rights of the southern states were secure. But, southerners felt their federal constitutional rights were at risk when they entered the free states because those states emancipated any slaves voluntarily brought within their jurisdiction.[34] Thus, southerners felt that the northern states were denying them the right to travel with their constitutional sanctioned property. Similarly, if their slaves ran away to the free states, those states refused to fulfill their constitutional obligation by cooperating in the return of fugitive slaves.

B. The Great Proslavery Shift of the 1850s

In the 1850s, supporters of slavery won huge victories in Congress, which legalized slavery throughout the west. Congress further protected the rights of masters to recover fugitive slaves with a new and powerfully nationalistic fugitive slave law. Added to this were Supreme Court decisions which made slavery a specially protected institution under the Constitution, allowed slavery in all the federal territories, concluded that free blacks had virtually no rights under the Constitution and could never be considered citizens of the United States, and undermined the right of free states to emancipate visiting slaves.

1. The Compromise of 1850

In January of 1850, Senator Henry Clay of Kentucky introduced a series of resolutions to settle the pending issues before the nation.[35] Clay's resolutions, and his Omnibus Bill that followed, overwhelmingly favored the South. Clay's Omnibus Bill ultimately collapsed, and was revived in a series of separate laws known as the Compromise of 1850.[36] The Compromise organized the new territories without any ban on slavery, thus opening more than 400,000 square miles to masters and their bondsmen and bondswomen. This eviscerated the Missouri Compromise, which Clay himself had crafted in 1820, by allowing

34. FINKELMAN, *supra* note 27.

35. Paul Finkelman, *The Appeasement of 1850*, *in* CONGRESS AND THE CRISIS OF THE 1850S 36 (Paul Finkelman & Donald R. Kennon eds., 2012).

36. DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 98-101 (Don E. Fehrenbacher ed., 1976).

slavery north of the 36° 30' parallel.[37] Much of the Mexican Cession—what became Utah and Nevada and parts of Colorado and Wyoming—was north of the Missouri Compromise line. In addition to this, the Compromise gave Texas tens of thousands of acres of land and ten million dollars so that the government in Austin could pay off its pre-statehood debts.[38]

In return for these sweeping concessions to slavery in the west, the Compromise brought California into the Union as a free state. This was hardly a concession to the free states, however, because by the time Congress passed the California bill there were nearly 100,000 free people there and at most, a few hundred slaves.[39] California was destined to be a free state and even southern nationalists knew this. This gave the free states a two vote majority in the Senate, but there was no reason to believe that this would be permanent. The rest of the Mexican Cession was large enough to accommodate five or six or even more new slave states.[40]

The Compromise also dealt with two non-territorial issues involving slavery. The new Fugitive Slave Law of 1850 was one of the most repressive and unfair federal laws in our history.[41] The law provided for the appointment of federal commissioners in every county who, along with judges, were required to "hear and determine the case" in "a summary manner" without a jury.[42] Under this law, the slave owner or his agent had only to present "satisfactory proof" that the person claimed was a fugitive slave.[43] This could be done by "deposition or affidavit" certified "in writing" before any judge or magistrate in the home state of the slave owner.[44] The potential for fraud, or even mistaken identity, was huge. The claimant could bring any black who fit the description in the "deposition or affidavit" before a judge and demand the right to remove the person as a fugitive slave.[45]

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37. Finkelman, *Appeasement of 1850*, *supra* note 35, at 54; Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845 (2011).

38. Act of Sept. 9, 1850, ch. 49, 9 Stat. 446.

39. Finkelman, *The Cost of Compromise and the Covenant with Death*, *supra* note 37, at 862.

40. For a more detailed discussion of the 1850 debate, see *id.,* and PAUL FINKELMAN, MILLARD FILLMORE (2011).

41. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

Alleged fugitives were prohibited from testifying at their own hearings, even to explain that the wrong person had been seized.[46] The law also prohibited any judge—state or federal—from issuing a writ of habeas corpus for an alleged slave. This was the first time Congress had ever suspended the writ of habeas corpus—and it was done in clear violation of the procedures set out in the U.S. Constitution.[47] The habeas provision of the Constitution envisioned a suspension for an immediate emergency caused by an invasion or rebellion. But in 1850 Congress indefinitely suspended the Great Writ throughout the whole country even though there was no immediate crisis.

Under the law, anyone aiding a fugitive slave or interfering with the rendition process was subject to a $1,000 fine plus court costs, six months in jail, and civil damages of $1,000 to be paid to the slave owner for each slave who was not recovered.[48] If literally enforced, a northerner could be fined, sued, or jailed for merely giving a black person walking down the road a piece of bread or a cup of water, or allowing the black traveler to sleep in his barn. Hiring a black who turned out to be a fugitive came with enormous potential costs. In an age when there were no meaningful forms of identification, and thus no way to know if a black was free or a fugitive, the law effectively encouraged northerners—even free black northerners —to refuse to hire blacks because they might turn out to be fugitive slaves. The harsh penalties, and the minimal standards of proof, could force northern whites to assume that all blacks they saw were fugitives even though in 1850 there were more than 150,000 free blacks living in the North.[49] From the perspective of blacks and many white northerners, the Act of 1850 had brought the law of slavery into the free states and required northerners to do the bidding of southerners.

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46. *Id.* ("In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence.").

47. U.S. CONST. art. I, § 9 ("The Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it."). *See* Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience – A History Lesson for a Post-9-11 America*, 2 CARDOZO PUBLIC L. POLICY & ETHICS J. 25 (2003).

48. Fugitive Slave Act of 1850 § 7.

49. The Court had essentially held this in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847). Van Zandt, an Ohio farmer, gave a ride in his wagon to nine blacks walking along the road. *Id.* at 219. They were all fugitives belonging to Jones, a Kentucky slave owner. *Id.* at 218. Jones successfully sued Van Zandt for the value of one of the slaves who permanently escaped and the cost of recapturing the rest. *Id.* at 220. Van Zandt argued that he had no notice they were slaves and that, in Ohio, all people were presumptively free. *Id.* at 221. The Supreme Court upheld the judgment against Van Zandt, and thus put northerners on notice that they should not assume blacks in their states were free. *Id.*

The statute created, for the first time, a national system of law enforcement through the appointment of one or more federal commissioners in every county in the nation. The Act of 1850 authorized the commissioners to hear fugitive slave cases and summon sufficient force to secure the return of runaways. Federal marshals and commissioners were empowered to call on the militia, the army, or create a posse to enforce the law. The statute gratuitously declared that "all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law," although there was no clear remedy if citizens refused to help enforce the law.[50] If these measures failed, however, and marshals were unable to prevent a rescue, they could be held personally liable for the value of any slave who escaped their custody. No other federal law had ever provided such penalties for officers who were unable to implement a law.

Someone could be dragged south as a slave without ever being permitted to offer his or her own voice as evidence that he or she was free. The outrageousness of the testimony provision was matched by the provision for paying the commissioners and judges who heard these cases. If a judge ruled in favor of the alleged slave, thus setting him or her free, the judge was entitled to a five-dollar fee.[51] If the judge ruled for the master, he got a ten-dollar fee.[52] Most northerners viewed this as a blatant attempt to bribe the courts.[53]

The Fugitive Slave Act was an utterly one-sided law that threatened the liberty of every black in the North, while also jeopardizing their white friends, neighbors, and employers. The "compromise" offered in return for this law was a ban on the public sale of slaves in the District of Columbia. This ban would not harm slave owners or the system of slavery, but merely end the embarrassment of having slaves marched through the national capital in chains or publicly auctioned off in the shadow of the White House and Congress.[54] Northerners (and even a few southerners) were deeply offended by this. But southerners understood that the ban was merely symbolic because slave owners in

50. *See* Fugitive Slave Act of 1850 § 5.

51. *Id.* § 8.

52. *Id.*

53. The differential payment was based on the fact that commissioners were paid by collecting fees (rather than a salary) and it took much more time to fill out the paperwork necessary to return a fugitive slave than to set a black free. While the different fees made economic sense, they created the appearance that justice was for sale in the North. The payment scale was a public relations disaster for the national government and the Fillmore administration.

54. See generally the essays in IN THE SHADOW OF FREEDOM: THE POLITICS OF SLAVERY IN THE NATIONAL CAPITAL (Paul Finkelman & Donald R. Kennon eds., 2011).

the District could easily take their slaves to Virginia for sale.[55] They could also privately sell their slaves. Southern opposition to ending the trade in the District was not based on the fear that it would actually harm the system of slavery—because it clearly would not—but as a matter of proslavery principles. Ending the D.C. slave trade would be an admission that buying and selling slaves was morally wrong—which extreme southern nationalists would not admit and did not believe.

At the same time, shrewd southerners may have understood the ban on the trade in the national capital would actually benefit them. The ban on the trade virtually ended the demands of northern Congressmen for an end to slavery in the District of Columbia. Thus, what was sold to the northerners as a victory was strategically valuable to the South.

In sum, the Compromise of 1850 was an enormous victory to the South. It opened up vast amounts of land to slavery, much of it north of the Missouri Compromise line. This territory would eventually accommodate four full states and parts of three others, but it might easily have been used to create six or seven new slave states. It transferred ten million dollars from the national government to the state of Texas, which constituted the largest transfer of money from the national government to a state since the nation began. The new fugitive slave law committed the national government to spending huge sums of money, created a new level of court officers, and vastly expanded the reach and power of the national government, just to accommodate slaveowners. The law also trampled on states' rights, reaffirming the Supreme Court's holding in *Prigg* that the northern states had no right to protect the liberty of their black residents and citizens, even those who were born free. The law provided no penalties for southerners who purposefully kidnapped or mistakenly seized free blacks, but provided harsh penalties for northerners who tried to prevent the removal of their neighbors, friends, and relatives, even if they believed they were free. The law trampled on the rights of the free states by sending federal commissioners, marshals, and troops into northern communities to round up blacks.

In return for these huge concessions, Congress banned the public slave trade in the District of Columbia, which as noted above, had no impact on the institution of slavery and did not prevent masters from selling their slaves across the river in Alexandria. The North also gained when Congress admitted California as a free state. But this result was hardly a concession to the North, because everyone understood

55. A. Glenn Crothers, *The 1846 Retrocession of Alexandria: Protecting Slavery and the Slave Trade in the District of Columbia*, *in* IN THE SHADOW OF FREEDOM, *supra* note 54, at 141.

Californians wanted to enter the Union as a free state. Even Robert Toombs of Georgia did "not consider the admission of California an aggression on the South" because he acknowledged that the new state's residents were overwhelmingly opposed to slavery.[56] More significantly, Congress and President Millard Fillmore refused to consider a proposed constitution from citizens of New Mexico, which would also have led to that territory entering the Union as a free state.[57]

2. The Kansas-Nebraska Act

Four years after the Compromise of 1850—which from a northern perspective might better be called the Appeasement of 1850[58]—the South made new and spectacular gains in the Kansas-Nebraska Act.[59] This law provided for the organization of territorial government in the remaining western lands, which included all or part of the present-day states of Nebraska, Kansas, South Dakota, North Dakota, Montana, Wyoming, Colorado, and Idaho. In 1820, Congress had banned slavery in all of this territory as part of the Missouri Compromise. Extreme proslavery southerners had long argued that the Missouri Compromise was unconstitutional because Congress could not deprive them of the right to enter a federal territory with their property. This argument had little resonance in the North or among moderate southerners, who accepted the power of Congress to regulate the territories. Furthermore, if Congress could prohibit slavery in some territories, it could specifically allow slavery and protect it in other territories. In the Florida Territory, for example, federal and territorial authorities prosecuted the ship captain Jonathan Walker when he tried to help a boat load of slaves escape to the British West Indies, where they would have been free.[60] After his conviction, Walker was branded on his hand with the letters S.S., for "slave stealer."[61] Such support for slavery in some of the territories was seen, at least by moderate southerners, as a reasonable trade-off for banning slavery in other territories.

After the Mexican War, a number of moderate southerners seemed willing to simply extend the Missouri Compromise line though the new territories, but southern extremists opposed this, and they were joined by

56. FINKELMAN, MILLARD FILLMORE, *supra* note 40, at 114.

57. *Id.* at 83-85, 89.

58. Finkelman, *Appeasement of 1850*, *supra* note 35.

59. Kansas–Nebraska Act, ch. 59, 10 Stat. 277 (1854).

60. ALVIN F. OICKLE, JONATHAN WALKER: THE MAN WITH THE BRANDED HAND 1-13 (1998).

61. *Id.*

two northern doughface leaders. After Henry Clay's Omnibus Bill collapsed, Senator Stephen A. Douglas of Illinois picked up the pieces of Clay's proposal and guided them through Congress one bill at a time.[62] Thus, Douglas willingly opened all the new territories to slavery, pleasing his southern friends and allies in the Democratic Party, and positioning himself to run for president in 1856. Millard Fillmore, the Whig accidental president, eagerly signed the compromise bills while refusing to submit to Congress a constitution for New Mexico written by a democratically elected convention in the territory because it would have created a free state of New Mexico.[63] Both men assumed their relentless support of slavery in the Compromise package would strengthen their presidential ambitious. Fillmore was unable to win the Whig nomination in 1852, but Douglas, who was only thirty-nine years old, was still building his career with the presidency as his ultimate goal.

Douglas furthered his presidential ambitions in 1854 by sponsoring the Kansas-Nebraska Act. This law provided for the creation of territorial governments in what would become most of the Great Plains states. The Missouri Compromise of 1820 had banned slavery in all of this area, but Douglas's bill allowed slavery in all of the area. Douglas said that the issue of slavery would be determined by "popular sovereignty," inviting proslavery and antislavery settlers to move there.[64] The result was not a peaceful referendum on slavery, but a mini-Civil War known as Bleeding Kansas.[65] Aggressive supporters of slavery, aided by the administrations of Franklin Pierce and James Buchanan, created a proslavery government in the territory, even though a clear majority of the settlers were northerners who opposed slavery.[66] Eventually, Buchanan pushed for the admission of Kansas as a slave state based on the Lecompton Constitution, which was written by a fraudulently elected convention and ratified by an equally suspect referendum.[67]

In 1858 Douglas would break with Buchanan over Lecompton, but not because it would lead to a slave state in Kansas. Douglas famously declared that he did not care whether slavery was voted "up or down."[68]

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62. POTTER, *supra* note 36, at 109-11.

63. FINKELMAN, MILLARD FILLMORE, *supra* note 40, at 84; POTTER, *supra* note 36, at 110-11 (1976).

64. POTTER, *supra* note 36, at 172-74.

65. NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA (2004).

66. MICHAEL F. HOLT, FRANKLIN PIERCE (2010).

67. POTTER, *supra* note 36, at 297-328.

68. *Id.* at 349.

Douglas objected to the Lecompton Constitution because it was written and ratified by a patently fraudulent process and everyone in the United States knew this. But, on the main principle—Popular Sovereignty—Douglas, Buchanan, and almost every other Democrat leader agreed that slavery was an issue for the settlers of the territories, not the Congress or the president. It should be remembered that throughout this period, Democrats controlled the Senate and had there been no secession, the Democrats would have been able to block Lincoln at every turn. Furthermore, the three state majority[69] that northerners had in the senate—the votes of six senators—was fragile and hardly dominant. A solid South could always find a few northern senators—the four they would need—to outvote the North on significant sectional issues.

Whatever the outcome of Kansas settlement, it is hard to see how southerners could complain about the process. Fillmore and Douglas in 1850 and Pierce and Douglas in 1854 had opened up almost all the territories to slavery. That southerners were unable to win the vote in Kansas was a function of their preference for cotton over wheat; but that did not mean they might not win the settlement race in other territories. Most importantly, opening all the territories to slavery in 1850 in 1854 along with the Fugitive Slave Law of 1850 reflected a Congress more than willing to support the South. Whatever else southerners had to complain about, they could not legitimately complain that Congress had harmed their states' rights, or slavery, in the previous decade.

3. The Supreme Court and Slavery in the 1850s

The Supreme Court heard a number of cases involving slavery in the late 1840s and 1850s. With one minor exception,[70] slaveowners won every one of these cases and the Court overwhelmingly supported the power of Congress to assist them in recovering fugitive slaves. In *Jones v. Van Zandt*,[71] a unanimous Court held that northerners could be held liable for the fugitive slaves they aided even if they did not have any "notice" that the person they helped was a fugitive. In this case, Van Zandt, an Ohio farmer, had given a ride to a group of slaves walking along a road in outside of Cincinnati.[72] He was subsequently sued by the owner, Jones, for the cost of recovering them and the value of one who

69. By this time Minnesota and Oregon had become free states, along with California, as non-slave states.

70. Norris v. Crocker, 54 U.S. (13 How.) 429 (1851).

71. Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847).

72. *Id.* at 219.

was never recovered.[73] Van Zandt argued there was a presumption of freedom for everyone in Ohio and thus he could not "know" that the people he gave the ride to were fugitive slaves.[74] The Court rejected this argument, essentially applying the law of the South—that all blacks were presumptively slaves—to the free states.[75] The opinion was written by Justice Levi Woodbury of New Hampshire, and even the antislavery John McLean of Ohio accepted the result.

In *Strader* v. *Graham*,[76] the Court considered for the first time the thorny problem of slave transit into free states. The Constitution allowed for the recovery of fugitive slaves, but said nothing about the right to voluntarily take a slave to a free state. *Strader* involved three slave musicians who, with the permission of their master (Graham), had traveled on a number of occasions from Kentucky to Ohio and Indiana to perform.[77] After a number of such trips, they boarded Strader's steamboat, without Graham's permission, and escaped.[78] Graham won a judgment in the Kentucky courts because Strader had allowed the slaves on his ship without their master's written permission, in violation of Kentucky law.[79] On appeal, Strader argued that the slaves had become free under the Northwest Ordinance and the laws of Ohio and Indiana when Graham allowed them to go to those free jurisdictions.[80] This argument was based on a legal theory, first developed in *Somerset v. Stewart*[81] by Lord Chief Justice Mansfield, that a slave became free when taken to a free jurisdiction because there was no positive law creating slavery, and once free, the former slave was always free. By 1850, almost every northern state had adopted this rule, as had a many southern states.[82] But by this time a number of slave state jurists and politicians had begun to question the propriety of following this rule when slaves returned from visits to free states.

In *Strader*, the Court faced the problem indirectly. The Kentucky courts had ruled that the status of Graham's slaves was not at issue, and whether they were entitled to their freedom for previous trips to the North could only be determined if they appeared before the state

73. *Id.* at 220.
74. *Id.* at 221.
75. *Id.*
76. Strader v. Graham, 51 U.S. (10 How.) 82 (1851).
77. *Id.* at 93.
78. *Id.*
79. *Id.* at 92-93.
80. *Id.* at 85-86.
81. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).
82. The history of this rule is set out in FINKELMAN, *supra* note 27.

courts.[83] But until they appeared in a Kentucky court, they were presumptively slaves. Therefore, Strader had violated Kentucky law by allowing Graham's slaves on his ship and he was liable to Graham for their value.[84] The U.S. Supreme Court ruled that it must defer to the state of Kentucky on this matter, upholding the judgment against Graham.[85] Under this rule, the slave states were free to decide for themselves who was a slave and who was not. In other words, the Court gave the slave states sanction to ignore free state law, and perhaps federal law, in determining who was a slave and who was not. The decision implied that the slave states could ignore the Full Faith and Credit provision of Article IV of the Constitution, just as Kentucky had ignored the constitutions of Indiana and Ohio. The true proslavery implications of this case would become apparent in *Dred Scott v. Sandford*, six years later.

A year after *Strader*, the Court clarified an aspect of the jurisprudence of fugitive slaves in *Moore v. Illinois*.[86] In *Prigg*,[87] the Court had struck down all state personal liberty laws. In that case, Justice Story had declared that no state could add to the requirements for the return of fugitive slaves, and thus all personal liberty laws providing due process for alleged fugitives were unconstitutional.[88] Despite this huge victory for slavery, in a concurring opinion Chief Justice Taney complained that the decision would also prevent the free states from helping in the return of fugitive slaves.[89] But in *Moore*, the Court upheld an Illinois statute which punished Illinois citizens for harboring fugitive slaves.[90] This was one more victory for slavery.

Five years later, the Court decided *Dred Scott v. Sandford*,[91] the most notoriously proslavery decision in the nation's jurisprudence. The outcome of the case—that Scott remained a slave—was plausibly correct, based, if nothing else, on *Strader v. Graham*.[92] Scott claimed his freedom because he had lived in the free state of Illinois and in the

83. *Strader*, 51 U.S. at 89.
84. *Id.*
85. *Id.* at 96-97.
86. Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).
87. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).
88. *Id.* at 625-26.
89. *Id.* at 627-28 (Taney, J., concurring).
90. *Moore*, 55 U.S. at 22.
91. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
92. Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" For the Defendant*, 12 LEWIS & CLARK L. REV. 1219 (2008); Paul Finkelman, *Coming to Terms with* Dred Scott: *A Response to Daniel A. Farber*, 39 PEPPERDINE L. REV. 495 (2012).

Wisconsin Territory (in what later became Minnesota) where slavery was banned by the Compromise of 1820 (also called the Missouri Compromise) and various other federal laws.[93] The Court initially planned to decide the case on the basis of *Strader*, and had it done so the case would probably be long forgotten. But the southerners on the Court insisted on a more comprehensive result, which led to Taney's massive and extraordinarily proslavery opinion.[94] Speaking for the Court, Taney held that 1) slavery was a specially protected property under the Constitution; 2) free blacks could never be considered citizens of the United States and essentially had "no rights" under the Constitution; 3) that Congress had no power to ban slavery in the federal territories; 4) no law in the territories could free slaves because that would be an unconstitutional taking under the Fifth Amendment; and 5) that the Missouri Compromise unconstitutionally banned slavery in the federal territories, and by implication the ban on slavery in the Act creating the Oregon Territory was also unconstitutional. This was a sweeping proslavery opinion that settled the issue of slavery in the territories by allowing slavery in all the territories.

A concurring opinion by Justice Nelson of New York also directly telegraphed how the Court would rule on the issue of slave transit. Nelson noted at the very end of his opinion:

> A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on Business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.[95]

The implication was clear: as soon as the Court had an opportunity, it would guarantee that masters could travel anywhere in the United States with their slaves. In his "House Divided Speech,"[96] Abraham Lincoln predicted that the logic of Dred Scott would lead to legalizing slavery in

93. These statutes are set out in PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 8-10 (1997).

94. The best discussion of the internal politics of the Court on this is DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

95. *Dred Scott*, 60 U.S. at 468 (Nelson, J., concurring).

96. ABRAHAM LINCOLN, *A House Divided: Speech at Springfield, Illinois*, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 1, at 461.

the North through the "next Dred Scott decision."[97] Nelson's opinion certainly made this seem likely.

The final presecession decision on slavery was *Ableman v. Booth*,[98] arguably the most anti-states' rights decision since *Martin v. Hunter's Lessee*,[99] *McCulloch v. Maryland*,[100] and *Cohens v. Virginia*.[101] But the difference between the cases is striking. *Martin*, *McCulloch*, and *Cohens* were seen as attacks on the sovereignty of southern states, leading to complaints by some Virginians that the Court had eviscerated the rights of the states. *Ableman* was directed at northern states and supported the Fugitive Slave Law of 1850. The case began when Sherman Booth, an antislavery editor in Milwaukee, helped lead a mob that rescued a fugitive slave name Joshua Glover, who had been in federal custody.[102] United States Marshal Stephen Ableman then arrested Booth. At this point, the Wisconsin Supreme Court intervened, freeing Booth with a writ of habeas corpus.[103] There, the Wisconsin Court declared that the Fugitive Slave Law of 1850 was unconstitutional.[104] The Wisconsin Supreme Court then refused to send a record of the case to the U.S. Supreme Court. Thus, the U.S. Supreme Court did not decide the case until 1859, when Chief Justice Taney emphatically asserted:

> No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.[105]

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97. For a discussion of this, see FINKELMAN, *supra* note 27.

98. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

99. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

100. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

101. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

102. For a full history of the case, see H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (2006).

103. *In re* Booth & Rycraft, 3 Wis. 157 (1854).

104. *Id.* at 212.

105. Ableman v. Booth, 62 U.S. (21 How.) 506, 524 (1859).

Northern states' rights claims would gain no support from the Supreme Court. Nor was the U.S. Supreme Court troubled by the Fugitive Slave Law of 1850. Speaking for a unanimous Court, Taney unambiguously proclaimed: "the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States."[106] Taney noted that the Wisconsin Supreme Court had asserted its supremacy over the federal courts. This astounded the Chief Justice as he noted:

> These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.[107]

Ableman was a strongly nationalist opinion—as strong as anything Justice Joseph Story or Chief Justice John Marshall might have written. But it was proslavery nationalism. It upheld the Fugitive Slave Law of 1850 and emphatically rejected the antislavery jurisprudence of a northern state. It was a decision slaveowners loved.

4. The Proslavery 1850s

The 1850s was a decade of enormous political success for the South and slavery. In 1849, slavery was illegal in almost all of the federal territories. After 1857, for the first time since the Constitution was adopted, slavery was legal in *every* federal territory. In 1849, there was a weak federal fugitive slave law with few viable enforcement mechanisms. After 1850, the nation developed, for the first time in American history, a national law enforcement bureaucracy, solely for the purpose of returning fugitive slaves. In 1849, almost all the free states emancipated visiting slaves with no constitutional restrictions. By 1857, the Supreme Court had made it clear that it would strike down such behavior at the first opportunity. In the 1840s, blacks were gaining rights in the North, as Rhode Island enfranchised them and Ohio repealed its black laws.[108] Black lawyers were beginning to appear in northern courts, and it seemed to be only a matter of time before some black attorney would seek admission to the bar of the U.S. Supreme

106. *Id.* at 526.

107. *Id.* at 514.

108. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986).

Court.[109] By 1860, Congress and the president had teamed up to deny every black in the nation the right to fundamental due process when seized as a fugitive slave, and the Supreme Court had expanded this deprivation of their status by holding that blacks could never be citizens of the United States and that, under the Constitution, blacks "had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[110] Finally, in the 1850s, Congress and the Courts worked in tandem to undermine the rights of the free states to protect their black neighbors or resist the encroachments of slavery into their communities.

III. SECESSION AND STATES RIGHTS

After a decade of spectacular success at the national level, in 1860-61 the most aggressive proslavery politicians led their states out of the Union. Were they concerned about states' rights? Was the right of the states to control their own domestic institutions at the heart of secession? The answer is clearly no.

There was not a single example of the deprivation of states' rights that southerners could complain about. The national government did not threaten to end slavery in the states or even interfere with it. In his first inaugural address, Lincoln reaffirmed this while quoting his own party's platform on this point:

> Apprehension seems to exist among the people of the Southern States that by the accession of a Republican Administration their property and their peace and personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed and been open to their inspection. It is found in nearly all the published speeches of him who now addresses you. I do but quote from one of those speeches when I declare that—
>
> I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.
>
> Those who nominated and elected me did so with full knowledge that I had made this and many similar declarations and had never recanted them; and more than this, they placed in the platform for my acceptance, and as a law to themselves and to me, the clear and emphatic resolution which I now read:

109. Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161 (1994).

110. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

> "*Resolved*, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter what pretext, as among the gravest of crimes."[111]

Lincoln certainly hated slavery, and always had. But, he understood the Constitution precisely as did John C. Calhoun or Jefferson Davis: that the national government had no power to regulate slavery in the states. Lincoln had "no inclination" to interfere with slavery in the states because he had no power to do so; nor did any other politician in the Lincoln administration or in Congress. Southern states' rights had not been threatened in the 1850s and there was no threat to them from the incoming administration. Whatever Lincoln's policies were towards the territories, there was no threat to states' rights in the South. The secession documents underscore this. Most of the complaints of the seceding states are about national policies outside the southern states or about actions of the North.

The most important state right that any of the southern states claimed was that they had the "right" to secede. The secessionists claimed 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 "now the State of South Carolina" had "resumed her separate and equal place among nations."[112] 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 were 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

111. Abraham Lincoln, *First Inaugural Address—Final Text*, Mar. 4, 1861, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262-63 (1953).

112. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, *supra* note 8.

aggressively 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 complaints that the national government had note impinged 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 a direct 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."[113]

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 needed 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.[114] In the early 1840s, Governor William H. Seward of New York and three successive governors of Maine refused to surrender northern free blacks wanted in the South for helping slaves escape. Just before the Civil War, Governors Salmon P. Chase and William Dennison of Ohio also refused

113. *Id.*

114. *See* State v. Sheriff of Burlington, No. 36286 (N.J. 1836) (also known as Nathan, Alias Alex. Helmsley v. State); Jack v. Martin, 14 Wend. 507 (N.Y. 1835). *State v. Sheriff of Burlington*, which is unreported, 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*.

to surrender a free black who had helped a slave escape.[115] These northern governors rested their actions on states' rights arguments.[116] Finally, after the Supreme Court struck down the first wave of northern personal liberty laws in *Prigg*,[117] many northern states responded with new laws, which simply withdrew all northern cooperation in the return of fugitive slaves.[118] This was a variant of states' rights philosophy. In these laws, passed in the 1840s and more so in the next decade after the adoption of the 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.

Third, the most aggressive states' rights arguments of the antebellum decade came from northerners, particularly judges in Ohio,[119] New York,[120] and most of all Wisconsin.[121] In response to the Oberlin-Wellington rescue in Ohio, that state's supreme court came within one vote of causing a confrontation with the federal government by issuing a writ of habeas corpus directed at the U.S. marshal in Cleveland.[122] The Wisconsin Supreme Court 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*, the state's highest court rejected any measure of comity towards visiting southerners.[123] Here, the state emancipated eight Virginia slaves who were brought into the state for just long enough to take the next steamboat to New Orleans.[124] 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 legitimate within

115. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

116. Paul Finkelman, *States Rights North and South in Antebellum America*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125-58 (Kermit L. Hall & James W. Ely, Jr. eds., 1989); Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 CIV. WAR HIS. 211-34 (1988); Paul Finkelman, *States' Rights, Federalism, and Criminal Extradition in Antebellum America: The New York-Virginia Controversy, 1839-1846*, *in* GERMAN AND AMERICAN CONSTITUTIONAL THOUGHT: CONTEXTS, INTERACTION, AND HISTORICAL REALITIES 293-327 (Hermann Wellenreuther ed., 1990).

117. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

118. *See generally* MORRIS, *supra* note 26.

119. *Ex parte* Bushnell, *Ex parte* Langston, 9 Ohio St. 77 (1859).

120. Lemmon v. The People, 20 N.Y. 562 (1860).

121. *In re* Booth & Rycraft, 3 Wis. 157 (1854), *rev'd*, Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

122. *Bushnell*, 9 Ohio St. at 77.

123. *Lemmon*, 20 N.Y. at 565.

124. *Id.*

the context of American constitutional 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 believed 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 throughout the United States with their constitutionally protected property *and* it interfered with interstate commerce.

Finally, while southerners proclaimed their support for states' rights, they insisted that the 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.[125]

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 a 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 an 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 for feeding and housing these sailors. Although believing such laws violated the Commerce Clause, the Supremacy Clause, and the treaty power, Justice William Johnson, while riding circuit, refused to interfere with the enforcement of these laws.[126] 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

125. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, *supra* note 8.

126. Elkison v. Deliesseline, 8 F. Cas. 493, 496-98 (C.C.D.S.C. 1823).

commissioners to South Carolina and Louisiana to negotiate some accommodation for free black sailors from the North, but both states refused to meet with the commissioners and basically expelled them.[127]

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.

Thus, in the end, secession was not based on the need of the southern states to protect their states' rights from an aggressive national government. On the contrary, the southern states argued that they were leaving because the northern states insisted on using their own states' rights to oppose slavery. Nor was it about the "encroachments" of the national government, because there were none. Nor could it be about the failure of the national government to protect slavery. Federal troops had been used to suppress John Brown's invasion of Harpers Ferry, Virginia. Federal troops had been used to bring the fugitive slave Anthony Burns out of Boston. The national government had expended enormous resources to prosecute people who rescued, or tried to rescue, fugitive slaves in New York,[128] Massachusetts,[129] Pennsylvania,[130] Ohio, [131] Wisconsin,[132] Illinois,[133] and elsewhere. While many of those prosecutions were unsuccessful, there were convictions in Ohio after the Oberlin rescue, in Wisconsin after the Joshua Glover rescue, and in other places. While Wisconsin may have resisted the fugitive slave law in Sherman Booth's case, the government won in the end and Booth's printing press was seized and sold for the benefit of the slave owner,[134] and after the Supreme Court decision, Booth went to jail and the Wisconsin Supreme Court declined to intervene.[135] Despite the intense

127. Finkelman, *States Rights North and South in Antebellum America*, *supra* note 116.

128. United States v. Cobb, 25 F. Cas. 481 (C.C.N.D.N.Y. 1857); United States v. Reed, 27 F. Cas. 727 (C.C.N.D.N.Y. 1852).

129. United States v. Stowell, 27 F. Cas. 1350 (C.C.D. Mass. 1854); United States v. Scott, 27 F. Cas. 990 (D. Mass. 1851); United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851).

130. United States v. Hanway, 26 F. Cas. 105 (C.C.E.D. Pa. 1851).

131. JACOB R. SHIPHERD, HISTORY OF THE OBERLIN-WELLINGTON RESCUE (Boston, John P. Jewett & Co. 1859).

132. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); United States v. Rycraft, 27 F. Cas. 918 (D. Wis. 1854).

133. United States v. Hossack, 26 F. Cas. 378 (N.D. Ill. 1860) (unreported). For a full discussion of this case, see PAUL FINKELMAN, SLAVERY IN THE COURTROOM 128-34 (1985).

134. In June 1861, after the Civil War had begun, the Wisconsin Supreme Court affirmed the validity of this sale in *Arnold v. Booth*, 14 Wis. 180 (1861).

135. Ableman v. Booth, 11 Wis. 498 (1859).

opposition to the Fugitive Slave Law in northern Ohio, the Buchanan administration managed to cobble together two juries made up of supporters of the law and convict two of the Oberlin rescuers.[136] The Ohio Supreme Court refused to assert its states' rights to release the Oberlin rescuers from federal custody.[137]

This history showed a growing northern states' rights opposition to slavery but also a firm federal support of slavery that, if anything, trampled on the states' rights of the North. But for the seceding states, these northern developments were intolerable. So too were northern demands for political actions against the spread of slavery. Georgia could not complain that slavery was excluded from the federal territories because it was allowed in *all* the federal territories in 1860. Georgia could only complain that "Northern anti-slavery men of all parties asserted the right to exclude slavery from the territory by Congressional legislation and demanded the prompt and efficient exercise of this power to that end," and that these demands were "insulting and unconstitutional."[138] Georgia complained that the incoming Lincoln administration was opposed to allowing slavery in the territories, and this justified secession. In other words, without any legislation on the table, Georgia claimed it could leave the Union because it opposed the platform of the new president. Secession was not about "states' rights," but about political power. Southerners did not like the outcome of the presidential election, so they claimed the right to leave the Union.

Mississippi was equally appalled at northern states' rights actions and beliefs. Mississippi complained that northerners had "broken the compact which our fathers pledged their faith to maintain."[139] This was because in the North "hostility" to slavery "advocates negro equality, socially and politically, and promotes insurrection and incendiarism in our midst."[140] This hostility had "enlisted" the North's "press, its pulpit and its schools against us, until the whole popular mind of the North is excited and inflamed with prejudice."[141] Northerners had "made combinations and formed associations to carry out" their "schemes of emancipation in the States and wherever else slavery exists."[142] In other words, northerners exercised their rights of free speech, freedom of

136. SHIPHERD, *supra* note 131.

137. *Ex parte* Bushnell, *Ex parte* Langston, 9 Ohio St. 77 (1859).

138. *Georgia Secession*, *supra* note 9.

139. *A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union*, *supra* note 10.

140. *Id.*

141. *Id.*

142. *Id.*

religion, and state political autonomy to support policies the South did not like. The issues were not based on constitutionalism or states' rights, but on political power and the power of ideas. Southerners left the Union because they disagreed with northerners. Mississippi complained that northerners believed in "negro equality"[143] and this was enough to justify secession.

Texas also asserted that it was leaving the Union because of northern states' rights, not the denial of southern states' rights. The Texans complained:

> 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 [the fugitive slave clause] 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 the compact fails to accomplish the object of its creation.[144]

Like the secessionists in Mississippi, Texans complained that northerners refused to agree with them on the fundamental inequality of blacks. Texans declared they had to leave the Union because northerners were "proclaiming the debasing doctrine of equality of all men, irrespective of race or color—a doctrine at war with nature, in opposition to the experience of mankind, and in violation of the plainest revelations of Divine Law."[145]

In the end, the root of secession was just as Alexander Stephens said: racism and slavery. For the first time in its history, the United States had elected a president who was prepared to stand up to the demands of slavery and fight its spread. He had no power—and thus no inclination—to interfere with slavery in the states. He would not trample on the states' rights of the South. But, he would fight slavery on the political level. Northerners agreed with him. Having legitimately

143. Most northern whites of course did not believe in racial equality.

144. *A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union*, *reprinted in* Yale Law School, *Confederate States of America: Documents*, JOURNAL OF THE SECESSION CONVENTION OF TEXAS 61-66 (E.W. Winkler), *available at* http://sunsite.utk.edu/civil-war/reasons.html (last visited May 11, 2012).

145. *Id.*

lost the election, southerners had two choices. They could accept the outcome of the election and participate in politics. Or, they could turn against their own country.

In 1860-61, southerners could not legitimately claim, as their ancestors had in the Declaration of Independence, that they were being denied a place at the political table or a voice in the political process. Americans in 1776 had no political voice in Britain, no seats in Parliament, and no vote. Southerners held almost half the seats in the Senate and with their northern Democratic allies they could control that body; they were a majority of the Supreme Court, and of the four northerners on the Court only the aging John McLean—the longest serving Justice—was even moderately opposed to slavery, and he had voted in favor of the Fugitive Slave Laws on a number of occasions.[146] While a minority in the House of Representatives, southerners had still been able to pass enormously significant legislation supporting slavery in the previous decade.

Thus, the decision to leave the Union was not about access to politics; it was about whether southerners could win every election, or control any northerner who won, thus maintaining their version of racial hegemony, and protecting slavery. Having lost the election, they feared they would lose more in the future. While most northerners rejected full racial equality, blacks voted in some northern states and had some rights in all the free states. This, along with hostility to slavery, was reason enough to leave the Union. The decision was of course a disaster. Southern leaders believed their own ideology and followed their prejudices down a horrible road that led to war and destruction. Slavery was safe within the Union, where the Constitution protected slavery at every turn,[147] and where the South had a perpetual veto over all Constitutional amendments.[148]

But once the South rejected the Constitution, and southerners who had taken an oath to defend the Constitution made war on their own country, the protections were gone. In the end, secession led to exactly what the southern disunionists—some might call them the southern

146. *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847). On McLean and antislavery, see Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VANDERBILT L. REV. 519 (2009).

147. For a discussion of the proslavery nature of the Constitution, see PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (2d ed. 2001).

148. It takes three-fourths of the states to ratify a constitutional amendment. In 1860 there were fifteen slave states. If all of these states had remained in the Union, to this day, in 2012, it would be impossible to end slavery by amendment, since it would take forty-five free states to outvote the fifteen slave states.

traitors—feared most: an end to slavery, and at least formal constitutional equality for all American, no matter what their race. It led to what Lincoln memorably called a New Birth of Freedom.