

CHAPTER 1

Lincoln's Dilemma or How We Got Here, and Where We're Headed

IT IS AN OBVIOUS UNDERSTATEMENT to say the Civil War changed America. A nation divided, whose wounds spilled blood and treasure from North to South. The country would never be the same—but not for the reasons most people think.

While slavery was mercifully conquered, animosities between generations of Americans lingered well into the twentieth century. More important, the War Between the States, as it came to be known, irretrievably altered the nation's constitutional framework—and *not* for the better. As one political commentator succinctly put it, “The long-term

result of the Civil War was to make the federal government an irresistible force. The states were crushed—not only the Southern states, but finally the power of all the states to withstand federal tyranny.”¹

As much as anything, the North’s willingness to go to war over the issue of secession was what fundamentally transformed the relationship between the federal government and the individual states. Indeed, had the war been only about freeing the slaves, nonviolent solutions were possibly within reach. The idea of “emancipated compensation” had been debated all the way back to the founding.² Critics of Abraham Lincoln, such as Professor Thomas DiLorenzo of Loyola, suggest that the option of “peaceful” emancipation prior to bloodshed was unwisely rejected by the sixteenth president.³ Late into the war, Lincoln reportedly presented to his cabinet the idea of compensating slave holders as a condition of the South’s surrender, but the cabinet rejected the idea.⁴

Though we can’t conclusively know whether war over slavery could have been avoided, there were other issues of paramount importance that led to the conflict between North and South, and eventually secession. In fact, Southern displeasure toward national policy was evident at the earliest points of our nation’s history.

Alexander Hamilton's 1790 plan for a national bank, for instance, generally favored the North by assuming the States' Revolutionary War debt.⁵ But it was federal protectionism designed to preserve the North's manufacturing base that had long been an irritant simmering in the South. When Lincoln moved to raise tariffs on those Southern states that were heavily reliant on imports, he reopened an economic wound that went all the way back to the "tariffs of abominations" in 1828.⁶

The power to collect these duties, by force if necessary, was absolute in Lincoln's mind. That was hardly surprising, given that protectionism was a hallmark for Republican politics at the time.⁷ The levies, however, had the effect of converting even ardent nationalists like John Calhoun of South Carolina into "nullification" advocates due to what they described as the "tyranny" of the Northern majority which had imposed the tariff.⁸ Secession was in the air.

Far from treasonous, as DiLorenzo points out, secession was long considered the ultimate safety valve against federal encroachment.⁹ The right of states to voluntarily leave the Union had been debated at the Constitutional Convention, and the notion of a permanent compact rejected.¹⁰ In short, the framers had to answer the fundamental question that

all governments must eventually address: should relations between fellow citizens be voluntary? For those seeking self-government, the answer was obvious.

In the early days, the New England federalists seriously contemplated secession over the Louisiana Purchase and what they considered to be Thomas Jefferson's attempts at weakening Northern power.¹¹ Abolitionists such as John Quincy Adams had proclaimed that if "states shall be alienated from each other" it is better to "part in friendship from each other, than to be held together by constraint."¹² And even before the first shot was fired on Fort Sumter, there was still "widespread sentiment in the North in favor of allowing the Southern states to peacefully secede."¹³

Lincoln held very different views. He declared the "Union is perpetual" and through the sheer force of personality had successfully convinced enough of the electorate that "no state, upon its own mere motion, can lawfully get out of the Union."¹⁴ He had also assured the South that he would not interfere with slavery; after all, the abolitionist movement was still relatively small and the North had its own history of discrimination.¹⁵ Secession became an easier issue to sell because so many in the North were simply not willing to fight over the issue of emancipation alone.¹⁶

In fact, Union commander Gen. George B. McClellan once predicted that Northern soldiers would mutiny if they knew their efforts were specifically aimed at emancipating blacks.¹⁷ General William Tecumseh Sherman, the man responsible for the bloody march across the South, had little time for abolitionists, no real problem with slavery, and considered his years living in Charleston to be some of his best. But he valued the Union more and wouldn't tolerate secession.¹⁸

Of course, slavery was still of paramount importance to constituents of the Deep South who greatly feared Northern talk that encouraged insurrection. But they, too, thought the institution of slavery was secure because the federal government had no legal authority to effectively end it should the Southern states secede. On the eve of Lincoln's inauguration, President James Buchanan conceded there was no federal power to force a state to remain in the Union, declaring "that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in a civil war..."¹⁹

Nevertheless, President Lincoln framed the conflict in secessionist terms. And he now faced a Hobson's choice—either preserve the constitutional design as it was written, or preserve the Union at a staggering cost.²⁰ Lincoln chose the

latter, but “saving the Union” cost 600,000 lives in America’s bloodiest and most divisive conflict. The prosecution of the war also resulted in the suspension of the writ of habeas corpus, martial law, the restriction of freedom of the press (including the jailing of Northerners deemed as possibly sympathetic to the Confederacy), and more military tribunals by far than any other administration. None of which conclusively suggests the war should not have been fought. However, more than just a few of Lincoln’s most vehement critics have questioned why the Founding Fathers are routinely vilified over their silence on slavery, while the sixteenth president is revered for exploiting the issue when the war actually had more to do with secession.²¹

In any event, the North’s determination to go to war, and the South’s reaction to it, helped to diminish the idea of “states’ rights” for at least the next century. The very notion itself became a pejorative one. Unfortunately, federalism—or what the framers intended the relationship between the central government and the states to look like—was also a casualty. The framers’ goal was “a compound republic” that would divide the government “into distinct and separate departments” and “guard one part of the society against the injustice of the other part.”²²

The aftermath of the Civil War ushered in a brave new world, resulting in a consolidation of power in Washington that would have been unthinkable at the founding. Though America is far removed from the issues of the nineteenth century, the federal government's reach is larger and more powerful than ever. But, at long last, a backlash may finally be brewing.

So-called “Tea Party” protests were spontaneously formed in 2009 to counter what became the most ambitious federal bailout in history, dubbed the Troubled Asset Relief Program, or TARP. Opponents deride it as a \$700 billion unlawful appropriation, essentially transferring legislative authority to the Treasury Department. Citing well-established principles of separation of powers, the critics note that “Congress may not delegate its lawmaking authority to the executive branch.”²³

That's not all. Federal pay czars, forced bankruptcies, and private sector shakedowns, not to mention massive increases in federal spending in the so-called “economic stimulus” bills, reawakened a silent majority. And the inexorable drive towards federal control of healthcare—especially the requirement in the 2010 overhaul that Americans purchase individual health insurance—is starting to profoundly shift the electoral landscape.

(Republican Senator Scott Brown's upset victory in Massachusetts being another example.)

Indeed, the issue of federal intrusion has become so big that the newly elected governor of Virginia, Bob McDonnell, said, "I think you're going to see a resurgence of discussions of federalism, about the Tenth Amendment, about limits on federal power, and federal spending."²⁴

A resurgence is already in evidence. Limited government activists are demanding that political parties adopt a clear stand against "a federal government that is too big, too intrusive, and all too eager to seize power from the states."²⁵ State legislatures are fighting back, passing bills or proposing constitutional amendments that prohibit Washington from imposing new mandates. A number of states have even passed so-called "sovereignty measures" designed to reinvigorate what President Ronald Reagan called the "new federalism."²⁶ Tennessee and Montana want to exempt their citizens' firearms from federal law, and Texas Governor Rick Perry even mentioned the "s" word, suggesting that Washington's thirst for power could lead a few states beyond "sovereignty" resolutions to actual secession.²⁷

The Supreme Court in *Printz* ruled that the federal legislature may not "command the states' executive power"

(by requiring, in that case, state officials to conduct background checks of weapons purchases pursuant to the Brady Handgun Violence Prevention Act.), but Congress continues to find creative ways to dictate state policy.²⁸ Extension of unemployment compensation and increased Medicaid reimbursements, for instance, cost the states billions, as funding for these programs is shared between federal and state governments. Yet, if states increase their commitments toward the programs, there is no guarantee Washington won't cut off federal dollars in the future, leaving local government to shoulder the entire cost. The same is true for many transportation initiatives, such as mass transit, under the federal highway trust fund.

As a result, there seems to be little doubt that this federal micromanaging of the most arcane pieces of state law has exhausted the patience of state legislators.²⁹ “Why would I want to rule anything out?” asked Rep. Charles Key of Oklahoma. “Why would we take a position that says, ‘We really don’t like this but we’re only going to go so far?’”³⁰ This sounds like a nation getting close to the tipping point.

Too many of our leaders have simply forgotten what our republic was supposed to look like. American government rests upon the horizontal checks and balances we read

about in civics classes. But our republic's most important (and undervalued) characteristic is the vertical separation of powers as described by the framers. Dual sovereignty between the federal government and the states ensures a strict division of power. It is not only the best guarantor of liberty, but remains "the true theory" of our Constitution.³¹ "The way to have good and safe government," according to Thomas Jefferson, "is not to trust it all to one, but to divide it among the many."³² Later in his autobiography, the "Sage of Monticello" offered this as well: "It's not by the consolidation or concentration of powers, but by their distribution that good government is effected. Were it not this great country already divided into states, that division must be made..."³³

In other words: power divided is power checked.

Here the federal judiciary could play a constructive role within its proper sphere by striking down legislation that is clearly beyond the expressed constitutional powers of the federal government. Instead, they seem to have aided and abetted federal expansion, while at the same time severely curtailing the constitutional prerogative of the states. That is, activist judges have stretched the constitutional limits of central power while simultaneously imposing their will on the states—and not just on the hot button issues of

abortion or the death penalty, but on routine matters of state law governing term limits, religious displays, welfare requirements, family law (including marriage), and criminal justice. The federal courts have even taken over local school districts.³⁴

Yet this form of judicial supremacy was never supposed to occur. “Of the three powers,” in the words of Montesquieu (from whom much of the separation of powers doctrine originates), “the judiciary is next to nothing.”³⁵ For good reason. As Justice Felix Frankfurter once warned, “...if the people in the distribution of powers under the Constitution should ever think of making judges supreme arbiters in political controversies, they will dethrone themselves” and create a power “more dangerous than the worst elective oligarchy in the worst of times.”³⁶

Alas, in 1803 the Supreme Court struck down the Judiciary Act of 1789, effectively establishing judicial review.³⁷ The decision was controversial and the federal courts remained wary of settling most local disputes right into the twentieth century. “The Courts,” according to constitutional historian, Forrest McDonald, “were not expressly given the power to rule on constitutionality. The nearest thing to a direct statement on the subject is the supreme law clause.”³⁸ Jefferson

remained a leading skeptic, thinking judicial review imperious and often describing the Court's rulings as anti-republican. In 1820 he wrote, "I know no safe depository of the ultimate powers of the society but the people themselves..."³⁹ Fellow Virginian John Randolph also denied such plenary power to the judiciary, asking, "Are we not as deeply interested in the true exposition of the Constitution as the judges can be? Is not Congress capable of self-government?"⁴⁰

Federalists such as Madison were also worried about the separation of powers, wondering "upon what principle it can be contended that any one department draws from the Constitution greater powers than another in making out the limits of the powers of the several departments."⁴¹ None of them contemplated the federal courts dictating policy to the states.

It is worth remembering that the Constitution was not written to protect us from one another; it was written to protect the states and the people from a newly created central government—about which many of the founders had understandable reservations given their colonial experience—an experience that led to, well, secession.

"The two enemies of the people are criminals and government," Jefferson declared, "so let us tie the second down with the chains of the Constitution so the second

will not become the first.”⁴² The three fundamental threats to individual liberty come from foreign enemies, domestic crime, and government. The framers believed that the federal government would handle the first; the states would govern the second, and the Constitution the third.

In matters of crime, the colonists wished to avoid the dangers of a nationalized police force, one of the hallmarks of a totalitarian regime. Hence, the power of the *polis* (commonly referred to as the police power or the “inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.”) was reserved for state governments that existed long before constitutional ratification.⁴³ By delegating matters of war and peace to the newly formed central government, the framers merely confirmed the arrangement. After all, the states had created the national government; they were not about to give up their sovereign powers over internal disputes involving their own citizens residing within a particular state.

To be sure, the delegates at the Constitutional Convention did spell out those things that were to be prohibited to the states, and they also granted the federal government judicial

power for those “controversies between two or more states” and “between citizens of different states.”⁴⁴ But as Madison (known as the Father of the Constitution) would reiterate, the “proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.”⁴⁵

Even Alexander Hamilton, long considered the champion of an energetic central government, confirmed that political power would be “divided between the national and state governments” so that “each of the portions of powers delegated to the one or to the other...is...sovereign with regard to its proper objects.”⁴⁶ These were to be the cornerstones of the new republic: a “government of law and not of men,” where the limited powers of central authority were specifically enumerated.⁴⁷

On this, the Tenth Amendment to the Constitution is clear: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Nonetheless, modern-day activists have successfully convinced the courts, as well as the American people, that subsequent amendments to the document, in particular the

Fourteenth, altered the entire constitutional framework bequeathed to us by those who ratified it. The effect has rendered the Tenth Amendment essentially dormant, leaving the states and the people at the whim of an unlimited central authority. A dangerous proposition, considering that “in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁴⁸

Well, the federal government hasn’t had much difficulty in controlling the governed lately, but it has had great difficulty in controlling itself. This is not only contrary to the framers’ intent, but a serious threat to our individual freedoms. The Declaration of Independence recognized that governments exist only “to secure these rights” and would only derive “their just powers from the consent of the governed.”⁴⁹ Americans don’t seem too eager to consent to a federal behemoth that only a few generations ago would have been unrecognizable.

The Declaration, of course, also warns “that governments long established...not be changed for light or transient causes.”⁵⁰ But as Jefferson saw it, “whenever any form of government becomes destructive” to these unalienable rights, “it is the right of the people to alter or to abolish it...”⁵¹

The federal government has overstepped its bounds. And the effect has been to polarize the nation over the most contentious issues of the day that would be far better settled at the state level. One byproduct has been fiercely partisan fights over Supreme Court nominees due to the ill-advised power bequeathed to the modern judiciary. Subsequent chapters describe how the American experiment of limited, constitutional government has come under attack from those who should be protecting it and, barring a change in course, what a free people should consider doing about it.