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The Founders and Slavery

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Arthur Landever (11/16/06) The Founders and Slavery (Cleveland-Marshall College of Law)

Thank you for coming. I hope you will find my talk of some interest. I look forward, perhaps uncomfortably, to your questions.

I. Introduction. The point of my talk is that our founders, who our tradition praises profusely of course, as men on Mount Olympus, had moral blinders on. They thought slavery was repugnant, but they also thought that getting rid of it was low priority. They were confident that it was going to end. Better that it be done gradually and that the blacks be sent away, rather than to endanger independence, split the Union, have a race war and produce race mixing. Boy, did they miscalculate. They thought they were riding the wave of history. That Progress was on their side. They didn't realize that the cotton gin would come along to make cotton production explode in the South. They didn't expect Napoleon to turn over the great lands to the west. They didn't account for the fears generated by slave revolts.

By studying their period we can learn about the influence of culture upon ordinarily decent men (and women) by studying about the founders' attitudes and actions regarding slavery. The founders were deeply conflicted, the culture determined their priorities; they had both fears and hopes regarding ending slavery. A court case in England in 1772 seemed to be an important ingredient in the mix, helping to explain their actions in the 1770s, binding North and South against the British. In 1787, at the Continental Congress and in the Constitutional Convention, there were compromises over the slave question, in order form a stronger union, internally and externally.

II. This talk is based upon what I have found interesting in reading secondary sources. I have neither used original sources, nor developed new models. To that extent, what I offer is mere hypothesis. I hope it is interesting nonetheless. Perhaps it will encourage you to do further reading, to ask questions of yourself and others, and to understand both the joys and limitations of historical inquiry.

III. Here is the plan of my talk. I'm going to talk about key founders. Then I'm going to talk about the key English case, decided in 1772, *Somerset v. Stuart*. Then I'm going to talk about the Compromises of the 1770s and 1780s. Then I'm going to talk about what we can and can't learn from history. Then I'm going to consider what our generation is doing in the 21st century, considering what might shock our own descendants, two hundred years from now. What moral blinders does our generation have, which permit us to find much that is repugnant, on the one hand, and yet take little, if any action to eliminate it, on the other?

IV. What about the key founders? Here I'm talking about Jefferson, Washington, Madison, Benjamin Franklin, John Adams, and Alexander Hamilton. Do we credit them, as does perhaps the leading historian of the founders, Gordon Wood? He says, in his latest book, *Revolutionary Characters*, that they "confronted the slaveholding society in which they had been born and raised. It was an accomplishment of the Revolution that

necessarily out of anti-slave sentiments). 4-In writing his will, he freed his slaves, upon his wife's death, and apparently believed that 1808 should mark the time, not only for an end of the slave trade, but for at least a gradual end of slavery.

3-There are three Franklins: 1-As printer, accepting ads, fostering the slave trade, and as successful entrepreneur, acquiring two slaves. 2-peace-maker at the Constitutional Convention, willing to forgo an end to slavery, temporarily, until the Constitution was adopted, with its slavery-in- place provisions. 3-Proponent of ending slavery, as head of the Pennsylvania anti-slave society, calling for freedom for slaves in 1790, perceiving their equal talents with whites, and calling for affirmative action to educate them.

4-There are two John Adamses: 1-Hater of slavery, never a slave owner. 2-Compromiser, placing a priority on passage of a Constitution and unity with the white South slave, even if it meant that the slave institution would continue. He said he would leave it up to the white South. They would know how to deal with this intractable problem. "Every measure of prudence, therefore, ought to be assumed for the eventual total extirpation of slavery from the United States. If, however, humanity dictates the duty of adopting the **most prudent measures** for accomplishing so excellent a purpose, the same humanity requires that we should not inflict severer calamities on the objects of our commiseration than those which they at present endure... The same humanity requires that we should not by any rash or violent measures expose the lives and property of those of our fellow-citizens who are so unfortunate as to be surrounded with these fellow-creatures, by hereditary descent, or by any other means without their own fault."

5-Madison. He was much like Jefferson and Washington. "...the real differences of interests lay, not between the n (orthern) and southern states. The institution of slavery and its consequences form the line of discrimination..."

6- Hamilton. He was much like Adams, although, unlike Adams, he was closely associated with the antislavery movement.

7- Patrick Henry: "Would anyone think I am master of slaves of my own purchase!... I am drawn along by the general inconveniences of living without them, I will not, I cannot, justify it."

8-John Marshall, the later Chief Justice, had 10 to 20 slaves as a successful Virginia lawyer.

VI What about Somerset v. Stuart?

This was a decision in 1772, by Chief Justice Mansfield of the Kings Bench. James Somerset was a black, who had been held as a slave in Virginia and in Massachusetts, and then brought to London, and continued to be held as a slave there. He was then forced on board a ship bound for Jamaica. A key mover in opposition to slavery, Granville Sharp, one of the great heroes of the anti-slavery movement, petitioned for a writ of habeas corpus and for Somerset's freedom. Justice Mansfield, who interestingly,

had in his own household, a mixed race child, at first repeatedly urged a negotiated settlement, which would have entailed anti-slave activists purchasing the slave from Stuart and then freeing him. But Stuart, insisting on his rights of ownership, would have none of that. Reluctantly, Mansfield, for his colleagues, found himself confronted with the question as to the legality of forced departure of Somerset from England.

His answer: “We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first,) before all the Judges, as is usual, for obvious reasons, on a return to a habeas corpus; the only question before us is whether the cause of the return is sufficient? If it is, the Negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. **The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it’s so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.”**

He was saying that absent a law of Parliament permitting it in England, the odious practice of forcibly removing Somerset from England would not be permitted. The decision, even to some later judges in England, was interpreted, as ending slavery in England. But Mansfield later clarified his opinion, emphasizing its narrowness, extending only to whether there could be forced departure from England. England could still have its slaves. Indeed, England and its colonies would not end slavery until the 1830s.

VII Somerset scared the dickens out of the white South, although Franklin, in London at the time, seemed to understand its narrow effect. An important recent work, *Slave Nation*, by the husband and wife team of Blumrosen, underscores the importance of the decision in America. (But perhaps the authors emphasize the decision and the anti-slave concerns of the South too much). Nonetheless, it seems reasonable to give the decision weight, in later developments in America, given colonial concern about the British Act of 1766, purporting to assert parliamentary control over the colonies.

1770s. Soon after the decision, there were 43 stories in 20 newspapers in America: “Black slaves in England had been freed.” Southern slave holders were warned that if Somerset was law in the colonies, the institution would be endangered. By 1773, Virginia’s House of Burgesses called for committees of correspondence throughout the colonies.

The North, faced with British efforts to control shipping and commerce, desperately needed Southern cooperation. John Adams of Massachusetts called for Southerner

Washington to be commander of the colonial army, The South underscored, though, that it “would not admit of supervision of the colonies by any government, even one that included other American colonies.”

Thus, the Articles of Confederation, America’s first Constitution, rejected outside control of each state’s laws.

Article III. Each colony shall retain and enjoy as much of its present laws, rights, and customs as it may think fit, and reserves to itself the sole and exclusive regulation and government of its internal police, in all matters that shall not interfere with the article of this confederation.”

Significantly, the Continental Congress rejected John Dickinson’s design of a more powerful central government that might well intrude upon a state’s governance.

1780s: By the mid 1780s, the new Union was faced with a myriad of problems. Looking at the glass darkly, at least, the Continental Congress was veering toward bankruptcy. Congress had no power to tax. It had no power to regulate interstate commerce. There was no presidency or federal court system. Foreign countries mocked the government under the Articles, and the British continued to occupy forts in the old Northwest. Ominously, by 1786, armed bands of farmers, ind espeate financial straits closed the courts in Massachusetts interior and threatened to lay siege to Boston. To Washington, the situation seemed desperate.

Could North and South compromise to save the Union, in both their interests?

What the North wanted:

- 1-southern states to agree to stronger Union, 2-with a presidency, and 3-a tax system, and including the power of Congress to regulate commerce by a simple majority,
- 5-wanted no slavery in the territories north of the Ohio River.
- 6-Wanted an end to the slave trade, sooner, rather than later.
- 7-not to count slaves for representation.

What the North was willing to agree to:

- willing to leave slavery in place, in the south, as it was ending in the north.
- willing to agree to wait 20 years before the slave trade ends.
- willing to have slaves counted for purposes of representation and taxation 3/5.
- willing to have capital in the upper South.

What the South wanted:

- 1-slave trade for another 20 years.
- 2-protection of slavery in the states, as against any Congressional efforts to interfere.
- 3-slaves to be counted for representation but not for head tax purposes.
- 4-assurance of a slave system in the territories to the southwest. Slavery

What the South was willing to agree to:

willing to forbid slavery in the Northwest Territories.
willing to reduce its representation in the House to 3/5.
willing to pay head tax of 3/5 for slaves.
willing to end the slave trade by 1808 (Va. was happy about it since it would increase the value of its slaves, who were multiplying beyond need).

The Result was the following in the Constitution:

- 1-Article IV Sec.1-full faith and credit clause and Sec. 2- runaway slave provisions.
- 2-Tax and representation as 3/5 of a person. Art. I, sec. 2, clause 3. Rep. and direct taxes.
3/5 of other persons (not being Indians or persons working for a term).
- 3- Article V. Amendment not allowed which would end the slave trade before 1808. See Article I sec. 9, clauses 1 & 4.

1787 Legislation in the Continental Congress provided as follows: No slavery in Northwest Territory (territory immediately bordering the states on the west, north of Ohio river). Reaffirmed by the first congress.

VIII. What are history's lessons? We probably don't learn lessons that we can easily apply to new situations, since such new situations have their own complexities, their many actors. We also know that there are many pathways, depending upon the roads one chooses. We know that persons during the process, don't know how it's going to end up. Thus, the colonists were pledging their lives, as well as their sacred honor. They understood that if they lost their gamble, they would most likely be hanged.

But at least we can gain some understanding of what happened in this particular instance of slavery and the American struggle with it in the late 18th century.

We can also reflect about the what ifs. What if Jefferson's 1784 motion in the Continental Congress for an end to slavery in even the Southern territories had been successful? What if there had not be the invention of the cotton gin at that time? What if Napoleon had not put up the Louisiana lands for purchase? What if, after the Civil War, President Andrew Johnson had been removed from office, after General Sherman had issued an order to provide 40 acres and a mule to newly freed blacks?

We can try to understand human nature in varied settings. We can attempt to gauge the pervasive umbrella of culture—conscious and unconscious-- the levels of subcultures, and the interplay of the cultures, subcultures, and law, upon each other. We can attempt to grasp the inevitable complexities and inconsistencies of truth.

Today, in the questions we choose and those we avoid, in the sources we look at, and the weights we give to evidence, we probably learn more about ourselves than we do about what lessons the past provides to us, at least as to new situations.

In the end, historical study is probably better justified as learning for its own sake than as offering ready insights into the new. We regrettably are always "doomed to repeat"

unfortunate consequences, in the sense that the new in what we face is usually so different from earlier models.

At the same time, as citizens of the world, we ought to move, as at least a part of our culture happily allows and encourages us to do, to eliminate today's pervasive and abhorrent version of world-wide slavery. There are 27 million or so slaves today, a conservative figure, in a new kind of non-title ownership slavery, throughout the world. No law purports to condone the modern institution, and indeed, countless resolutions and charters expressly outlaw it. Yet it persists. Meaningful enforcement of the prohibitions is often (intentionally) not present.

We surely know enough to move against today's slavery, by using our own efforts, and by pressuring our government to employ the nation's economic muscle.

Regrettably, as we know, there are other horrors, in addition to that of slavery. The genocide in Darfur readily comes to mind. There is mass starvation, mass rape and violence against women and children.

Obviously as students of history we seek to learn about the past and its present dimension. There will always be incomplete knowledge, of course. That should not paralyze us and prevent us from making decisions based upon what information we have. We have a job to do: to identify the horrors, to join with others in an active and growing movement, and to demand of our government and international organizations that they eliminate the diverse pillars of oppression today, as our pock-marked founders could not do, or chose not to do, in 1787.

Bibliography

1. *Amistad*, 40 U.S. 518 (1841).
2. *The Antelope*, 23 US. 66 (1825)
3. Kevin Bales, *Disposable People—New Slavery in the Global Economy—Revised Edition with a New Preface*, 2004.
4. Kevin Bales, *Understanding Global Slavery—A Reader* (2005).
5. David Barton, *The Founding Fathers and Slavery*.
6. Alfred W. Blumrosen and Ruth G. Blumrosen, *Slave Nation—How Slavery United the Colonies & Sparked the American Revolution* 2005.
7. Joseph J. Ellis, *American Sphinx, the Character of Thomas Jefferson* 1997.
8. Joseph J. Ellis, *Founding Brothers—The Revolutionary Generation* 2000.
9. Paul Finkelman, "Introduction: 'Let Justice Be Done, Though The Heaves May Fall': The Law of Freedom." 70 *Chi Kent L. Rev.* 325 (1994):
10. Benjamin Franklin, *Address to the Public* 11/9/1789:
11. Eugene D. Genovese, *From Rebellion to Revolution: Afro-American Slave Revolts in the Making of the Modern World* 1979.
12. Denise and Frederic W. Henderson, *How the Founding Fathers Fought for an End to Slavery* 1993.
13. Herbert S. Klein, *Slavery in the Americas* 1967.

14. David McCullough, John Adams 2001
15. John R. Miller, Ambassador-at-Large for International Slavery, on Release of the Sixth Annual Trafficking in Persons Report (2006).
16. "Never Forget: They Kept Lots of Slaves." N.Y. Times Book Review. 12/14/03:
17. Emma I. Powers, The Newsworthy Somerset Case: Repercussions in Virginia
18. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).
19. *Scott v. Sanford*, 60 U.S. 393 (1857).
20. Granville Sharp, Representation of the injustice and dangerous tendency of admitting the least claim of private property in the persons of men, in England, etc. (London, 1769).
21. *Somerset v. Stewart* (K.B., 1772, Lord Mansfield presiding), 98 Eng. Reports 499, 509, 510.
22. David Turley, Slavery 2000.
23. George Washington: Last Will 7/9/1799
24. William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U of Chicago L. Rev. 86 (1974).
25. Henry Wiencek, An Imperfect God: George Washington, His Slaves, and the Creation of America.
26. James G. Wilson, Why the International Criminal Court Should have Jurisdiction over Contemporary forms of Slavery, at 175, David. Barnhizer (ed). *Effective Strategies for Protecting Human Rights* (2001).
27. Steven M. Wise, *Though the Heavens May Fall—The Landmark Trial that Led to the End of Human Slavery*, 2005.
28. Gordon S. Wood, *Revolutionary Characters—What Made the Founders Different*. 2006: