

Recovering the Legal History of the Confederacy

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Abstract

Although the government of the Confederate States of America has been formally treated as a legal nullity since 1878, from February, 1861 to April, 1865 the Confederacy was a real government, with a Constitution, a Congress, district courts, and administrative offices. This Article seeks to recover the legal order of the Confederacy in its robust state, before the prospect of its obliteration came to pass.

The Article explores the question why certain southern states would have considered seceding from the United States, and forming a separate nation, in late 1860 and early 1861. It then turns to the legal order of the Confederacy that was erected after secession. It focuses on two characteristics of that legal order: its architecture, including the drafting of the Confederate Constitution, the establishment of Confederate district courts, and the failure of the Confederate Congress to organize a Supreme Court for the Confederacy; and the central legal issues with which the Confederate government was preoccupied. The Article concludes that in the minds of contemporaries, the outcome of the Civil War and the dissolution of the Confederacy that accompanied it represented a transformative phase in American history, in which the way of life that the Confederacy symbolized was confined to oblivion.

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I. Introduction

In June 1867, Chief Justice Salmon P. Chase issued an opinion in *Shortridge v. Macon*,¹ where the plaintiff, a citizen of Pennsylvania, sued the defendant, a citizen of North Carolina, to collect on a promissory note given by the defendant in 1860.² The defendant stated that under the Sequestration Act of August 30, 1861, passed by the Congress of the Confederate States of America, he was compelled to pay the value of that note into the Confederate Treasury.³ His defense raised the question of whether the courts of the United States were bound to recognize the laws of the Confederate government.⁴ Chase held that they were not.⁵ Those laws

1. *Shortridge v. Macon*, 2 AM. L. REV. 95, 99 (C.C.D.N.C. 1868) (holding that "compulsory payment under the [Sequestration Act of August 30, 1861] to the rebel receiver of the debt due to the plaintiffs from the defendant was no discharge").

2. *See id.* ("This is an action for the recovery of the amount of a promissory note, with interest. . . . It is admitted, that the plaintiffs were citizens of Pennsylvania; that the defendant was a citizen of North Carolina . . .").

3. *See id.* (outlining Defendant's argument that the Confederacy, while it existed, was a legitimate government and that the Sequestration Act of August 30, 1861 was valid when it was passed).

4. *See id.* at 95–96 (arguing that because after the American Revolution state courts recognized colonial acts of sequestration against those hostile to the colonies, courts, following the Civil War, should recognize similar actions taken by the Confederacy).

5. *See id.* at 98 ("[N]othing . . . gives countenance to the doctrine . . . that the insurgent [s]tates, by the act of rebellion and by levying war against the nation, became

were to be treated as having no effect because the Confederacy had no legal status that United States courts were obliged to respect.⁶ The United States, Chase wrote, had never "admitted the existence of any government de facto, hostile to itself within the boundaries of the Union."⁷ He went on to say:

Those who engage in rebellion must expect the consequences. If they succeed, rebellion becomes revolution; and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.⁸

In *Williams v. Bruffy*,⁹ the Supreme Court of the United States reaffirmed that position.¹⁰ Justice Stephen Field wrote that the government of the Confederate States of America was "simply the military representative of the insurrection against the authority of the United States."¹¹ When the Confederacy's "military forces were overthrown," Field maintained, "it utterly perished, and with it all its enactments."¹² Recovering the legal order of the Confederate States of America is reminiscent of transforming a ghost into human shape.

Regardless of the official postwar legal status of the Confederacy, from its formation in February 1861 to its demise in April 1865, it was a real government with a Constitution,¹³ a Congress,¹⁴ district courts,¹⁵ and administrative offices.¹⁶ Those who created the Confederate States of

foreign [s]tates . . .").

6. *Id.*

7. *Id.*

8. *Id.* at 99.

9. *See Williams v. Bruffy*, 96 U.S. 176, 192 (1878) (holding there was "no validity in any legislation of the Confederate States which this Court can recognize").

10. *See id.* ("The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws.").

11. *Id.*

12. *Id.* at 191–92.

13. *See generally* CONFED. CONST. OF 1861.

14. *See id.* art. I, § 1 ("All legislative powers herein delegated shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives.").

15. *See* WARREN MOISE, *REBELLION IN THE TEMPLE OF JUSTICE: THE FEDERAL AND STATE COURTS IN SOUTH CAROLINA DURING THE WAR BETWEEN THE STATES* 3 (2003) ("Soon after secession, the Confederate States Congress created federal courts . . .").

16. *See id.* (describing how the Confederate States Congress created a department of justice).

America believed that it would eventually thrive as an independent nation, and many, at the moment of creation, believed that the independence of the Confederacy would be secured without armed resistance from the United States.¹⁷ They were wrong, of course: The Confederacy lost the war; its member states were absorbed back into the Union; and it became a formal legal nullity.¹⁸ For more than four years, however, it was a functioning, and sometimes thriving, legal order.¹⁹ This Article seeks to recover the legal order of the Confederacy in its robust state, before the prospect of its obliteration came to pass.

The Article begins by raising the question why certain southern states would have considered seceding from the United States in late 1860 and early 1861. It reviews several factors that combined to precipitate that decision, including the widespread perception among Southerners that after the election of Lincoln and the Republican party in November 1860, that they were about to be "subjugated" by a political majority with an antislavery agenda; that secession from the Union was constitutional; that few adverse military or political consequences would follow from secession; and, finally, that after secession the confiscation of federal property in the South could be accomplished peacefully. The Article postulates that secession is best understood as an emotional and precipitate response by Southerners who did not fully think through its consequences.

Next, the Article turns to the legal order of the Confederacy that was erected after secession. It focuses on two characteristics of that legal order: (1) its architecture, including the drafting of the Confederate Constitution, the establishment of Confederate district courts, and the failure of the Confederate Congress to organize a Supreme Court for the Confederacy; and (2) the central legal issues with which the Confederate government was preoccupied—the imposition of martial law, the suspension of the writ of habeas corpus, and conscription of soldiers—all of which were directly connected to the war effort. The Article concludes that, in the minds of contemporaries, the outcome of the war and the dissolution of the Confederacy that accompanied it represented a transformative phase in American history. With the South's defeat in the war, the links between the

17. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 9 (1988) [hereinafter MCPHERSON, *BATTLE CRY*] (noting that it became common in the winter of 1861 to say that "a lady's thimble will hold all the blood that will be shed" over secession (internal quotations omitted)).

18. *Supra* note 9 and accompanying text.

19. See generally MOISE, *supra* note 15 (describing the functioning of the federal and state court systems in South Carolina during the Civil War).

way of life that the Confederacy symbolized and the future of America were severed, and that way of life was not merely confined to the American past, but to oblivion.

II. *Toward Secession*

An abiding puzzle for anyone reviewing the course of American history is why, after the election of a Republican president in 1860, residents of a substantial portion of the United States concluded that they would be better off outside the existing union of states than within it. The conspicuous success of the American nation since its late eighteenth-century founding only accentuates the puzzle. Between 1776 and 1860, the United States secured its independence in a war against Great Britain; ratified a federal constitution that created enduring republican institutions of government; confirmed its control of the American continent in another war with the British and in acquisitions of vast chunks of land stretching from the Appalachian mountains to the Pacific Coast; gained still more western lands in a successful war with Mexico; saw its population increase dramatically; and established itself as an international commercial and diplomatic presence.²⁰ The abundance of natural resources on the American continent dwarfed those afforded to residents of most other world nations in the first half of the nineteenth century.²¹ In that geographical, political, and economic setting, the average white male American's ability to affect the form and substance of his government, to increase his economic prosperity, and to pursue his happiness free from the oversights of officialdom marked him as a singularly favored citizen on the world stage.²²

So why, in the last months of 1860 and the early ones of 1861, did representatives of southern states choose to transfer their allegiance from a nation with that track record of success to a confederacy whose form was hastily conceived, whose military and economic prospects were far from

20. *See generally* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 TO PRESENT (2003).

21. *See* MCPHERSON, BATTLE CRY, *supra* note 17, at 9 (explaining that even as America's population boomed in the mid-nineteenth century, the "ratio of land to people was much greater than in Europe").

22. *See id.* at 28 ("Americans in the mid-nineteenth century could point to plenty of examples . . . of . . . men who by dint of industry, prudence, perseverance, and good economy had risen to . . . affluence. With . . . Abraham Lincoln[']s election] they could point to one who had risen from a log cabin to the White House.").

assured, and whose future was at best unknown? By 1860, a generation of southern Americans had come to conclude that the benefits enjoyed by American citizens at large were no longer likely to be afforded to them if they remained participants in the Union, and that those benefits might well accrue to them as members of a new southern American republic.²³ A starting place for understanding how they might have reached that conclusion comes in a rehearsal of some themes that had served to define American culture in the eighty-odd years between independence and Gettysburg, and which had combined, by the middle of the nineteenth century, to create an atmosphere of deep sectional antagonism.

A. *The Emergence of Sectional Antagonism*

Over the course of the seventeenth and eighteenth centuries, two defining features of American civilization had emerged.²⁴ One was the continuous displacement of Amerindian tribes from land they once occupied.²⁵ That displacement extended over a vast area from the northernmost to the southernmost regions of the Atlantic coast beyond the Appalachian mountains.²⁶ As tribes withdrew from or were driven from lands in that area, European settlers occupied those lands and established agricultural households, ranging from small farms to large plantations.²⁷ By the opening of the eighteenth century, it was clear that this process of tribal displacement would extend past the Appalachians to the regions adjacent to the Ohio and Mississippi Rivers.²⁸

23. See, e.g., CHARLES B. DEW, APOSTLES OF DISUNION 12 (2001) (highlighting southern fears that "[c]onstitutional protections would become nothing . . . in the treacherous hands of Republican[s], whose avowed purpose [was] to subject . . . [Southerners], not only to the loss of property but the destruction of [themselves], [their] wives and . . . children, and the desolation of [their] homes, . . . alters, and . . . firesides" (internal quotations omitted)).

24. See, e.g., MCPHERSON, BATTLE CRY, *supra* note 17, at 45 (noting that, as a result of continuous forced removals, by 1850, only a few thousand Native Americans remained west of the Mississippi River).

25. See, e.g., PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 1 (1968) (noting that despite the Proclamation of 1763, which ordered a halt to all settlement west of the Appalachians, rival colonies continued to push into these regions in a furious pursuit of western land).

26. See, e.g., MCPHERSON, BATTLE CRY, *supra* note 17, at 42 ("By the 1840s [the West] had become a farming frontier.").

27. HERBERT A. APPLEBAUM, COLONIAL AMERICANS AT WORK 58 (1996) ("[T]he seventeenth century was the age of the . . . small farmer. . . . [O]nly one in four [farmers] were large planters.").

28. See GATES, *supra* note 25, at 59 (explaining how the weak central government

As settlers with European ancestors moved west to occupy tribal lands, they were accompanied, in southern regions, by African-American slaves.²⁹ The importation of African slavery had been the second defining feature of seventeenth- and eighteenth-century America.³⁰ The owners of staple-crop plantations relied heavily upon African slave labor in areas where the cultivation of crops such as tobacco, rice, and indigo was made possible by climatic conditions.³¹ Plantations dedicated to producing yearly crops of those articles and selling their crops to European markets had become a model of agricultural householding in the American Coastal South.³² At the base of the model was the use of African slaves to harvest crops and perform a variety of other household tasks.³³

In the first three decades of the nineteenth century, the United States acquired a vast amount of new territory, encompassing all of the area that now composes the transcontinental United States.³⁴ Much of that territory was acquired by purchase from Spain, France, and Great Britain, but a large chunk came from the Mexican Cession, a spoil of the Mexican War.³⁵ The acquisition of those "public lands," as they were termed, doubled the size of the American nation.³⁶

under the Articles of Confederation was unable to prevent westward expansion into these regions).

29. See, e.g., *id.* at 81 ("By 1830 there were 20,000 persons of American birth with their 1,000 slaves in Texas.").

30. See JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* 12–13 (1982) (noting that the last half of the eighteenth century was a "boom" time for the slave trade, as "slave trading was one of the planters' most profitable and widely practiced enterprises").

31. See *id.* at 39 (noting that by the mid-nineteenth century the South had become so dependent on slave labor that in one generation the number of slaveholders increased by seventy-three percent).

32. See *id.* at 17 (noting that when Georgia prohibited slavery early in its history, it could not compete in the southern agricultural economy as its neighbors were booming under the plantation system). Eventually, economic pressures forced Georgia to relent and accept slavery. *Id.*

33. See *id.* at 152 (noting that southern plantations were run according to "Plantation Management Theory," where plantations were run as bureaucracies, with the landowner overseeing management, who in turn controlled every aspect of the slaves' lives with extensive rules and regulations).

34. See MCPHERSON, *BATTLE CRY*, *supra* note 17, at 9 (explaining that between the Louisiana Purchase in 1803 and the mid-nineteenth century, American settlers had expanded to the Pacific Coast).

35. See GATES, *supra* note 25, at 75–83 (outlining Great Britain's land cessions in 1783 and 1818, the purchase of Louisiana from France, and the acquisition of Florida from Spain and Texas from Mexico).

36. See *id.* at 86 (noting that between 1803 and 1848, the United States added

Here was a huge new mass of land for settlers to occupy, although much of it was populated by Amerindian tribes, and its vastness and aridity posed formidable challenges for settlement.³⁷ Early nineteenth-century developments in the transportation sector, however, would eventually enable the regions of the upper Midwest, the Southwest, and the far West to become populated.³⁸ The advent of turnpikes, canals, and railroads facilitated the westward movement of population, and cities, most of them adjacent to rivers or railroad lines, sprang up in the trans-Mississippi West.³⁹

The opening up of western public lands, and the ability of populations to move easily from east to west, had a dramatic effect on both the displacement of Amerindian tribes and the proliferation of plantation-style agriculture. As public lands were acquired in the lower South, and states such as Alabama, Mississippi, Louisiana, Texas, and Arkansas entered the Union, slaveholding settlers poured into those states, displacing tribes in the process.⁴⁰ The invention of the cotton gin resulted in the introduction of another staple crop that could be grown in warm regions and required intensive labor to be processed.⁴¹ Generations of African-American slaves, born in the United States, accompanied their owners over the Appalachians into regions where cotton could be grown.⁴² The world-wide demand for

approximately 1.2 billion acres to its original approximate 1 billion acres of land).

37. See W. B. Hazen, *The Great Middle Region of the United States, and Its Limited Space of Arable Land*, 120 N. AM. REV. 1, 3 (1875) (noting that the vast area westward of the 100th meridian is "a dry broken, and barren country, with very little timber, except thorny bushes, and, from lack of moisture, unfit for agriculture").

38. See, e.g., MCPHERSON, *BATTLE CRY*, *supra* note 17, at 12 ("Springing from the prairie . . . , Chicago became the terminus for fifteen rail lines by 1860, its population having grown by 375 percent during the [1850s].").

39. See *id.* ("Towns bypassed by the [railroad] shriveled; those located on the iron boomed, especially if they also enjoyed water transport.").

40. See Parke Pierson, *Seeds of Conflict*, AM.'S CIVIL WAR, Sept. 2009, at 25, 25 (explaining that advancements in transportation and the availability of the cotton gin "brought enormous changes to the South. Southerners eager to take part in the cotton boom began to move west to cultivate new lands, and the white and slave populations of Mississippi and Alabama soared"). "One of President Andrew Jackson's motives for moving Native Americans out of the Southeast was to open up land for more cotton plantations." *Id.*

41. See, e.g., *id.* ("[A]s cotton growth flourished, so did the South's dependence on slavery and the plantation system as the bulwarks of its economy.").

42. See DANIEL W. HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* 130 (2007) ("For African Americans, the move [westward] across the mountains constituted a second great disruption in the generation following the end of forced migration across the ocean.").

clothing made from cotton revived plantation agriculture based on slave labor.⁴³ Rather than being confined to a comparatively small number of southern states along the Atlantic coast, slavery, after the 1830s, seemed yoked to westward expansion.⁴⁴

By the 1850s, the continuing displacement of Amerindian tribes from southern lands suitable for planting labor-intensive staple crops had allowed an economy built on African-American slave labor to expand and flourish, so that by the 1850s the future of slavery in America no longer seemed precarious.⁴⁵ That same displacement of tribes from northern regions resulted in the availability of tracts of inexpensive land in those regions, but the unsuitability of much of that land for staple crop production, and the consequent diversity of northern occupational pursuits, meant that indentured servitude, apprenticeship, and wage labor, rather than slavery, became the forms of labor in northern economies.⁴⁶ Consequently the massive entrepreneurial ventures of the first half of the nineteenth century, which took place along east-west axes and opened up the interior of the continent, affected the wage labor states more than the slave states.⁴⁷ Developments in transportation increased the population of wage labor states and diversified their economies.⁴⁸ The same developments in slave states, however, served to reinforce the ubiquity of staple-crop plantation agriculture featuring labor-intensive work by slaves.⁴⁹ Sections of the

43. *See id.* at 128 ("In response to an apparently insatiable demand for textiles, U.S. cotton production soared . . .").

44. *See* MCPHERSON, *BATTLE CRY*, *supra* note 17, at 41 (noting that the issue of expansion of slavery into the West in the 1840s accentuated the divide between the North and South as the North recognized how reliant the South had become on cotton and slave labor, and that the western expansion of cotton cultivation was irreversible).

45. *See, e.g., id.* at 162 (noting that following President Buchanan's election in 1857, one Southerner remarked, "we may yet live free men under the Stars and Stripes").

46. *See id.* at 13–14 (noting how the industrialization of the North revolutionized the northern workforce).

47. *See, e.g., id.* at 91 (noting the disparity in northern and southern industrial and transportation development in the 1840s and 1850s).

48. *See id.* (noting "[d]uring the [1840s], population growth had been 20 percent greater in the free states than in the slave states" because transportation and industrialization in the North increased the economic opportunities in the North).

49. *See id.* at 91–92 (noting that as the North raced ahead in industrial development, the South, ever dependent on its staple crops, became more and more dependent on northern business). "Some 15 or 20 percent of the price of raw cotton went to 'factors' who arranged credit, insurance, warehousing, and shipping for planters." *Id.* at 92. "Most of these factors represented northern . . . firms." *Id.*

nation became surrogates not just for different economies but for different forms of social organization.⁵⁰

As northern and southern, wage labor and slave labor, antislavery and proslavery regions emerged in the nineteenth century, their representatives formed political blocs, and sectional tensions emanating from the issues of slavery and westward expansion dominated the landscape of American governance.⁵¹ The delicate balance struck by the Constitution's framers between a federal union of enumerated powers and states holding reserved powers, between the "inalienable" rights of liberty and property, and between a fragile republic of modest size and the prospect of that republic's expanding and prospering on a grand scale became placed under pressure.⁵² The principles of sovereignty that guided the founding generation had to adjust to massive territorial expansion, the continual growth of the American population, and the increasingly sectional cast of nineteenth century American life.⁵³ One by one the central institutions of American government and politics—the presidency, Congress, the Supreme Court, and the national political parties—tried to adjust the framework of American governance to contain or defuse sectional tension arising from the interaction of slavery with population growth and westward territorial expansion. One by one, they failed.⁵⁴

50. *See id.* at 39–40 ("[B]y the 1850s Americans on both sides of the line separating freedom from slavery came to emphasize more their differences than similarities. Yankees and Southrons spoke the same language, to be sure, but they increasingly used these words to revile each other.").

51. *See id.* at 41 ("So long as the slavery controversy focused on the morality of the institution where it already existed, the two-party system managed to contain the passions it aroused. But when in the 1840s the controversy began to focus on the expansion of slavery into new territories it became irrepressible.").

52. *See, e.g., id.* at 78–91 (highlighting the chaos and tension between the North and South on the matter of fugitive slave laws). "In the typical oblique language of the Constitution of slavery, Article IV, Section 2 stipulated that any 'person held to service or labor in one state' who escaped to another 'shall be delivered up on a claim of the party to whom such service or labor shall be due.'" *Id.* at 78. As the Constitution was silent on how this command should be enforced, fugitive slave laws created tremendous tension between the North and South. *Id.* The North responded to fugitive slave laws with personal liberty laws that "imposed criminal penalties for kidnapping." *Id.* at 79. After Pennsylvania convicted a man for kidnapping and returning a slave to his master in Maryland, the Supreme Court declared Pennsylvania's anti-kidnapping law unconstitutional while upholding fugitive slave laws. *Id.* at 79.

53. *See supra* note 21 and accompanying text (noting the population boom of the mid-nineteenth century); *supra* note 35 and accompanying text (noting that during the eighteenth century, the United States's land territory more than doubled); *supra* note 50 and accompanying text (highlighting the cultural tensions between the North and the South).

54. *See, e.g.,* MCPHERSON, BATTLE CRY, *supra* note 17, at 119 (noting that President

For three decades after 1830, Congress employed several strategies to respond to the potentially divisive effects of slavery. One was to adopt a "gag" rule prohibiting discussion of the issue;⁵⁵ another was to precisely calibrate the balance between slave and free states in the Union, so that each new free state that entered would be accompanied by a new slave state;⁵⁶ another was the Compromise of 1850, legislation that demarcated a line between slave and free territory in the trans-Mississippi West and strengthened the enforcement of a federal fugitive slave law in free states;⁵⁷ yet another was the Kansas-Nebraska Act, which replaced a demarcation line between free and slave territory with the principle of "popular sovereignty," in which the residents of a federal territory entering the Union decided among themselves whether to be a free or slave state.⁵⁸ None of the strategies endured, and the last resulted in the formation of two constitutions in the State of Kansas, one imposing and the other abolishing slavery, and bloodshed among the residents of the state.⁵⁹

While Congress pursued those strategies, a succession of presidents, from Jackson through Buchanan, consistently declined to involve

Pierce vigorously enforced Congress's fugitive slave laws—which the Supreme Court had blessed—at "great cost to domestic tranquility, to the structure of the Democratic party, and ultimately to the Union itself").

55. See, e.g., WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY* 210 (1996) ("The gag rule . . . passed easily [in the House] . . . with votes of Northern and Southern Democrats and many Whigs from the South No more petitions on the subject of slavery! No more scuffles over the petitions!").

56. See MCPHERSON, *BATTLE CRY*, *supra* note 17, at 8 (explaining that the Missouri Compromise of 1820 was Congress's attempt to settle the issue of slavery west of the Mississippi River). The Missouri Compromise tried to solve the problem of slavery in the West by splitting the Louisiana Purchase at the latitude of 36 degrees 30 minutes. *Id.* Consequently, slavery was prohibited north of the 36 degrees 30 minutes parallel, except for in Missouri, where slavery was allowed. *Id.*

57. See *id.* at 71 ("The Compromise of 1850 undoubtedly averted a grave crisis. But hindsight makes clear that it only postponed the trauma."). The Compromise of 1850 provided for the admission of California as a free state, a prohibition of slavery in the District of Columbia, \$10 million for Texas to settle its border dispute with New Mexico, a strengthening of the fugitive slave laws, and organization of Utah and New Mexico as territories without restrictions on slavery. *Id.* at 75.

58. See *id.* at 123 (explaining that the Kansas-Nebraska Act repealed the Missouri Compromise and allowed western states to decide for themselves the legality of slavery within their borders). The Kansas-Nebraska Act "may have been the most important single event pushing the nation towards civil war." *Id.* at 121.

59. See *id.* at 153 (noting that in Kansas, the fight over slavery devolved into a "bushwacking war"). The physical unrest was accompanied by political unrest as Kansas's constitutional convention resulted in both a "Constitution with Slavery" and a "Constitution with no Slavery." *Id.* at 165.

themselves with the issue of slavery, taking the position that it was a matter of state law.⁶⁰ At the same time it was acknowledged that Congress could outlaw slavery in federal territories, which it had done since the Northwest Ordinance of 1789.⁶¹ In 1857, however, the Supreme Court found itself drawn into the question of slavery in the federal territories in the *Dred Scott* case,⁶² and appeared to hold, if the opinion of Chief Justice Taney was taken as the opinion of the Court, that the Due Process Clause of the Fifth Amendment precluded Congress from abolishing slavery in the territories.⁶³ The *Dred Scott* case suggested that slavery could accompany the initial stage of westward expansion in all the federal territory that stretched from the Mississippi River to the Pacific coast.⁶⁴

60. See, e.g., JAMES H. BAKER, *JAMES BUCHANAN* 83 (2004) (noting that President Buchanan referred to slavery as "a 'domestic institution' under the control of the states"); EDWARD P. CRAPOL, JOHN TYLER: *THE ACCIDENTAL PRESIDENT* 38 (2006) (noting that President Tyler advocated for the admission of new states as slave states so that slavery would become diffuse throughout the Union and would wither out at the state level); JOHN S. D. EISENHOWER, ZACHARY TAYLOR 99 (2008) (noting that while Taylor wanted to limit slavery in the territories, he had no intention of disturbing the institution in the South); MCPHERSON, *BATTLE CRY*, *supra* note 17, at 62 (noting that while President Van Buren acknowledged slavery could be prohibited in federal territories, he preferred to leave the issue of slavery in the states to the states); *id.* at 52 (noting that President Polk refused to consider the issue of slavery in California because he did not think slavery in the West was a federal concern); *id.* at 74–75 (noting that President Fillmore supported the Southern sentiment that new territories be admitted without restrictions on slavery so each new state could decide the slavery question for themselves); JOHN MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 303 (2008) ("Jackson may have opposed states' rights when it came to nullification, but on slavery . . . he was not interested in reform."); ROY FRANKLIN NICHOLS, *FRANKLIN PIERCE: YOUNG HICKORY OF THE GRANITE HILLS* 432 (1958) (noting that President Pierce believed "the government had been founded on the principle of mutual concession and recognition of the reserved rights of the states" and "this principle was in danger of being overthrown under the guise of social reform by the North"); ROBERT M. OWENS, *MR. JEFFERSON'S HAMMER: WILLIAM HENRY HARRISON AND THE ORIGINS OF AMERICAN INDIAN POLICY* 68–69 (2007) (noting that while governor of the Illinois Territory, Harrison, who felt it was up to each territory to decide the question of slavery, lobbied Congress to lift the Northwest Ordinance of 1787's prohibition on slavery in the territory).

61. See, e.g., HOWE, *supra* note 42, at 136 (noting that under the Articles of Confederation government, Congress prohibited slavery in the lands north of the Ohio River in the Northwest Ordinance of 1787).

62. See *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (suggesting that Congress could not prohibit the expansion of slavery into the western territories without running afoul of the Due Process Clause of the Fifth Amendment).

63. *Id.*

64. *Id.* ("An act of Congress which deprives a citizen . . . of property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law."). All the Justices on the Taney Court wrote separate opinions in *Dred Scott*, and only Taney's opinion explicitly

Notwithstanding *Dred Scott*, the Republican party platform in the 1860 presidential election endorsed the abolition of slavery in the federal territories, and the election was widely perceived as a contest between an antislavery North and a proslavery South.⁶⁵ Abraham Lincoln, the Republican candidate, carried all eighteen free states, giving him a decisive majority in the electoral college.⁶⁶ Although Lincoln had repeatedly said that he would not interfere with slavery in the South, Southerners believed that if slavery were excluded from the federal territories, population trends would ensure that slave states would be a permanent minority in both Congress and the electoral college.⁶⁷ Representatives of the Mississippi legislature, two months after Lincoln's election, declared that "utter subjugation awaits us in the Union, if we should consent longer to remain in it. We must either submit to degradation and to the loss of property worth four billions of money, or we must secede from the Union."⁶⁸ And members of the South Carolina legislature stated that with Lincoln's election "the South shall be excluded from the common territory . . . and a war must be waged against slavery until it shall cease throughout the United States."⁶⁹

addressed the constitutionality of slavery in the federal territories—an issue that was not necessary to the case's disposition. Nonetheless, Taney's opinion was described as "the opinion of the Court." See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 333–34 (1978) ("For there can be no doubt that Taney's opinion was accepted as the opinion of the Court . . .").

65. See REPUBLICAN NATIONAL PLATFORM (1860) ("[W]e deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to Slavery in any Territory of the United States.").

66. See MCPHERSON, *BATTLE CRY*, *supra* note 17, at 232 (noting that by sweeping the free states, Lincoln was able to amass 180 electoral votes, well surpassing the 152 needed for election in 1860).

67. See, e.g., DEW, *supra* note 23, at 24 (noting that just weeks after the election of 1860, a collection of twenty southern senators and representatives met because they felt "[a]ll hope of [political] relief in the Union, through the agency of committees, Congressional legislation, or constitutional amendments [were] extinguished").

68. *Declaration of Immediate Causes*, in JOURNAL OF THE MISSISSIPPI STATE CONVENTION 86, 87–88 (1861). The speeches and correspondence of the state commissioners of the original seceding states have been collected and analyzed in Dew's book. DEW, *supra* note 23, at 13.

69. JOURNAL OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, HELD IN 1860–1861 330–31 (1861); DEW, *supra* note 23, at 12.

B. The Constitutionality of Secession

The constitutional argument on behalf of secession was very far from being a marginal oddity in early- and mid-nineteenth century constitutional jurisprudence.⁷⁰ A "compact" theory of sovereignty, under which the Constitution was treated as an agreement among all the states involved in forming the Union to convey certain enumerated powers to a federal government and reserve the remaining sovereign authority in themselves, surfaced as early as the founding generation and had been prominently reasserted in the 1820s and 1830s.⁷¹ Since no provision of the Constitution expressly gave the federal government the power to prevent states from dissolving their connections with the Union, the argument ran that they retained the sovereign power to do so.⁷² This was especially self-evident if one believed, as many early nineteenth-century Americans did, that the primary loyalties of individual citizens were to their states and localities.⁷³

To be sure, there were some provisions in the Constitution, such as the General Welfare and the Necessary and Proper Clauses of Article I, that suggested that Congress might have been delegated power to prevent the union of states from disintegrating.⁷⁴ Many of the Court's important decisions during Marshall's tenure had the effect of construing federal power broadly in order to prevent states from engaging in policies that might have disintegrating tendencies.⁷⁵ But those decisions operated

70. See, e.g., DEW, *supra* note 23, at 13 (noting that Jefferson Davis argued secession was a fundamental constitutional right that the Declaration of Independence of 1776 defined as inalienable).

71. See, e.g., G. Edward White, *The Marshall Court and Cultural Change, 1815–1835*, in 3–4 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 489 (Paul A. Freund & Stanley N. Katz eds., 1988) ("[T]he Union [is] . . . a confederacy of the states based on the consent of the states in their capacity as representatives of the people. State interests could not be bypassed in the name of a nation entity directly representative of the people's will.").

72. See, e.g., *id.* ("Construction of the constitution ought to be strict . . . in all cases where the antecedent rights of a state may be drawn in question." (internal quotations omitted)). "[S]tate governments . . . retain every power, jurisdiction, and right not delegated to the United States." *Id.*

73. See MCPHERSON, BATTLE CRY, *supra* note 17, at 240 (noting that this loyalty arose from the notion that the states existed before the Union).

74. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defense and general Welfare of the United States . . ."); *id.* art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

75. See White, *supra* note 71, at 500 (explaining that the Court's goal was to "read

against the same background assumptions as the "compact theory" arguments on behalf of "states' rights": That the federal government's powers in the Constitution had been carved out of a residuum of state power.⁷⁶

In an April 29, 1861 message to the Provisional Congress of the Confederacy, Jefferson Davis reasserted the idea that the Constitution of 1789 was "a compact between independent [s]tates," a proposition which he found reinforced in the Ninth and Tenth Amendments, which "plac[ed] beyond any pretense of doubt the reservation by the [s]tates of all their sovereign rights and powers not expressly delegated to the United States by the Constitution."⁷⁷ In addition, the law of nations declared that "each [s]tate was, in the last resort, the sole judge" of what acts were consistent with those sovereign rights.⁷⁸ Later, Alexander H. Stephens, Davis's vice president, would elaborate on that argument, maintaining that it was "the inherent right of Nations" to "disregard the obligations of Compacts of all sorts" when "there has been a breach of the Compact by the other party or parties."⁷⁹ Northern states, by refusing to comply with their obligation to return fugitive slaves, had breached the compact with the South, justifying secession.

Lincoln rejected this view in his inaugural address, arguing that the Articles of Confederation declared that the Union was to be perpetual, and the Constitution had been created "to form a more perfect union."⁸⁰ In 1869, Chief Justice Salmon P. Chase reaffirmed that view in *Texas v.*

Article III as a mandate not only for extensive federal judicial power but for an obligatory judicial-legislative partnership to extend the authority of the national government" vis-à-vis the states).

76. See *id.* at 500–01 (explaining that Justice Story's opinion in *Martin v. Hunter* was "designed to entrench the proposition that the Constitution had created a federal government of potentially wide scope").

77. Jefferson Davis, *Message to Congress of the Confederate States of America (Apr. 29, 1861)*, in 1 MESSAGES AND PAPERS OF THE CONFEDERACY: INCLUDING THE DIPLOMATIC CORRESPONDENCE, 1861–1865 63, 64–65 (James D. Richardson ed., 1905) [hereinafter Richardson, MESSAGES AND PAPERS OF THE CONFEDERACY].

78. *Id.* at 1269.

79. 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES: ITS CAUSES, CHARACTER, CONDUCT AND RESULTS 496 (1868).

80. See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 264–65 (Roy P. Basler ed., 1953) ("[I]n contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments.").

White,⁸¹ pointing to the Guarantee Clause and preamble of the Constitution as evidence that the framers wanted to protect the states in the Union "against domestic violence" and to preserve "a more perfect Union."⁸² Chase also spoke of the Constitution as creating an "indestructible Union" or "indestructible states."⁸³ But those comments were predicated on the hypothesis that the Confederate states had never left the Union—the same hypothesis that enabled all the decisions of their courts and legislatures to be deemed legal nullities. That hypothesis erected a fiction, and Chase was unable to point to any constitutional provision preventing a state from seceding.⁸⁴ To show that the Framers anticipated a permanent Union was not the same as showing that they had refused to allow states to withdraw from it.

C. *The Ideology of Secession*

The rapidity of secessionist declarations by southern states after Lincoln's election was remarkable, as was the assembling of the Confederate government uniting them. By February 1, 1861, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas followed South Carolina in seceding.⁸⁵ Between February 4 and 9, a convention of those states met in Montgomery, Alabama, and drafted a provisional constitution for the Confederate States of America.⁸⁶ By February 9, 1861, Jefferson Davis of Mississippi and Alexander Stephens of Georgia had been elected President and Vice-President of the Confederacy.⁸⁷ In contrast to the decision for American independence, which took place more than a year after the Continental Congress first convened, or the creation and ratification of the Constitution of the United States, which took place slightly less than two years after delegates were first assembled in Philadelphia, the Confederacy

81. *Texas v. White*, 74 U.S. 700, 725 (1868) ("Texas . . . entered [an] indissoluble [Union]. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. . . . The union between Texas and the other States was as . . . indissoluble as the union between the original States.").

82. *Id.* at 724, 734.

83. *Id.* at 725.

84. *Id.* at 700–36.

85. See MCPHERSON, *BATTLE CRY*, *supra* note 17, at 235 ("Mississippi [seceded] on January 9, 1861, followed by Florida on January 10, Alabama on January 11, Georgia on January 19, Louisiana on January 26, and Texas on February 1.").

86. *Id.* at 257.

87. *Id.* at 259.

was launched, with a constitution, three months after the news of Lincoln's election reached the South.⁸⁸

Part of the swiftness was attributable to the fact that secession came in the form of conventions in individual states rather than through the actions of a body akin to the Continental Congress.⁸⁹ Delegates to those conventions were elected, but the actions of the conventions were not submitted to the people at large for ratification except in Texas, where approximately three-fourths of those who voted endorsed secession.⁹⁰ The process of secession faced fewer parliamentary obstacles than had those of independence or the creation of the Constitution.

But it was also clear that the act of secession represented a kind of release to Southerners who had become increasingly apprehensive about their future. Many saw secession as a gesture of principled defiance with few immediate adverse consequences. It was widely thought in seceding states that the United States government would not forcibly attempt to keep them in the Union; secession was regarded as an initial step in an eventually cooperative relationship with the states that remained.⁹¹ The crowds who waved flags and danced in the streets in Charleston, Savannah, New Orleans, and Mobile, after their state conventions voted for secession, were not anticipating the four years of carnage that would ensue.⁹²

Supporters of secession frequently compared themselves to the Revolutionary War patriots who had resolved to separate themselves from Great Britain in order to preserve their liberties. From Jefferson Davis, who called upon Southerners to "renew such sacrifices as our fathers made to the holy cause of constitutional liberty,"⁹³ to a Virginia slaveholder, who equated remaining in the Union with being "'deprived of that right for which our fathers fought in the battles of the revolution,'"⁹⁴ to a Virginia officer in the Confederate Army, who likened the Union's "war of subjugation against the [S]outh" to "England's war upon the colonies,"⁹⁵

88. *Id.* at 234.

89. *Id.*

90. *Id.* at 235.

91. *See id.* at 238 (noting that Southerners thought "the Yankees were cowards and would not fight" (internal quotations omitted)).

92. *Id.*

93. Jefferson Davis, Message to Confederate States Congress (Feb. 22, 1862), in JEFFERSON DAVIS, CONSTITUTIONALIST: HIS LETTERS, PAPERS, AND SPEECHES 202 (Dunbar Rowland ed., 1923).

94. OAKES, *supra* note 30, at 239.

95. Letter from Thomas Rowland (June 14, 1861), in JAMES M. MCPHERSON, WHAT THEY FOUGHT FOR: 1861–1865 9 (1994) [hereinafter MCPHERSON, WHAT THEY FOUGHT

those who joined the Confederacy thought of secession as a "Holy Cause of Liberty and Independence."⁹⁶ In the late months of 1864, when Confederate soldiers suffered increasingly severe hardships, and desertions from the Confederate army skyrocketed, letters and diaries of the soldiers continued to describe the war as a "gigantic struggle for liberty," a fight "against tyranny and oppression," and a crusade "for the dear rights of freemen."⁹⁷

The emphasis on liberty and independence in the rhetoric of secessionists has regularly been described as ironic because the "holy cause" for which Southerners seceded and fought was a social and economic system predicated on the "rights" of white Southerners to deprive black Southerners of their liberties and confine them to a permanent state of dependency. Only occasionally, however, can one find evidence of the recognition of these contradictions in the rhetoric of those who supported secession or fought for the Confederacy.⁹⁸ Much more common were statements that Southerners would be "subjugated" or "degraded" if a northern-dominated federal government were to abolish slavery.⁹⁹ The "liberty" they enjoyed as free white men, capable of owning African-American slaves, would be taken away. Those comments demonstrated how deeply white Southerners, by the 1850s, had come to view African-American slavery not only as a symbol of a social hierarchy based on race, but as a way of defining what it meant to be free. Not only could white men own slaves, they could not be slaves. If slavery were abolished, those features of whiteness would disappear as well. No word better captured white Southerners' sense that preserving slavery meant preserving their

FOR].

96. Letter from Henry Orr (Oct. 31, 1861), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 9.

97. Thomas J. Key, Diary Entry (Aug. 8, 1864), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 24–25; Robert Emory Park, Dairy Entry (Dec. 24, 1864), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 25.

98. See Letter from Charles Woodward Hudson (Sept. 14, 1861), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 51 ("It is insulting to the English common sense of race [to say that Confederate soldiers] are battling for an abstract right common to all humanity. Every reflecting child will glance at the darkey who waits on him [and] laugh at the idea of such an 'abstract right.'").

99. See Letter from Thomas J. Goree (Feb. 18, 1862), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 12 ("It is better to spend all in defending our country than to be subjugated and have it taken away from us."); Letter from Sydney S. Champion (June 1, 1864), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 25 (expressing that a northern victory would amount "to a depth of degradation [sic] immeasurably below that of the Helots of Greece").

own freedom than "subjugation."¹⁰⁰ Slaveholders and nonslaveholders both described the prospect of northern political control of the South as "galling in its tyranny,"¹⁰¹ concluding that "[i]t is better to spend our all in defending our country than to be subjugated and have it taken away from us."¹⁰²

It is thus appropriate to see the conventions that resulted in seven states leaving the Union within a six-week period, only a month after Lincoln's election, as markers of released pent-up emotions, producing acts whose consequences were not fully anticipated. It is also appropriate, however, to see the declarations of secession as constituting a full recognition, by white residents of the seceding states, of how enlisted they had become in the institution of slavery. Alongside the traditional rhetoric of American sovereignty debates invoked in official justifications for secession, both during and after the event—allusions to "liberty," "states' rights," "consolidation," "tyranny," and other watchwords—there were also the particularistic appeals secessionist Southerners made to other Southerners whom they hoped to persuade to join them. In the course of addressing a joint session of the Georgia General Assembly on December 17, 1860, three days before South Carolina seceded, Judge William L. Harris, a Mississippi secession commissioner,¹⁰³ declared that:

[The Lincoln Black Republicans] are more defiant and more intolerant than ever before.

....

They . . . now demand equality between the white and negro races, under our Constitution; equality in representation, equality in the right of suffrage, . . . equality in the social circle, equality in the rights of matrimony

[T]hey have proclaimed freedom to the slave, but eternal degradation for you and for us.

100. See MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 12 (noting that "[s]ubjugated was the favorite word for the fate worse than death that would face southern whites if the Confederacy lost the war").

101. Letter from John Weaton (Jan. 19, 1864), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 25.

102. Letter from Thomas J. Goree (Feb. 18, 1862), in MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 12.

103. See DEW, *supra* note 23, at 18–21 (noting that as momentum for secession grew in the South in late 1860 and early 1861, five states—Alabama, Georgia, Louisiana, Mississippi, and South Carolina—appointed "commissioners" to the legislatures of other slaveholding states). Commissioners were instructed to "spread the secessionist message" across the South. *Id.* at 18.

....

Our fathers made this a government for the white man, rejecting the negro, as an ignorant, inferior, barbarian race, incapable of self-government, and not, therefore, entitled to be associated with the white man upon terms of civil, political, or social equality.

This new administration comes to power, under the solemn pledge to overturn and strike down this great feature of the Union . . . and to substitute in its stead their new theory of the universal equality of the black and white races.

....

[T]here is but one alternative:

This *new union* with Lincoln Black Republicans and free negroes, *without slavery*; or slavery under our old constitutional bond of union, *without* Lincoln Black Republicans, or free negroes either, to molest us.

If we take the former, then submission to negro equality is our fate. If the latter, then *secession* is inevitable—each State for itself and by itself, but with a view to the immediate formation of a Southern Confederacy¹⁰⁴

104. William L. Harris, Address to the Georgia General Assembly (Dec. 17, 1860), *in* DEW, *supra* note 23, at 83, 85–87.

In 1860 President Buchanan tendered to [Harris] a seat upon the bench of the Supreme Court of the United States, to fill the vacancy occasioned by the death of Mr. Justice Peter V. Daniel of Virginia, but this appointment Judge Harris declined in consequence of the approaching and foreseen disruption of the Federal Union. He spurned the honors of an office which might place him in an attitude of official hostility to measures the adoption of which he foresaw would be the only alternative to the degradation of his people.

JAMES D. LYNCH, THE BENCH AND BAR OF MISSISSIPPI 343 (1881).

The idea that Buchanan would have nominated a justice to the Court with the views expressed by Harris is arresting, but there are some reasons to doubt the authenticity of Lynch's statement. Daniel died in May 1860, and Harris would not have been aware of any "approaching . . . disruption of the [F]ederal [U]nion" until November 1860 at the earliest, and would not have known that on the Court he would have been "in an attitude of hostility" to secessionist measures until December 20, when South Carolina seceded. *Id.* Thus, if Harris was tendered an offer by Buchanan and declined it for the reasons stated, his exchange with Buchanan would have had to take place in the comparatively narrow time frame between December 20 and December 31, 1860, which included the Christmas holiday. Other contemporary sources discussing Buchanan's nomination did not mention Harris as a candidate, although they did indicate that some candidates from Mississippi were proposed. From the outset Buchanan's candidate for the position seems to have been Jeremiah S. Black, who served the Buchanan administration as Attorney General and Secretary of State. *See* CHAUNCEY F. BLACK, ESSAYS AND SPEECHES OF JEREMIAH S. BLACK: WITH A BIOGRAPHICAL SKETCH 8 (1885) (noting that Black served as Attorney General from 1857 until 1860 when he replaced Lewis Cass as Secretary of State). Because Buchanan regarded

D. The Initial Response to Secession

Galvanized by sentiments such as those expressed by Harris, seven states left the Union and assembled the Confederate States of America by the middle of February 1861.¹⁰⁵ Eight southern states remained in the Union, and Buchanan remained in the presidency until March 4.¹⁰⁶ In the interval between Lincoln's election and his inauguration, neither the Confederacy, Congress, nor the Buchanan administration showed any inclination to escalate secession into war.¹⁰⁷ It appeared, in fact, as if the seceding states might be left undisturbed so long as union sentiments prevailed across the rest of the South.¹⁰⁸ The gap between secession from the Union by seven "cotton" states and civil war seemed a tolerably wide one.

Between February and April 1861 that state of affairs continued in place.¹⁰⁹ The eight slave states remaining in the Union, all of whom had a lower concentration of slaves in their populations than the states that had seceded, showed little inclination to embrace secession.¹¹⁰ Legislatures in five of those states proposed that delegates be elected to conventions considering secession, but conventions were only held in three of those

Black as valuable in those capacities, he delayed submitting Black's nomination until February 1861, at which point several southern senators inclined to support a Buchanan nominee had left the Senate. *See id.* at 24 (noting that due "to the previous withdrawals of Southern Senators," Black was never confirmed). Black's nomination was eventually tabled, giving Lincoln the appointment. *Id.*

105. *See* MCPHERSON, *BATTLE CRY*, *supra* note 17, at 235–36 (noting that by February 1, 1861, South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas had seceded).

106. *See id.* at 236 (noting that Virginia, North Carolina, Tennessee, Arkansas, Missouri, Kentucky, Maryland, and Delaware remained in the Union by the time Lincoln was inaugurated on March 4, 1861).

107. *See id.* at 248 (noting that the federal government's passivity towards the secession crisis was due to "lame-duck syndrome"). "During the four-month interval between Lincoln's election and inauguration, Buchanan had the executive power but felt little responsibility for the crisis, while Lincoln had responsibility but little power." *Id.*

108. *See id.* at 249–50 (noting that President Buchanan believed that if no other states joined the original seven in secession, the "disunion fever would run its course and the presumed legions of southern unionists would bring the South back to its senses").

109. *See id.* at 274 (noting that after February 1861, no states left the Union for the Confederacy until Virginia seceded on April 15, 1861).

110. *See id.* at 255 (noting that slaves accounted for forty-seven percent of the population in the original seven states to secede, while slaves accounted for just twenty-three percent of the population in the eight southern states that remained part of the Union through February 1861).

states, Arkansas, Missouri, and Virginia.¹¹¹ By April 4, each state had rejected secession.¹¹² North Carolina and Tennessee voters declined even to hold conventions, the legislatures of Delaware and Kentucky did not issue convention proposals, and the governor of Maryland refused to call the legislature into session for the purpose of considering a secession convention.¹¹³

Meanwhile, Congress directed its activity toward some form of compromise with the states that had seceded.¹¹⁴ Buchanan's last message to Congress, delivered on December 3, denied that states had a constitutional right to secede, but also conceded that the federal government had no power to "coerce" a seceding state to remain.¹¹⁵ It also described secession as one of the "natural effects" of "the incessant and violent agitation of the slavery question" by the North.¹¹⁶ Buchanan asked northern states to repeal their personal liberty laws, which he deemed "unconstitutional and obnoxious,"¹¹⁷ to support a constitutional amendment legitimizing the right of slave-ownership in all federal territories,¹¹⁸ and to join southern states in an effort to acquire Cuba, which could enter the Union as a state with a large slave population.¹¹⁹

Those requests, which in effect asked northern members of Congress to support the platforms of southern candidates whom a majority of American voters had decisively rejected in the 1860 election, had no chance

111. *See id.* at 254 (noting that Arkansas, Tennessee, North Carolina, Missouri, and Virginia created provisions for the calling of a secession convention).

112. *See id.* at 255 ("[T]he Missouri and Arkansas conventions rejected secession in March . . . and Virginia did the same by a two-to-one margin on April 4.").

113. *See id.* ("Voters in North Carolina and Tennessee, given the choice of voting for or against the holding of a convention, voted against doing so."). "The legislatures of Kentucky and Delaware refused to provide for conventions and the governor of Maryland did not call his legislature into session." *Id.*

114. *See id.* at 252 (describing how each house of Congress "set up a special committee" to "sift all the compromise proposals introduced").

115. *See* James Buchanan, Message to Congress (Dec. 3, 1860), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3157, 3159 (James D. Richardson ed., 1897) (claiming that the Constitution would only justify revolution if the Federal Government were "guilty of 'a deliberate, palpable, and dangerous exercise' of powers not granted by the Constitution").

116. *Id.* at 3157.

117. *Id.* at 3161.

118. *See id.* at 3169 (outlining the three main points of the proposed amendment as: (1) recognizing the right of property in slaves; (2) imposing a duty to protect that right in the Territories; and (3) reinforcing the validity of the fugitive slave law).

119. MCPHERSON, BATTLE CRY, *supra* note 17, at 251.

of being taken up by Congress.¹²⁰ But other compromise proposals surfaced in the lame-duck Congress of 1860–61, which included a few members from states that had seceded.¹²¹ Special committees were formed in both houses to formulate proposals, and eventually five came to Congress.¹²² Two emanating from the House committee, which had thirty-three members, were eventually passed by both houses.¹²³ One was a resolution endorsing the repeal of personal liberty laws inconsistent with the 1850 Fugitive Slave Act,¹²⁴ the other was a proposed Thirteenth Amendment to the Constitution, which prevented the federal government from interfering with slavery in the states.¹²⁵ That amendment actually received the two-thirds majority in both houses necessary to send it to the states for ratification, although events were shortly to intervene to prevent the ratification process from getting under way.¹²⁶

Other proposals were designed to make more immediate concessions to the slave states remaining in the Union.¹²⁷ One, originating in the Senate committee of thirteen members, was a series of amendments to the Constitution designed to be valid in perpetuity.¹²⁸ They established protection for slavery in the states; abolished slavery in territories north of 36 degrees 30 minutes while retaining it south of that line, including subsequently acquired territories; prevented Congress from abolishing slavery on federal properties within slave states or in the District of Columbia;¹²⁹ prevented Congress from interfering with the interstate trade

120. *See id.* (recognizing that most of these proposals were doomed to fail because "they all shared the same feature: Republicans would have to make all the concessions").

121. *Id.* at 248.

122. *Id.* at 252.

123. *See id.* at 255–56 (noting that the special House Committee of Thirty-Three had one representative from each state); *id.* at 256 (recognizing the importance of these two recommendations, which received "Seward's active and Lincoln's passive endorsement," in preventing the upper South from seceding for the time being).

124. *Id.* at 256.

125. *Id.*

126. *Id.*

127. *See id.* at 253 (noting that fear of a "secession panic on Wall Street" led some Republican party leaders to advocate for adopting a one-sided "compromise" that would overwhelmingly benefit the South).

128. *See id.* at 253 & n.44 (drawing precedent from Article V of the Constitution for an unamendable amendment, "these constitutional amendments were to be valid for all time; no future amendment could override them").

129. The amendment further provided that slavery could be abolished in the District of Columbia only if its inhabitants consented and slavery had been abolished in both Virginia and Maryland. *Id.* at 252–53.

of slaves; and established compensation for slaveowners who were prevented from recovering their fugitive slaves in northern states.¹³⁰ Presented in a package by Senator John J. Crittenden of Kentucky, the amendments nearly passed the Senate, being rejected 25-23 on the Senate floor.¹³¹ All twenty-five Republicans voted against them, and fourteen senators from states that had seceded or were contemplating seceding did not vote.¹³²

In addition, Congress agreed to take up the recommendations made by a "peace convention" of statesmen, most of whom had retired from public office, that the Virginia legislature had created and former president John Tyler chaired.¹³³ The delegates to that convention attempted to modify the Crittenden compromise package, extending the demarcation line between free and slave territory only to "present territory" and requiring a majority vote of senators from both free and slave states before the acquisition of any future territory.¹³⁴ Those changes were made to assuage northern apprehensions about the future acquisition of Cuba, Mexico, or other regions suitable for slavery, but they were not enough to get the peace convention's recommendations through Congress.¹³⁵

The compromise proposals signaled that those in the South who believed that secession would have no immediate adverse consequences had reason for optimism.¹³⁶ The proposals amounted to a retreat from the Republican platform's categorical stance of not allowing slavery to expand beyond its current state base.¹³⁷ They were also designed to prevent the federal government from ever interfering with slavery in states where it was already established.¹³⁸ Only one of them, the "peace convention" proposal, could have been said to make concessions to antislavery constituencies, either within or outside of Congress.¹³⁹ The same attitude seemed present

130. *Id.*

131. *See id.* at 254 (noting that the proposal was rejected in the Senate).

132. *Id.*

133. *Id.* at 256-57.

134. *Id.* at 257.

135. *Id.*

136. *Id.* at 255.

137. *See id.* at 253 (recognizing the proposed constitutional amendment that would have protected slavery south of the 36 degrees 30 minutes line in territories "now held, or hereafter acquired" amounted to an expansion of slavery).

138. *See id.* (noting the Republicans proposed an unamendable constitutional amendment that would have prohibited Congress from interfering in any way with the interstate slave trade).

139. *See id.* at 257 (proposing to limit the application of the 36 degrees 30 minutes line

in Lincoln's March 4, 1861, inaugural address.¹⁴⁰ In it he repeated his pledge not to interfere with slavery where it existed and stated that when "in any interior locality" dissatisfaction with the policies of the federal government was "so great and so universal, as to prevent competent resident citizens from holding the Federal offices," those offices would be closed "for the time."¹⁴¹ On the potentially disruptive issue of federal property in states that had seceded, much of which had been seized by those states, Lincoln said only that the federal government would continue to "hold, occupy, and possess" its property, and would "collect the duties and imposts" in the states.¹⁴² Customs duties and imposts could conceivably be collected offshore, and, at the time of Lincoln's address, only two conspicuous federal military posts existed in seceded states: Fort Pickens, in Pensacola Bay off of Florida, and Fort Sumter, on an island in Charleston harbor.¹⁴³

E. The Problem of Federal Property in the South: Fort Sumter

The status of those federal forts, however, threatened to be disruptive.¹⁴⁴ Of the two, Fort Sumter, in the range of Confederate guns pointing out from Charleston, was potentially the more symbolic.¹⁴⁵ It had the capacity to mount 146 guns and accommodate 650 soldiers, and when fully staffed it posed a formidable threat to any traffic in Charleston harbor.¹⁴⁶ But at the time South Carolina seceded, the fort was undergoing repairs, and the comparatively small number of Union soldiers assigned to its garrison were headquartered at nearby Fort Moultrie on the South

to present territory, rather than protecting slavery in future acquired territory below the line).

140. See ABRAHAM LINCOLN, Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 249, 249–71 (Roy P. Basler ed., 1953) (expressing intent not to interfere with slavery where it already existed and taking a moderate tone in regard to federal property in states that had seceded).

141. *Id.* at 266; see also *id.* at 263 ("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.").

142. *Id.* at 266.

143. MCPHERSON, BATTLE CRY, *supra* note 17, at 263.

144. See *id.* at 264 (describing the dispatch on Lincoln's desk the day after inauguration requesting more supplies for Fort Sumter).

145. See *id.* at 263 ("Fort Sumter had become a commanding symbol of national sovereignty in the very cradle of secession, a symbol that the Confederate government could not tolerate if it wished its own sovereignty to be recognized by the world.").

146. *Id.* at 264.

Carolina mainland.¹⁴⁷ After South Carolina's secession, the state sent commissioners to Washington to negotiate a withdrawal of Union troops from both Moultrie and Sumter.¹⁴⁸

The Buchanan administration, which favored withdrawing troops but did not want to appear as if it were appeasing the Confederacy, promised not to reinforce the Union garrison at Charleston but stopped short of agreeing to withdraw it.¹⁴⁹ While negotiations were taking place, the commander at Fort Moultrie, Major Robert Anderson, moved his troops from there to Fort Sumter under the cover of darkness, placing the troops in a location less easily assailable from the South Carolina mainland.¹⁵⁰ When public opinion in the North hailed Anderson as a hero and demanded that Sumter not be given to South Carolina, Buchanan approved a proposal to reinforce the troops now stationed at Sumter.¹⁵¹ A merchant ship was dispatched with supplies and 200 men, but its mission became public knowledge, and when the ship arrived in Charleston harbor on January 9, 1861, it was fired on by South Carolina forces and retreated.¹⁵² The Union soldiers at Sumter were ordered not to fire back.¹⁵³ The incident initiated a truce between South Carolina and the Buchanan administration in which Sumter and Fort Pickens were left undisturbed, but no additional efforts to reinforce them were made.¹⁵⁴ After the Confederacy came into being in February, Jefferson Davis sent another set of commissioners to Washington to negotiate the withdrawal of Union forces from both Sumter and Pickens.¹⁵⁵

There matters stood on March 4, when Lincoln formally assumed the presidency.¹⁵⁶ The morning after Lincoln's inauguration he received a dispatch from Anderson, indicating that his supplies were running low and would be exhausted within six weeks.¹⁵⁷ The information set off a series of

147. *See id.* (explaining that in December 1860 only workmen lived at the fort).

148. *See id.* (noting that even prior to seceding South Carolina had started attempting to broach the issue of withdrawing Federal troops from Fort Sumter).

149. *Id.* at 265.

150. *Id.*

151. *See id.* at 266 (positing that Buchanan's decision to reinforce Fort Sumter was aided by the arrival of several "staunch unionists" in his cabinet).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 267.

156. *Id.* at 261.

157. *Id.* at 264.

debates within the Lincoln administration.¹⁵⁸ Most of Lincoln's cabinet favored giving up Pickens and Sumter as a gesture of reconciliation to the upper south states, and William Seward, Lincoln's Secretary of State, made independent, unauthorized contact with the Confederate commissioners and signaled to them that Sumter and Pickens would be given up to the South.¹⁵⁹ Lincoln, however, mindful of his pledge to "hold, occupy, and possess" federal territory in seceded states, resisted withdrawing from either of the forts.¹⁶⁰ By the middle of March, Lincoln had made the decision to reinforce Fort Pickens, but the issue of what to do about Sumter remained open.¹⁶¹ By early April, a majority of Lincoln's cabinet had resolved not to give up Sumter, Lincoln had privately reprimanded Seward, and logistical plans for reinforcing the forts were conceived.¹⁶²

Under the plans, Pickens was to be reinforced secretly with troops as well as supplies, but Sumter was to be reinforced publicly.¹⁶³ The reinforcement of Sumter was to take place by troop transports, escorted by Union warships, which would station themselves at a sandbar in the Atlantic near the mouth of Charleston harbor.¹⁶⁴ Tugs and small boats would carry only supplies from the transport ships to the garrison at Sumter, with the soldier reinforcements remaining on the transports.¹⁶⁵ The governor of South Carolina would be notified that the Union forces had been instructed not to fire unless fired upon, and that only provisions were being brought to the fort.¹⁶⁶ That message was sent on April 6.¹⁶⁷

Lincoln's strategy was designed to place the Confederate leaders in a dilemma.¹⁶⁸ If they allowed Fort Sumter's reinforcement, they were

158. *See id.* at 267–68 (outlining the tension between Lincoln's advisors, who overwhelmingly supported withdrawal, and Lincoln's pledge to "hold, occupy, and possess" federal property).

159. *See id.* at 268 (suggesting Seward contacted Confederate officials out of a desire to establish himself as the "premier of the administration").

160. *See id.* at 268–69 (explaining how Lincoln increasingly listened to the opinion of Montgomery Blair, the only member of his cabinet to staunchly oppose withdrawal, and began to consider other proposals for reinforcing the fort).

161. *Id.* at 268.

162. *See id.* at 269–70 (chronicling the shift in Lincoln's cabinet toward supporting reinforcement).

163. *Id.* at 271.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 272.

168. *Id.* at 271–72.

permitting a potentially powerful Union military presence to remain within the state that had led secession.¹⁶⁹ If they resisted, they would be using military force against federal property and federal troops, an unambiguously "warlike" action.¹⁷⁰ On April 9, Davis's cabinet selected the latter option.¹⁷¹ They endorsed his order to General Pierre Beauregard, the new commander of South Carolina militia forces, to fire on Fort Sumter before the federal transports arrived.¹⁷² Beauregard first asked Anderson to surrender; then, when Anderson rejected the offer, he began firing on Sumter in the early morning hours of April 12.¹⁷³ By April 14, Anderson's garrison had surrendered, and the newly created Confederate flag flew over Sumter.¹⁷⁴ The next day, Lincoln announced that a rebellion "too powerful to be suppressed by the ordinary course of judicial proceedings" had taken place in South Carolina, and called 75,000 militiamen into the service of the Union army "to maintain the honor, the integrity, and the existence of our National Union."¹⁷⁵ The response in the North to Lincoln's request was so favorable that governors from northern states asked the War Department to call up more troops from their states than Lincoln had requested.¹⁷⁶

When Lincoln responded to the firing on Sumter by asking for militia support from southern as well as northern states, regional consciousness, pivoting on the slavery issue, surfaced.¹⁷⁷ Alongside the extremely enthusiastic responses issuing from the governors of Massachusetts, New York, Ohio, Indiana, and Illinois were statements from those of Virginia, North Carolina, Missouri, Kentucky, Tennessee, and Arkansas, indicating that they would, as the governor of Kentucky put it, "furnish no troops for

169. *Id.* at 271.

170. *Id.*

171. *See id.* at 273 (explaining Davis's order to attack the fort "before the relief fleet arrived, if possible" in order to take a strong position and avoid firing on unarmed boats).

172. *See id.* (describing Davis's decision to order the attack following a cabinet meeting on April 9, 1861).

173. *Id.*

174. *See id.* (describing how Anderson surrendered "[a]fter thirty-three hours of bombardment by four thousand shot and shells which destroyed part of the fort and set the interior on fire").

175. ABRAHAM LINCOLN, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 331, 331–32 (Roy P. Basler ed., 1953).

176. *See* MCPHERSON, BATTLE CRY, *supra* note 17, at 275 (relating how "[h]aving raised the requisitioned thirteen regiments, Ohio's governor wired Washington that 'without seriously repressing the ardor of the people, I can hardly stop short of twenty'").

177. *Id.* at 276–77.

the wicked purpose of subduing her sister Southern States."¹⁷⁸ "The division," a North Carolina newspaper stated, "must be made on the line of slavery. The South must go with the South."¹⁷⁹

That argument resonated throughout the southern states that had remained in the Union.¹⁸⁰ Four of those states, Arkansas, North Carolina, Virginia, and Tennessee, formally seceded between May 6 and June 8, some by referendum, others in conventions.¹⁸¹ A convention in Virginia had voted for secession as early as April 17, and Virginia militia seized the federal armory at Harper's Ferry and the navy yard at Gosport the next day.¹⁸² On April 27, the convention invited the Confederate government to transfer its capital from Montgomery, Alabama, to Richmond, Virginia, and that invitation was accepted on May 21.¹⁸³ Secession had spread throughout the South, and the Confederacy had chosen to define itself as a military foe of the Union government.¹⁸⁴

Looking back on the rush of events between November 1860 and April 1861, one gains the distinct impression that secession was initially viewed by its adherents as a gesture of principled defiance: A declaration that free white southern men would not be subjugated by a growing majority of abolitionists and Black Republicans.¹⁸⁵ One also gains the impression that many enthusiasts for secession did not believe that severe consequences would follow from it.¹⁸⁶ The initial response of the Buchanan

178. *Id.* at 276; *see also* 1 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SER. III 69–71 (1899) [hereinafter 1 WAR OF THE REBELLION] (reprinting the affirmative responses of the Governors of Connecticut, Indiana, Maine, and Massachusetts to Lincoln's request that those states muster troops for the Union Army).

179. MCPHERSON, BATTLE CRY, *supra* note 17, at 277 (quoting Editorial, WILMINGTON JOURNAL, March 4, 1861).

180. *See id.* at 276–77 (suggesting the upper South was inclined to oppose secession prior to Lincoln's hostile declaration, after which many southern unionists felt they were "left no other alternative but to fight for or against [their] section" (internal quotations omitted)).

181. *Id.* at 282–83.

182. *Id.* at 278–79.

183. *Id.* at 280.

184. *E.g., id.* at 276 ("Tennessee 'will not furnish a single man for the purpose of coercion,' proclaimed her governor, 'but fifty thousand if necessary for the defense of our rights and those of our Southern brothers.'").

185. *See id.* at 284 ("The upper South, like the lower, went to war to defend the freedom of white men to own slaves and to take them into the territories as they saw fit, lest these white men be enslaved by Black Republicans who threatened to deprive them of these liberties.").

186. *Id.* at 278.

administration and Congress seemed to confirm that belief: It seemed as if few members of the Union government were interested in abolishing slavery, either now or in the future.¹⁸⁷ The federal government had not been anything like a massive presence in the South, so few secessionists may have anticipated the impasse that would emerge over Fort Sumter.¹⁸⁸ Had those who formed the Confederacy in February 1861 been aware that within two months their government would be consumed with fighting the largest war in American history, and that conducting that war would be the principal activity of that government for all of its existence, they might well have deliberated longer before formally seceding from the Union.¹⁸⁹ Secession, in retrospect, was an emotional and impulsive gesture.¹⁹⁰

III. The Legal Order of the Confederacy

Because the government of the Confederacy lasted only slightly more than four years, and devoted much of its attention to military and diplomatic matters, it is difficult to imagine what sort of nation the Confederate States of America might have become had its founders managed to secure its independence.¹⁹¹ Nonetheless if one reconstructs the structure of government contemplated by the framers of the Confederate Constitution, paying particular attention to the role of Congress and federal courts in the Confederacy, one may be able to gain an impression of the sort of independent Confederate nation that its founders contemplated, even if that nation never came fully into being.

A. The Confederate Constitution

One reason why the original seven secessionist states were able to form a confederated government so quickly was that their delegates, once

187. See James Buchanan, Fourth Annual Message (Dec. 3, 1860), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3157, 3158 (James D. Richardson ed., 1897) (blaming "the incessant and violent agitation of the slavery question throughout the North" for inciting the secession conflict and asking that the South "be let alone and permitted to manage their domestic institutions in their own way").

188. MCPHERSON, BATTLE CRY, *supra* note 17, at 279.

189. See *id.* at 277 (concluding that absent "[Lincoln's] proclamation of April 15 calling out the militia" many Southerners would have preferred not to secede at all).

190. *Id.* at 235.

191. MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861 1 (1991).

assembled in convention, adopted the text of the Constitution of the United States¹⁹² as their template for the Confederacy's constitution.¹⁹³ The eventual document that became the Constitution of the Confederate States of America retained far more of the text of the U.S. Constitution than it changed.¹⁹⁴ The use of the Constitution as a template for the formal organization of the Confederacy is revealing in itself, demonstrating how deeply residents of the American South had internalized most of the substantive and structural principles set forth in the 1789 Constitution and its first twelve Amendments.¹⁹⁵ It was as if, on the whole, delegates from the secessionist states were satisfied with the government the founding generation had created.¹⁹⁶

If the text of the U.S. Constitution in 1804 is compared with that of the Confederate Constitution drafted in 1861, it becomes apparent that the delegates to the Confederacy's constitutional convention made relatively few changes to the 1804 document.¹⁹⁷ Some of those changes, however, were highly revealing of the sort of government the delegates envisaged the Confederate States of America would become.¹⁹⁸

Although the changes were scattered throughout the text of the Confederate Constitution, they were animated by a single overriding concern: The Constitution of the Confederate States of America was to be

192. By "the text of the United States Constitution," I generally mean the 1804 version of that text, which contained the first twelve amendments and served as a template for the Confederate drafters. On some occasions, however, I refer to "the 1789 Constitution" in order to emphasize the historical setting in which the Constitution of the United States was initially framed.

193. See DEROSA, *supra* note 191, at 57 (characterizing the Confederate framers' first action in convention as "merely copying the U.S. Constitution in its totality as of 1861, including the first twelve amendments, as one complete text").

194. See *id.* at 17 ("[A]ccording to one notable scholar's comparison of the two documents, both . . . 'have the same number of articles with the subject matter arranged in the same order Only a change in terminology, an addition or omission of a clause, a slight modification of phraseology distinguish the two instruments.'" (quoting JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861* 224 (1930))).

195. All of those amendments were included in the Confederate Constitution, although they were inserted in different places in that document and, in two instances, had their language modified. *Id.*

196. *Id.* at 36.

197. *Id.* at 17. The text of the Constitution of the Confederate States of America may be found in 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA 909–24 (1904–05) [hereinafter JOURNAL OF THE CONFEDERATE CONGRESS]. A more accessible version is available in Marshall L. DeRosa's *The Confederate Constitution of 1861*. DEROSA, *supra* note 191, at 135–51. My references are to the DeRosa version.

198. DEROSA, *supra* note 191, at 9.

founded on the principle that states were the primary unit of government.¹⁹⁹ Not only was the sovereignty of the states to prevail over that of any confederated government they formed, the rights of individuals were to be understood principally as rights possessed by citizens of states.²⁰⁰ Thus, the preamble to the Confederate Constitution substituted, for the opening words of the U.S. Constitution ("We the People of the United States, in Order to form a more perfect Union"),²⁰¹ the phrase "We, the people of the Confederate States, each state in its sovereign and independent character, in order to form a permanent Federal Government."²⁰² The version employed by the Confederate delegates emphasized the "sovereign and independent character" of states and the association of individuals with them, and made it clear that the government of the Confederacy was being created out of the sovereign power of states.²⁰³

Changes made to the Ninth and Tenth Amendments to the U.S. Constitution provided further evidence of the importance of state sovereignty to the Confederate drafters.²⁰⁴ Versions of those two amendments became clauses of a new Article VI in the Confederate Constitution.²⁰⁵ Clause 5 of that article was a modification of the Ninth Amendment: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several states."²⁰⁶ Clause 6 was a version of the Tenth Amendment: "The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the states, respectively, or to the people thereof."²⁰⁷ The addition of the modifying phrases "of the several states" in Clause 5 and "thereof" in Clause 6 precluded a possible reading of individual citizenship in the Confederacy as existing independent of state citizenship, or of the Confederate government as representing a

199. *See id.* at 39 ("The C.S.A. Constitution inherently checked the emergence of a national sovereign by constitutionally providing for the sovereignty of the states.").

200. *Id.*

201. U.S. CONST. pmb.

202. CONF. CONST. of 1861 pmb. Citations to the text of the Confederate Constitution are rendered as "CONF. CONST. of 1861," with the appropriate Article, Section, and Clause.

203. DEROSA, *supra* note 191, at 39.

204. *See id.* (identifying the Article VI of the Confederate Constitution, which "correspond[s] to the U.S. Constitution's Ninth and Tenth amendments" as one of the "[f]our constitutional provisions collectively provid[ing] for state sovereignty").

205. *Id.*

206. CONF. CONST. of 1861 art. VI, cl. 5.

207. *Id.* art. VI, cl. 6.

national entity to which individuals might adhere irrespective of their association with states.²⁰⁸

The placement of the other nine amendments to the 1804 Constitution also signaled the importance the Confederate drafters attributed to the principle of state sovereignty.²⁰⁹ Article I, Section 9 of the Confederate Constitution was based on that same Article and Section in the text of the U.S. Constitution, which set forth limitations on the powers of Congress.²¹⁰ The Confederate drafters retained many of the provisions of Article I, Section 9 of the U.S. Constitution intact.²¹¹ They added two provisions affecting the importation of "negroes of the African race from any foreign country other than the slaveholding States or Territories of the United States" ("hereby forbidden")²¹² and "the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy" ("Congress shall . . . have power to prohibit").²¹³ They inserted three provisions which attempted to ensure the fiscal propriety of the Confederate government while recognizing that it might need to raise money from the states from time to time.²¹⁴ They then listed the first eight amendments to

208. See DEROSA, *supra* note 191, at 40 ("The C.S.A.'s shift in emphasis from 'the people' to 'of the several States' and to 'the people thereof' . . . is evidence that its general government did not establish a national community of individuals irrespective of the states and constitutionally superior to the states." (emphasis in original)).

209. *Id.* at 78.

210. Compare U.S. CONST. art. I, § 9 (outlining limitations placed on Congress, such as the inability to suspend the writ of *habeas corpus* except "when, in case of rebellion or invasion, the public safety may require it"), with CONF. CONST. of 1861 art. I, § 9 (outlining the limitations placed on Congress in a fashion similar to the U.S. Constitution and further including the protections afforded by the Bill of Rights).

211. Compare U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it."), with CONF. CONST. of 1861 art. I, § 9, cl. 3 ("The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it."); compare U.S. CONST. art. I, § 9, cl. 4 ("No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."), with CONF. CONST. of 1861 art. I, § 9, cl. 5 ("No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."); compare U.S. CONST. art. I, § 9, cl. 6 ("No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."), with CONF. CONST. of 1861 art. I, § 9, cl. 8 ("No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.").

212. CONF. CONST. of 1861 art. I, § 9, cl. 1.

213. *Id.* art. I, § 9, cl. 2.

214. See *id.* art. I, § 9, cl. 9 ("Congress shall appropriate no money from the Treasury,

the 1789 Constitution verbatim.²¹⁵ The clear import of placing the Bill of Rights Amendments in Article I, Section 9 of the Confederate Constitution was to signal that those "rights" were limitations on the powers of the Confederate Congress.²¹⁶ They did not have any impact on the states in the Confederacy.²¹⁷

The Eleventh Amendment, dealing with the sovereign immunity of states, also appeared in the Confederate Constitution.²¹⁸ It was inserted into Article III, setting forth the powers of the courts of the Confederacy.²¹⁹ In Section 2, Clause 1 of that Article, the Confederate drafters took up the language in Article III, Section 2 of the U.S. Constitution, which conveyed jurisdiction on the courts of the United States.²²⁰ When they reached the

except by a vote of two-thirds of both Houses . . . unless it be asked and estimated by some one of the heads of departments, and submitted to Congress by the President . . ."); *id.* ("Congress shall appropriate no money from the Treasury . . . unless . . . for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been declared by a tribunal for the investigation of claims against the Government . . ."); *id.* art. I, § 9, cl. 10 ("All bills appropriating money shall specify, in Federal currency, the exact amount of each appropriation, and the purposes for which it is made; and Congress shall grant no extra compensation to any public contractor officer, agent, or servant, after such contract shall have been made, or such service rendered."). *Compare id.* art. I, § 9, cl. 6 ("No tax or duty shall be laid on articles exported from any State, except by a vote of two-thirds of both Houses."), *with* U.S. CONST. art. I, § 9, cl. 5 (lacking the "except" language present in the Confederate Constitution, this clause states that "[n]o tax or duty shall be laid on articles exported from any State").

215. *See* CONF. CONST. of 1861 art. I, § 9, cl. 12–19 (listing verbatim the first eight amendments included in the Bill of Rights). Clause 11 of Article I, Section 9, following the text of the 1804 U.S. Constitution, outlawed titles of nobility and prevented federal officeholders from accepting "any present, emolument, office or title, of any kind whatever" from "any king, prince, or foreign State." *Id.* art. I, § 9, cl. 11; *see also* U.S. CONST. art. I, § 9, cl. 7 ("No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State.").

216. DEROSA, *supra* note 191, at 78.

217. *Id.*

218. *See* U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.").

219. *See* CONF. CONST. of 1861 art. III, § 2, cl. 1 ("[N]o state shall be sued by a citizen or subject of any foreign State.").

220. *Compare* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . ."), *with* CONF. CONST. of 1861 art. III, § 2, cl. 1 ("The judicial power shall extend to all cases arising under this Constitution, the laws of the Confederate States, and treaties made or which shall be made

phrase in that section giving U.S. courts jurisdiction over suits "between a State and citizens of another State"²²¹—which had initially been interpreted as allowing states to be sued in the federal courts by citizens of other states²²²—they added "where the State is plaintiff," capturing the Eleventh Amendment's negation of that possibility.²²³ Then, when they reached the language "between a State or the citizens thereof, and foreign States, citizens, or subjects,"²²⁴ they added "but no State shall be sued by a citizen or subject of any foreign state."²²⁵ That addition was also consistent with the Eleventh Amendment, which stated that no suit could be "commenced or prosecuted" in the federal courts by citizens or subjects of foreign states.²²⁶ But it had a particular twist for the Confederacy. The Confederate States of America had been formed out of states that had seceded from the Union. The provision was thus saying that any American who remained a citizen of a state in that Union would be classified, under the Confederate Constitution, as a "citizen or subject of a foreign state."²²⁷ This meant that any state in the Confederacy that seized the property of Americans who were citizens of states remaining in the Union would not be amenable to suit in the Confederate courts for the recovery of that property.²²⁸

under their authority . . .").

221. U.S. CONST. art. III, § 2, cl. 1.

222. See *Chisholm v. Georgia*, 2 U.S. 419, 449–50 (1793) (acknowledging the potential harms of a "compulsive suit against a state for the recovery of money" but nonetheless concluding that under a fair construction of the Constitution the private citizens of other states could bring actions against a state).

223. See CONF. CONST. of 1861 art. III, § 2, cl. 1 (granting jurisdiction over suits "between a State and citizens of another State where the State is plaintiff").

224. U.S. CONST. art. III, § 2, cl. 1.

225. See CONF. CONST. of 1861 art. III, § 2, cl. 1 (granting jurisdiction over suits "between a State or the citizens thereof, and foreign States, citizens, or subjects; but no State shall be sued by a citizen or subject of any foreign state").

226. See U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.").

227. See DEROSA, *supra* note 191, at 104 ("It should be kept in mind that foreigners included U.S. citizens . . .").

228. *Id.* The Twelfth Amendment to the Constitution of the United States also appeared, verbatim, in the Confederate Constitution as Article II, Section 1, Clause 3. Compare U.S. CONST. amend. XII (changing the process by which members of the Electoral College voted for President and Vice-President, and setting forth a procedure where, if no candidate received a majority of electoral votes, through voting by states the House of Representatives would elect the President and the Senate the Vice-President), with CONF. CONST. of 1861 art. II, § 1, cl. 3 (changing the process by which members of the Electoral

The last explicit indications that the drafters of the Confederate Constitution were dedicated to the principle of state sovereignty are found in their deletion of a power associated with the general government in the original U.S. Constitution, and the qualification of some other powers given to Congress in that document.²²⁹ The preamble to the U.S. Constitution listed several purposes for which that document was being "ordain[ed] and establish[ed]," including "promot[ing] the general Welfare."²³⁰ Article I, Section 8 of that constitution implemented that purpose by listing, as one of Congress's enumerated powers, that of providing for the "general Welfare of the United States."²³¹ The Confederate Constitution eliminated those references to the general welfare.²³² In the view of the framers of that constitution, the "general welfare clause" of the U.S. Constitution had been inappropriately thought to supply a rationale for federally directed internal improvements and protective tariffs, two policies that many Southerners had opposed from the 1820s through the 1850s.²³³

To make doubly sure that the new Confederate government would not revive those policies, the 1861 framers added two sentences to Article I, Section 8 of the Constitution. One came in Clause 1 of that section, which gave Congress the power to lay and collect taxes and pay the debts of the general government.²³⁴ That sentence read, "nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry."²³⁵ The other addition came in Clause 3, giving the general government the power "[t]o regulate commerce with foreign

College voted for President and Vice-President, and setting forth a procedure where, if no candidate received a majority of electoral votes, through voting by states the House of Representatives would elect the President and the Senate the Vice-President).

229. *Infra* note 232.

230. U.S. CONST. pmb1.

231. *Id.* art. I, § 8, cl. 1.

232. *Compare id.* (granting Congress the power "[t]o lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States"), with CONF. CONST. of 1861 art. I, § 8, cl. 1 (granting Congress the power "[t]o lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence, and to carry on the government of the Confederate States").

233. DEROSA, *supra* note 191, at 92.

234. *See* CONF. CONST. of 1861, art. I, § 8, cl. 1 ("The Congress shall have power . . . [t]o lay and collect taxes, duties, imposts, and excises for revenue, necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States . . .").

235. *Id.*

nations, and among the several States, and with the Indian tribes."²³⁶ It provided that "neither this, nor any other clause contained in the Constitution shall ever be construed to delegate the power to Congress to appropriate money for any internal improvements."²³⁷

There were other changes in the Confederate Constitution which were less explicitly concerned with affirming the principle of state sovereignty, but nonetheless demonstrated an intention to check any tendencies on the part of federal institutions to aggrandize themselves. Those included provisions establishing executive branch representation in the Confederate Congress²³⁸ and an executive line-item veto over Congressional legislation,²³⁹ limiting presidential terms to six years, not subject to reelection,²⁴⁰ and requiring that the executive initiate and two-thirds of both houses of Congress approve any appropriations made from the federal treasury.²⁴¹ Perhaps the most pointed example of the drafters' concern about unchecked federal power was a provision that, after granting Congress the power to "establish post-offices and post routes,"²⁴² added that "the expenses of the Post Office Department, after the [first] day of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues."²⁴³ The framers of the Confederate Constitution not only wanted a limited general government,²⁴⁴ they wanted, wherever

236. *Id.* art. I, § 8, cl. 3.

237. *Id.* The internal improvements clause contained an exception for "the purpose of furnishing lights, beacons, and buoys, and other aid to navigation upon the coasts, and the improvement of harbors and the removing of obstructions in river navigation." *Id.* The costs and expenses of those improvements were to be paid out of "duties . . . laid on the navigation facilitated thereby." *Id.*

238. *See id.* art. I § 6, cl. 1 ("But Congress may, by law, grant to the principle officer in each of the Executive Departments seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department.").

239. *See id.* art. I, § 7, cl. 2 ("The President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved . . .").

240. *See id.* art. II, § 1, cl. 1 ("[President] and the Vice President shall hold their offices for the term of six years; but the President shall not be reeligible.").

241. *See id.* art. I, § 9, cl. 9 ("Congress shall appropriate no money from the Treasury except by a vote of two-thirds of both Houses . . . [and] unless it be asked and estimated for by some one of the heads of departments and submitted to Congress by the President . . .").

242. *Id.* art. I, § 8, cl. 7.

243. *Id.*

244. *See* Alfred L. Brophy & John V.N. Philip, *Book Notes*, 91 COLUM. L. REV. 1253, 1256 (1991) ("The Confederate Constitution embodied the Southern desire for a federal government, but on its own strictly limited terms.").

possible, a general government whose expenses were directly accountable and whose departments kept a vigilant eye on one another.²⁴⁵

The treatment of slavery in new territories had been the central issue engendering sectional discord, and that issue remained on the delegates' minds as they created the Confederacy.²⁴⁶ They hoped that the Confederacy would acquire new territories from the existing federal territory within the borders of the United States, or possibly from other states in the Union, as well as from other places.²⁴⁷ They also hoped that slavery would flourish in all the territories that were acquired.²⁴⁸ But they could not know that this would be so. It was possible that a majority of the residents of a new territory, on seeking admission to the Confederate States of America, would not be slave-owners, or might not be disposed toward encouraging the growth of slavery in their region, or might even be prepared to enact a state constitution abolishing slavery. Nowhere in the Confederate Constitution was there a provision requiring the states that joined it to maintain slavery.²⁴⁹ That would have been inconsistent with the principle of state sovereignty.

Yet the seven secessionist states that met to create the Confederacy left the Union primarily because their residents feared that the national government of the United States would prohibit slavery's spread into new territories and would eventually seek to abolish it in the states where it had become established.²⁵⁰ How were the drafters to avoid compelling territories who joined the Confederacy as new states to establish slavery—an apparent violation of the state sovereignty principle—but at the same time reaffirm the Confederacy's commitment to the proposition that the right of slaveowners to own property in slaves could not be infringed?

245. See David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1351 n.396 (2004) ("The object of this [constitutional provision] was to make, as far as possible, each Administration responsible for the public expenditures." (internal quotations omitted)).

246. *Supra* Part II.A.

247. See CONF. CONST. of 1861 art. IV, § 3, cl. 3 (noting that the "Confederate States may acquire new territory").

248. See Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1168 n.40 (1992) (observing that Alexander Stephens referred to "slavery as [the] cornerstone of [the] Confederacy").

249. See generally CONF. CONST. of 1861 art. I–VII (omitting any provision "requiring" the individualized Confederate states to maintain slavery).

250. *Supra* Part II.C.

The new Clause 3 that the drafters added to Section 3 of Article IV of the Confederate Constitution addressed that dilemma. It provided:

The Confederate States may acquire new territory; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States; and may permit them, at such times, and in such manner as it may by law provide, to form States to be admitted into the Confederacy. In all such territory, the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress and by the territorial government; and the inhabitants of the several Confederate States and Territories shall have the right to take to such Territory any slaves lawfully held by them in any of the States or Territories of the Confederate States.²⁵¹

The clause reaffirmed the legitimacy of "the institution of negro slavery" in a document that had already prohibited the Confederate government from abolishing it, but stopped short of conditioning admission of new states into the Confederacy on those states not abolishing slavery.²⁵² How could slavery be "recognized and protected by Congress and the territorial government,"²⁵³ yet not be made a condition of entry into the Confederacy? The answer, for those who drafted the Confederate Constitution, was that territories were the common property of all the Confederate states, not of the federal government, and thus unless the federal government had been delegated the power to condition admission of new states on their having instituted slavery, it could not make that a requirement.²⁵⁴ On the other hand the federal government had been required to recognize and protect slavery in the territories.²⁵⁵ Thus, the drafters of the Confederate Constitution simultaneously hoped for the best with respect to the spread of slavery in any new territories the Confederacy might acquire and prepared themselves for the day when they might need to add some states without slavery into their nation.

251. CONF. CONST. of 1861 art. IV, § 3, cl. 3.

252. See generally *id.* art. I–VII (omitting any provision "requiring" the individualized Confederate states to maintain slavery).

253. *Id.*

254. See Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617, 632 (2003) ("Representatives of slave states insisted that the states had equal rights in the territories (which were common property of all the states). Therefore, slave owners had a right to bring their slaves into all the national territories.").

255. See U.S. CONST. art. IV, § 2, cl. 3 (upholding the fugitive slave laws).

One of the reasons that the framers of the 1789 Constitution had called the Philadelphia convention into being was their concern about the disintegrative effects of state sovereignty in a republic whose territory was large.²⁵⁶ The framework of governmental powers that they designed in the Constitution was not one in which the principal locus of sovereignty lay in the states.²⁵⁷ Instead, it was one in which sovereignty was identified as ultimately resting in the people at large, and then allocated among two governments that served as the people's representatives, state governments and a federal government embodying a union of the states.²⁵⁸ A recurrent concern of the 1789 drafters was to identify governmental powers that were best exercised by a national government, powers that were best left to states, and "rights" of individual citizens that needed to be protected against interference by any level of government.²⁵⁹ The drafters of the Confederate Constitution may have taken that model of governance as their template, but they chose to perceive it as constructed differently.²⁶⁰ They chose to perceive that the entire edifice of the U.S. Constitution emanated from the premise that sovereignty rested in state governments as representatives of the people at large, and that any federal government created out of a residuum of state power only existed to further the collective interests of states.²⁶¹ National sovereignty could therefore not exist in contradiction to

256. John F. Hart, *Human Law, Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789–1835*, 45 SAN DIEGO L. REV. 823, 840 (2003).

257. See Chrystal Bobbitt, *Domestic Sovereign Immunity: A Long Way Back to the Eleventh Amendment*, 22 WHITTIER L. REV. 531, 548 (2000) ("Madison argued ardently in favor of popular sovereignty resting in the people, and flatly rejected the notion that states were sovereign entities.").

258. Ashley Dorn, *The Untimely Death of the Commerce Clause: Gonzalez v. Raich's Threat to Federalism, The Democratic Process, and Individual Rights & Liberties*, 18 TEMP. POL. CIV. RTS. L. REV. 213, 239 n.307 (2009).

259. See Burt Neuborne, *The House Was Quiet and the World Was Calm the Reader Became the Book*, 57 VAND. L. REV. 2007, 2037 (2004) ("The Founders' first two semantic concerns—fear of an inadequate or incomplete description of rights and fear that enumerating rights might imply residual governmental powers—reflected the Founders' fears about how the text of the Bill of Rights would be read.").

260. Compare U.S. CONST. pmbl. ("We the people of the United States . . . do ordain and establish this Constitution for the United States of America."), with CONF. CONST. of 1861 pmbl. ("We, the people of the Confederate States, each State acting in its *sovereign and independent character* . . . do ordain and establish this Constitution for the Confederate States of America." (emphasis added)).

261. See Steven A. Bibas, *The European Court of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence*, 15 HASTINGS INT'L & COMP. L. REV. 253, 295 n.223 (1992) ("Confederate political philosophy rested upon 'the absolute sovereignty of the states.'").

state sovereignty, nor could the national government be conceived as furthering the interests of individual citizens.²⁶² There was no "national community" of individual citizens; the rights of citizens were associated with their membership in local and state communities.²⁶³

In the three decades after 1820, representatives of southern states in Congress had articulated, and northern representatives had opposed, that theory.²⁶⁴ Locus-of-sovereignty debates surfaced in connection with issues that were directly or indirectly connected to the relationship of slavery toward westward expansion, such as internal improvements, tariff rates, the acquisition of new federal territories, and the admission of new states into the Union.²⁶⁵ By the 1850s, as those debates continued and southern "states' rights" arguments became more aggressively propounded, Southerners became well aware that national trends in population growth, territorial expansion, and developments in transportation and communication might not only disturb the delicate balance between slave and free states, but might also threaten to affect the relationship between national and state power in the Union.²⁶⁶ After a decade in which the prospect of that relationship being altered to the South's detriment was averted, and the institution of slavery revived, by a combination of presidential policies, the dramatic growth of southern-based cotton production, congressional compromises, and decisions by the Supreme Court of the United States, Lincoln's election threatened to shift the sectional balance of power in the Union, and with it the future of slavery.²⁶⁷

262. See CONF. CONST. of 1861 pmb1. (failing to provide a "general welfare" clause in the Confederate Constitution).

263. See James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1265 (1998) ("[C]itizens of the states 'were never . . . member-citizens of the same political community The . . . relation which they bore to the Citizens of the several States, never constituted a Nation.' This . . . was the 'cardinal principle of State Rights,' which was '[t]he fundamental principle upon which the several Confederate States withdrew'").

264. E.g., David M. Sprick, *Ex Abundanti Cautela (Out of Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma over "Federal" Power*, 27 CAP. U. L. REV. 529, 546 (1999).

265. E.g., Craig B. Mousin, *A Clear View From the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285, 299 (2005).

266. See *id.* (observing that the Compromise of 1850 only temporarily relieved the threat to the Union and ultimately federal sovereignty).

267. See Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1355 (2000) ("Lincoln's intensified outcry against slavery sounded, to Southern ears, like a call to sectional struggle.").

It thus became important to the southern secessionists who formed the Confederacy to see the enlistment of national power against slaveholding as a deviation from the original principles of the U.S. Constitution.²⁶⁸ They read the template for their own constitution as placing the locus of sovereignty firmly in the governments of the states, and as clearly legitimizing the right of property in African-American slaves—and where the template was not explicit enough in those respects, they revised its language.²⁶⁹

In most respects the principle of state sovereignty, as applied to the Confederacy, served to reinforce the sanctity of slaveownership.²⁷⁰ All the states forming the Confederacy were slave states, and the initial audiences for the secessionist commissioners were slave states remaining in the Union. But when protection for the right of slave-ownership ran squarely up against the principle of state sovereignty, the drafters of the Confederate Constitution opted to subordinate the former to the latter.²⁷¹ They reasoned that because individual sovereignty only manifested itself in the sovereignty of states, if a state resolved to abolish the "right" of slave ownership, it could.²⁷² When a Georgia delegate to the Confederate constitutional convention offered a provision that "no State shall be admitted [to the Confederacy] which, by its constitution or laws, denies the right of property in negro slaves," the drafters voted it down.²⁷³

Thus one of the ironies of the creation of the Confederacy was that its drafters took pains to establish a federal government whose powers were

268. Cf. G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1510 (2003) ("Instead the Court decisively constitutionalized the slavery issue in *Dred Scott*, drew itself prominently into the sectional debate over slavery . . . and brought upon itself a line of critical commentary that encouraged Abraham Lincoln, four years after the decision, to treat it as if it had very little authority.").

269. See CONF. CONST. of 1861 pmb1. (amplifying the importance of states' rights in the Confederacy); see also *id.* art. I, § 9, cl. 4 ("No . . . law denying or impairing the right of property in negro slaves shall be passed.").

270. Cf. Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENT. 649, 690 (2010) ("In this account, slavery was not an ultimate cause of war, but rather a collateral cause, since its elimination would undermine the South's autonomy and the states' rights that yielded that autonomy.").

271. *Supra* note 249 and accompanying text.

272. See George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 751 (1992) (indicating that the framers of the Confederate Constitution left open the possibility that a state of the Confederacy could "abolish slavery within their respective borders").

273. See 1 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 885 (refusing to accept the provision proposed by T.R.R. Cobb on reconsideration).

deliberately checked and circumscribed so that the sovereignty of the states who formed it could be clearly understood, yet the primary focus of that government, during the years of its existence, was in exercising functions—conducting a war, raising revenue and spending money for that effort, and engaging in international diplomacy—that the framers of the U.S. Constitution had identified as peculiarly suited for a federal union as opposed to individual states.²⁷⁴ The inefficiency and ineptitude of another federal government that was understood as being created out of a residuum of state power, the Articles of Confederation, had been exposed in a wartime setting, and had prompted the idea of a stronger national government that eventually emerged in the 1789 Constitution.²⁷⁵ The drafters of the 1861 Confederate Constitution can be seen as reviving a version of the model of state and federal powers embodied in the Articles. Most of the drafters did not anticipate, however, that the Confederacy would soon be overseeing a war of much greater magnitude than the American Revolution.

B. Courts in the Confederacy I: The Confederate District Courts

Instead those who created the Confederacy believed, for the most part, that they would be residing in a nation where institutions of the previous Union government had been replaced by Confederate institutions with more limited powers.²⁷⁶ Among those institutions were the courts of the Confederacy. What was to be the business of those courts? How were they to interact with state courts? How did the organization of the judiciary in Confederate states reflect the principles of government animating the Confederacy's creation?

Three issues connected to the Confederate courts are of particular interest. One involves the question of what laws those courts applied.²⁷⁷ A

274. See U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the Debts and provide for the common Defense . . ."); see also *id.* art. 1, § 8, cl. 11–12 ("To declare War, . . . To raise and support Armies . . .").

275. Christopher J. Parosa, *Federalism: Finding Meaning Through Historical Analysis*, 82 OR. L. REV. 119, 127 (2003).

276. *Supra* Part III.A.

277. The discussion that follows is limited to constitutional courts—that is, courts whose jurisdiction was derived from Article III of the Confederate Constitution and whose judges were appointed by the President of the Confederacy and accorded life tenure. CONF. CONST. of 1861 art. III, § 1, cl. 1. There were other courts operating in the Confederate states, such as territorial courts, military tribunals, and boards of commissions, established

second centers on the relationship between the federal courts in the Confederacy and the existing courts of the seceding states. The last issue involves the status of the Supreme Court of the Confederacy. Such a court was provided for in the Confederate Constitution, but despite efforts to organize it by the Confederate Congress, was never established.²⁷⁸

When the first group of secessionist states resolved to leave the Union, and delegates assembled in Montgomery, Alabama, to draft a provisional Constitution for a confederacy, the structure of courts in the secessionist states was as follows. Each seceding state had state circuit or district courts and courts of appeal, their jurisdiction defined by state legislatures and constitutions.²⁷⁹ In addition, there were seven U.S. district courts scattered throughout the seceding states, ranging from one to two courts in each state.²⁸⁰ Five of the original seceding states had been included in the nine circuits of the federal courts of the United States, which were composed of the federal district judges in those circuits and the Supreme Court justices assigned to them.²⁸¹ At the apex of the system was the Supreme Court of the United States, which heard cases on appeal from the highest courts of state and on certificate of division from circuit courts of appeal.²⁸²

under various legislative powers given Congress by the Confederate Constitution, whose personnel were appointed by Congress for limited terms. *Id.* art. I, § 8, cl. 9.

The Confederate Constitution also provided, modifying the Constitution of the United States, that "any judicial or other Federal officer, residing and acting solely within the limits of any State," could be impeached by a two-thirds vote of that state's legislature. *Id.* art. I, § 2, cl. 5.

Of the constitutional courts in the Confederacy, the discussion focuses on district courts and the Confederate Supreme Court. The additional constitutional court was the Court of Admiralty and Maritime Jurisdiction, located at Key West in Florida.

278. See John P. Norman, "Self-Preservation is the Supreme Law": *State Rights vs. Military Necessity in Alabama Civil War Conscription Cases*, 60 ALA. L. REV. 727, 732 (2009) ("The absence of a Confederate Supreme Court did not stem from the lack of a provision for one.").

279. Judge Robert W. Lee, *Florida Legal History: The Courts and Law During the Civil War, Reconstruction and Restoration Eras*, 15 ST. THOMAS L. REV. 485, 488 (2003).

280. *Id.*

281. See WILLIAM M. ROBINSON, *JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 68 (Wm. W. Gaunt & Sons, Inc. 1991) (1941) ("[T]he circuit courts were supposed to be three-judge courts, consisting of two justices of the Supreme Court and the district judge . . .").

282. U.S. CONST. art. III, § 2, cl. 1–2. Of the original states who seceded, Alabama and Louisiana were in the Fifth Circuit, South Carolina and Georgia in the Sixth Circuit, and Mississippi in the Ninth Circuit. Neither Florida nor Texas had been included in a circuit. In those states, cases designated for the circuit courts were heard by district courts. Because the inclusion of states in a federal circuit meant additional travel and labor for the Supreme Court justice assigned to that circuit, states were not included in federal circuits until the

Between November 7, 1860, and January 26, 1861, eight of the eleven U.S. district judges in the original secessionist states resigned their positions.²⁸³ One judge in the southern district of Florida and the two judges in the eastern and western districts of Texas declined to do so.²⁸⁴ After Virginia, Arkansas, North Carolina, and Tennessee seceded in May and June, the four district judges in first three of those states resigned, and by July of that year the district judge in Tennessee, having been impeached by Congress for his secessionist sympathies, was named a Confederate district judge for the three districts in the state.²⁸⁵

The resignation of federal district judges throughout the Confederate states created a potential gap in the application of federal law in those states.²⁸⁶ Filling that gap was one of the first tasks to which seceding states and the Confederate government applied themselves.²⁸⁷ When a United States district judge from a state resigned, there was a brief period when the court was closed.²⁸⁸ In most instances the resignations took place after the state had formally seceded, but some federal judges in the south resigned shortly after Lincoln was elected.²⁸⁹ Once states seceded, a provision of the state's ordinance of secession invested the courts of the state with the powers of U.S. district and circuit courts and transferred the records of cases pending in the U.S. courts to the state courts, where they remained in a kind of limbo, being kept separate from state court records.²⁹⁰ Then, as part of the initial business of the Confederate constitutional convention in February 1861, delegates took steps to create district courts of the Confederacy.²⁹¹ Once the delegates had drafted and adopted a provisional

federal district courts within them had a sufficient workload of cases. For more detail, see ROBINSON, *supra* note 281, at 62–68.

283. ROBINSON, *supra* note 281, at 14–16.

284. *Id.* at 15–16.

285. *Id.* at 17–18.

286. *Id.* at 9.

287. See Lee, *supra* note 279, at 488 ("[M]ost confederate states reappointed the former federal district court judges as confederate judges.").

288. *Id.*

289. See ROBINSON, *supra* note 281, at 25–26 (observing that Judge Andrew G. Magrath, the U.S. district judge for Charleston, South Carolina, resigned his office on November 7, 1860, the day after Lincoln's election). On May 22, 1861, when Magrath's court reopened as a Confederate district court, Magrath had been reappointed as the district judge. *Id.*

290. See *id.* at 21 (noting that the records from the former Northern District of Florida were transferred to the State circuit courts and kept separate from those of ordinary state cases).

291. See, e.g., Lee, *supra* note 279, at 488 ("The Confederate Government created a

constitution for the Confederate States of America, they became deputies in a provisional Congress of the Confederacy,²⁹² and one of their first acts, on February 9, 1861, was to declare that the laws of the United States, as they stood on November 1, 1860, would be the laws of the Confederate States as far as they were consistent with the provisional Confederate Constitution.²⁹³

That action filled any gap that might have existed with respect to laws being applied in the Confederate district courts. Although some delegates to the South Carolina convention had taken the position that secession brought a complete abrogation of any laws founded on the Constitution of the United States in the state, a subsequent ordinance declared that all federal laws would become laws of the state insofar as they were consistent with the constitution of South Carolina, and secession ordinances in other states made that more explicit.²⁹⁴ Thus there was no period of significant length in any of the Confederate states where federal law did not exist, although in some there were intervals in which former U.S. district courts remained closed while new Confederate district judges were appointed and the courts organized.²⁹⁵ Although the Confederate Congress quickly confirmed President Davis's nominees for district judges in March 1861, many of the district courts did not open until May, and some not until June.²⁹⁶

The provisional Confederate Congress's February 9 declaration meant that until the Confederate Constitution or enabling legislation provided otherwise, any federal courts created in the Confederacy, including a Confederate Supreme Court, would have the same jurisdictional powers as the courts of the United States.²⁹⁷ That situation did not remain in place very long, because delegates to the provisional Congress quickly turned to drafting the Confederate Constitution and the Judiciary Act of 1861,²⁹⁸ which altered the jurisdictional reach of the district courts.

Confederate District Court for Florida.").

292. ROBINSON, *supra* note 281, at 22.

293. An Act to Continue in Force Certain Laws of the United States of America, 1 STAT. 27 (Feb. 9, 1861), *repealed* by the dissolution of the Confederacy in 1865. For the full text of the statute, see DEPARTMENT OF JUSTICE, THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 27 (James M. Mathews, William S. Hein & Co. 1988) (1864) [hereinafter PROVISIONAL CONGRESS STATUTES].

294. ROBINSON, *supra* note 281, at 9.

295. *Id.* at 123.

296. *Id.* at 122–23.

297. *Supra* note 293 and accompanying text.

298. DEPARTMENT OF JUSTICE, PUBLIC LAWS OF THE CONFEDERATE STATES OF AMERICA,

Article III of the Confederate Constitution made two significant changes from Article III of the U.S. Constitution. Both changes signaled the interest of the convention delegates in limiting the ability of Confederate district courts to encroach on state prerogatives. One change eliminated the primary basis of federal court jurisdiction under the U.S. Constitution, controversies between citizens of different states.²⁹⁹ The change meant that cases in which the parties were residents of different states could no longer routinely be brought in the federal courts of the Confederacy. Nor could corporations bring actions in the federal courts to avoid having to litigate in the state courts in which their adversaries resided. The effect of the deletion was thus to limit the ability of the district courts of the Confederacy to entertain garden-variety diversity of citizenship suits.

The other change omitted the phrase "of law and equity" after "all cases" in the sentence in Article III, Section 2, Clause 1 that stated, "The judicial power shall extend to all cases."³⁰⁰ The omission did not mean that the distinction between law courts and equity courts, or between actions in law and actions in equity, was abolished in the Confederacy. It merely allowed states to decide for themselves whether to retain the distinction.³⁰¹ In some states, such as Louisiana and Texas, civil law traditions resulted in the abolition of equity as a separate jurisdiction.³⁰² Other secessionist states retained the distinction between law and equity.³⁰³ By eliminating the phrase, the framers of the permanent Confederate Constitution prepared the way for the district courts of the Confederacy to follow the practices of the states in which they sat.³⁰⁴

PASSED AT THE FIRST SESSION OF THE FIRST CONGRESS; 1862 37 (James M. Mathews ed., W.W. Gaunt 1970) (1862) (acknowledging that the Confederate judiciary was created on March 16, 1861 by an act titled "An Act to Establish the Judicial Courts of the Confederate States of America").

299. Compare CONF. CONST. of 1861, art. III, § 2, cl. 1 (failing to include a diversity jurisdiction clause), with U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases . . . between Citizens of different States . . .").

300. CONF. CONST. of 1861, art. III, § 2, cl. 1.

301. See David M. Potter, *Justice in Grey. A History of the Judicial System of the Confederate States of America*, 20 TEX. L. REV. 393, 395 (1942) ("Louisiana and Texas . . . , preferring the Roman concept of a single jurisdiction, prevailed upon the Southern states to omit the distinction, which had been preserved in the courts of the United States.").

302. *Id.*

303. See ROBINSON, *supra* note 281, at 78 ("The circuit courts possessed equity as well as common-law jurisdiction in Missouri, Mississippi, Florida, Georgia, Virginia, and North Carolina.").

304. See, e.g., *supra* note 301 and accompanying text (discussing Louisiana's and Texas's unique systems).

The Confederate Judiciary Act of 1861,³⁰⁵ passed on March 16, made that change explicit. One of its sections provided that the forms of process and the modes of proceedings in the trial of suits in law and equity in the Confederate district courts would follow those of the state courts.³⁰⁶ The retention of the phrase "suits in law and equity" made it clear that if a state permitted equitable remedies, such as North Carolina or Georgia, they could be invoked by district courts sitting in the state.³⁰⁷ The same section stated, however, that the district courts could not make use of equitable remedies "in any case where plain, adequate remedy may be had by law."³⁰⁸

In general, the Judiciary Act sought to streamline the processes of the district courts, to conform their modes of procedure to those of the states in which they sat, and to confine the scope of their powers.³⁰⁹ The abolition of circuit courts reduced the number of federal tribunals.³¹⁰ Fifteen of the fifty-four sections of the Act established state laws and practices as rules for the appropriate district courts.³¹¹ Others made state laws affecting debtor relief, the interest rate allowed on legal judgments, and the costs and fees of clerks and marshals binding on the appropriate district courts.³¹² The Act also restricted the authority of the district courts to issue writs of habeas corpus to cases involving prisoners held by the Confederate government.³¹³

The framers of the Confederate Constitution and the Judiciary Act thus contemplated that the business of the federal district courts in the Confederacy would be far less extensive than their United States counterparts. The Confederate district courts retained authority over such traditionally "national" subjects as admiralty and maritime cases, including crimes committed on navigable waters, and cases involving patents,

305. See Judiciary Act of 1861, stat. P.C., 1 sess., ch. 61 (1861), reprinted in PROVISIONAL CONGRESS STATUTES, *supra* note 293.

306. See *id.* § 12 ("And in any state in which there is or may be no separate court of equity, the district court shall administer and decide on matters of equity according to the course of practice in the courts of such state.").

307. *Id.*

308. *Id.*

309. ROBINSON, *supra* note 281, at 61.

310. *Id.* at 24.

311. See generally Judiciary Act of 1861, stat. P.C., 1 sess., ch. 61 (1861), reprinted in PROVISIONAL CONGRESS STATUTES, *supra* note 293.

312. ROBINSON, *supra* note 281, at 61.

313. See Judiciary Act of 1861, stat. P.C., 1 sess., ch. 61, § 16 (1861), reprinted in PROVISIONAL CONGRESS STATUTES, *supra* note 293 ("Provided, [t]hat writs of *habeas corpus* shall, in no case, extend to prisoners, unless when they are in custody under or by virtue of the authority of the Confederate States.").

copyrights, and naturalization.³¹⁴ When the Confederate Congress, mindful of the war effort, increased the number of criminal offenses for conduct that might help the enemy or disrupt military operations, it gave the district courts power to entertain prosecutions under those statutes.³¹⁵ But beyond that, the tendency was to restrict jurisdiction. The minimum amount of damages required to bring civil cases in the district courts was raised to \$5,000, and no civil suit could be brought in a district court unless the defendant was a resident of that district.³¹⁶ Finally, Article III of the Confederate Constitution limited the classes of persons that could institute actions in the federal courts.³¹⁷

Those who drafted the Confederate Constitution and the Judiciary Act of 1861 thus assumed that the state courts of the secessionist states would entertain the bulk of judicial business in the Confederacy, and that those courts would operate with few changes in their structure and organization. Both assumptions were correct. Secessionist state legislatures and constitutions left the jurisdiction and composition of state courts comparatively undisturbed during the years of the Confederacy³¹⁸—but the war disrupted the business of state courts.³¹⁹ In some states, such as Tennessee, Louisiana, Arkansas, Texas, and the western portions of Virginia, Union armies and sympathizers were able to suspend the operation of existing state courts or establish alternative provisional courts.³²⁰ Many states passed "stay laws," which had the effect of continuing legal proceedings in which the participants or attorneys were absent in military service.³²¹ The sittings of the highest courts in every state

314. ROBINSON, *supra* note 281, at 54–57.

315. *See id.* at 52–53 (illustrating the additional offenses made criminal by the Confederate Congress during the war). State courts were authorized to try federal offenses in a limited number of instances, but most alleged violations of the criminal statutes enacted by the Confederate Congress were tried in the federal district courts of the Confederacy. *Id.* at 53.

316. *Id.* at 58–59.

317. *See* CONF. CONST. of 1861, art. III, § 1, cl. 1–2 (extending the judicial power of the Confederate States to ambassadors, other public ministers and consuls, citizens claiming lands under grants of different states, states suing citizens of other states or foreign citizens and states, and the Confederate government itself).

318. For more detail, see ROBINSON, *supra* note 281, at 70–121, which summarizes the business of the state courts and their interaction with the district courts of the Confederacy.

319. *See id.* at 120 ("The operations of the enemy brought some derangement in the supreme court calendars. In occupied or threatened areas, the trial courts were generally suspended.").

320. *Id.*

321. *Id.*

except Alabama were either delayed or reduced over the course of the war.³²² The records of many cases in the state courts were disrupted, and in some instances destroyed, by being exposed to military operations.³²³ The leading study of the Confederate judiciary has estimated that the volume of business in the state courts fell from approximately one-half to approximately one-third of the number of pre-war cases.³²⁴

C. Courts in the Confederacy II: The Supreme Court

Meanwhile, as the district courts of the Confederacy were organized and staffed, members of the Confederate Congress attempted to establish the Supreme Court of the Confederate States of America. As provided for in the Provisional Constitution, the court was comprised of all of the judges of the Confederate district courts.³²⁵ Once those judges were appointed, and the Judiciary Act of 1861 passed, it required only to be formally organized.³²⁶ The date of organization was set for January 20, 1862.³²⁷

Intervening events called into question the Provisional Constitution's model for the Supreme Court.³²⁸ Four additional states joined the Confederacy in the spring of 1861, which increased the number of Confederate district judges to thirteen.³²⁹ All of those judges would sit on the Confederate Supreme Court. Within the same time period, the capital of the Confederacy moved from Montgomery, Alabama, to Richmond, Virginia, which meant that many of the district judges would need to travel

322. See *id.* at 97 ("The Supreme Court of Alabama held all its regular terms, at Montgomery, beyond the din of war."). For a more complete illustration of the other states' delays, see *id.* at 92–106.

323. See *id.* at 106–07 (estimating, based on the printed records of reported cases in the Confederate States, that "the excitement and hazards of the war were devastating to the Supreme Court records and reports in most states").

324. *Id.* at 107.

325. See CONF. PROV. CONST. of 1861, art. III, § 1, cl. 3, reprinted in PROVISIONAL CONGRESS STATUTES, *supra* note 293 ("The Supreme Court shall be constituted of all the District Judges, a majority of whom shall be a quorum, and shall sit at such times and places as the Congress shall appoint.").

326. *Id.*

327. *Id.*

328. See ROBINSON, *supra* note 281, at 420–21 ("By July 31, 1861, the number of district judges, and *ipso facto* the number of Supreme Court justices, had grown to thirteen. . . . [T]he impracticability of this composition of the Supreme Court became apparent.").

329. *Id.* at 420.

long distances to attend Supreme Court sessions and would be absent from their districts for months during the year.³³⁰ No district court sessions could be held in their absence.³³¹ Meanwhile, some states that initially composed their Supreme Courts as "conferences" of lower court judges—following the blueprint established by the Provisional Constitution for the Supreme Court of the Confederacy—abandoned that design.³³² Those developments resulted in the Confederate Congress passing a bill in July 1861 to reorganize the Supreme Court under the Permanent Constitution, which provided for such a court but had remained silent on its composition.³³³ When President Davis signed the bill on July 31, the reorganization of the Supreme Court was at hand; in a message on February 26, 1862, four days after his presidential inauguration, Davis asked Congress to start the reorganization process.³³⁴

That message ushered in four years of deliberations, in which the members of the Confederate Congress never agreed upon a bill organizing a Supreme Court for the Confederacy. At first glance, this failure seems inexplicable. The Confederate states were on a war footing for nearly all of their existence. Certain issues connected to the war effort, such as whether Congress could tax state bonds to raise money for the war or institute a uniform conscription policy for all the states in the Confederacy, appeared to cry out for resolution by an authoritative judicial body, whose decisions on constitutional issues could bind the Confederate states. On closer

330. *Id.* at 420–21.

331. See Judiciary Act of 1861, stat. P.C., 1 sess., ch. 61, § 3 (1861), reprinted in PROVISIONAL CONGRESS STATUTES, *supra* note 293, at 75 (stating in Section 3 that "a district court, in case of the inability of the judge to attend at the commencement of a session, may be adjourned to the next regular term, if the judge do not appear").

332. See ROBINSON, *supra* note 281, at 421 ("The idea of founding the high court of appeals upon a conference of judges of the courts of the next lower level had been tried out in many of the Southern States and had been abandoned everywhere except in South Carolina, where the plan had been successfully questioned.").

333. See CONF. CONST. of 1861, art. III, §§ 1–3 (containing no terms pertaining to the Supreme Court's composition).

334. See 1 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 295, 301, 307 (noting when the Provisional Congress made amendments to the act entitled "An act to establish the judicial courts of the Confederate States of America"); 2 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 22–23 (providing the text of an address to Congress on February 26, 1862, in which President Davis requested "the attention of Congress to the duty of organizing a supreme court for the Confederate States, in accordance with the mandate of the Constitution"); ROBINSON, *supra* note 281, at 422 ("[President Davis] was inaugurated on the 22nd; and on the 26th he called the attention of the Congress to its duty of reorganizing the Supreme Court under the provisions of the Permanent Constitution.").

examination, however, the failure of the Confederate Congress to organize a Supreme Court is one of the Confederacy's defining gestures in its brief history. In the debate over the organization of the court, one can see in sharp relief the visions of sovereignty and governance that informed the creation of the Confederacy.³³⁵

The process of establishing the court under the permanent Confederate Constitution began with the passage of the Judiciary Act of 1861.³³⁶ The Act gave the court an extensive appellate jurisdiction over cases coming from the district courts, including all serious criminal cases,³³⁷ all civil cases, in both law and equity, where the amount in dispute exceeded \$5,000, and all admiralty and maritime cases where the amount exceeded \$500.³³⁸ But the most startling feature of the court's jurisdiction, as proposed by the Act, involved cases coming from the highest state courts.³³⁹

Section 45 of the Act, modeled after Section 25 of the Judiciary Act of 1789,³⁴⁰ provided for the appeal of cases involving the "validity of a treaty or statute, or, of an authority exercised under the Confederate States," the "validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the Confederate States," and the "construction of any clause of the constitution, or of a treaty, or statute of commission held under the Confederate

335. ROBINSON, *supra* note 281, at 426.

336. See Judiciary Act of 1861, § 38 (providing the provision under "An Act to establish the Judicial Courts of the Confederate States of America").

337. Serious criminal cases were those cases in which the penalty on conviction was death or imprisonment. See Judiciary Act of 1861, stat. P.C., 1 sess., ch. 61, § 38 (1861), reprinted in PROVISIONAL CONGRESS STATUTES, *supra* note 293 (stating that "writs of error or appeals to the Supreme Court of the Confederate States shall be allowed the accused in all cases, in which the punishment or penalty, upon conviction, is death or imprisonment"). This was in contrast to the United States law at the time, where the only method of getting a criminal case to the Supreme Court of the United States was through a certificate of division. See *Ex parte Gordon*, 66 U.S. 503, 505 (1861) (establishing that the only way the Supreme Court can express an opinion on criminal proceedings in a Circuit Court is when "the judges of the Circuit Court are opposed in opinion upon a question arising at the trial, and certify it to this court for its decision").

338. See Judiciary Act of 1861, § 42 (stating that the Court has appellate jurisdiction over "all final judgments . . . rendered in any district court . . . where the matter in dispute . . . exceeds the sum . . . of five thousand dollars in equity, or of five hundred dollars in courts of admiralty and maritime jurisdiction"); ROBINSON, *supra* note 281, at 47 (same).

339. See Judiciary Act of 1861, § 45 (stating that "a final judgment or decree in any suit, in the highest court of law or equity of a state . . . may be re-examined, and reversed or affirmed in the Supreme Court of the Confederate States, upon a writ of error").

340. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (1789) (providing the foundational language of Section 42 of the Judiciary Act of 1861).

States."³⁴¹ Each of these bases for the Supreme Court of the Confederacy's appellate jurisdiction raised issues of constitutional construction, the supremacy of federal law over competing state law,³⁴² and the relationship between the state and federal judiciaries.³⁴³

When Section 45 of the Judiciary Act was reviewed, some members of the Confederate Congress were surprised by the omission of the limits on Supreme Court review of decisions of the highest state courts included in Section 25 of the Judiciary Act of 1789.³⁴⁴ The Act provided limited appeals in: (1) cases involving the validity of federal treaties and statutes to those in which the decision of a state court was "against their validity"; (2) cases involving the validity of state statutes challenged on constitutional grounds to those in which the state court decision was "in favor of . . . their validity"; and (3) cases where a party had claimed a "title, right, privilege, or exemption" from a state law on the basis of the federal constitution or a federal treaty, statute, or commission, and the state court had held against the exemption being claimed.³⁴⁵ Those qualifications indicated that the framers of the Judiciary Act of 1789 wanted to restrict the Confederate Supreme Court's review of decisions of the highest state courts to those involving a direct conflict between a state law and the federal constitution or federal law.³⁴⁶ Where a state court had acquiesced in the supremacy of

341. Judiciary Act of 1861, § 45. Section 46 of the Act addressed the retroactive effect of Section 45, providing that it did not apply to cases decided by state courts between secession and the passage of the Judiciary Act of 1861. *See id.* § 46 (stating that "all judgments . . . made by any state court since the date of secession of such state, upon any subject or matter which before such secession was within the jurisdiction of the courts of the United States" shall have full force and effect, and are appealable).

342. The Confederate Constitution had a Supremacy Clause identical to that of the United States Constitution. *Compare* CONF. CONST. of 1861, art. VI, cl. 3 ("The Constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made, or which shall be made under the authority of the Confederate States, shall be the supreme law of the land . . ."), *with* U.S. CONST. art. VI, § 2 ("The Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land . . .").

343. ROBINSON, *supra* note 281, at 458–91.

344. *Compare* Judiciary Act of 1861, stat. P.C., 1 sess., ch. 61, § 45 (1861), *reprinted in* PROVISIONAL CONGRESS STATUTES, *supra* note 293 (omitting certain qualifications that are present in Section 25 of the Judiciary Act of 1879), *with* Judiciary Act of 1789, § 25, (establishing certain limiting provisions that are not included in Section 45 of the Judiciary Act of 1861).

345. Judiciary Act of 1789, § 25.

346. *See id.* ("[N]o other error shall be . . . regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties,

federal law, the Act's framers concluded that the court did not need to undertake review.³⁴⁷

It is unclear what motivated the drafters of the Act to omit the limitations provided in Section 25 of the Judiciary Act of 1789, or what was the basis of the initial opposition to Section 45. Congressional divisions about that section would fatally affect the organization of the Confederate Supreme Court.³⁴⁸ The divisions did not center on whether the court's power to review the decisions of the highest courts of states should be more extensive than that afforded the Supreme Court of the United States. Instead, they centered on whether the court should have the power of appellate jurisdiction at all.

After Davis called for the reorganization of the court on February 26, 1862, both the Senate and the House introduced bills for that purpose. During debates on the bills, the very sort of issue that seemed necessary for the Supreme Court of the Confederacy to resolve surfaced.³⁴⁹ After the Confederate Congress levied a war tax on the states in August 1861,³⁵⁰ South Carolina argued that the Congress had no power to tax money invested in state bonds, and thus bonds should be exempted from the war tax.³⁵¹ A district judge in South Carolina agreed.³⁵² The Confederate government appealed that decision, but an appeal was only possible to the Confederate Supreme Court, which had not formally come into being.³⁵³

statutes, commissions, or authorities in disputes.").

347. *Supra* notes 344–46 and accompanying text.

348. ROBINSON, *supra* note 281, at 458 (opining that the question of whether the Supreme Court of the Confederate States should have appellate jurisdiction over the highest state courts in cases arising under the Constitution, laws, and treaties of the Confederate state "released a storm of oratory" for several months in 1863).

349. *Id.* at 424–25.

350. *Id.* at 426; MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 17, at 438 ("In August 1861 a direct tax of one-half of one percent on real and personal property became law.").

351. *See* ROBINSON, *supra* note 281, at 425 (stating that the Secretary of the Treasury had reported to the House of Representatives on August 18, 1862 that "by a judgment of the district judge of South Carolina money invested in State bonds has been excepted from the war tax").

352. *See* C. G. Memminger, Confederate States of America, Treasury Department (Jan. 10, 1862), in 2 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. IV, at 317 (photo. reprint 1972) (Fred C. Ainsworth & Joseph W. Kirkley eds., 1900) [hereinafter 2 WAR OF THE REBELLION] ("[The tax of one per cent on property] would be subject to still further abatement so long as the decision of the Confederate court of South Carolina as to the power of Congress to tax State bonds remains unreversed.").

353. ROBINSON, *supra* note 281, at 425.

No progress was made on the bill to organize the Supreme Court in either of the Confederate Congress's 1862 sessions. In January 1863, the Attorney General and Treasury Secretary of the Confederacy, in separate comments,³⁵⁴ referred to South Carolina's resistance to the war tax on state bonds, and suggested that other states may resist state bonds being taxed on similar grounds.³⁵⁵ It was vital that a supreme court be organized in order to decide issues affecting the conduct of the war.³⁵⁶ This stimulated the Senate to once again take up a bill organizing the court in January 1863; a bill, similar to the bill postponed the previous March, was introduced on January 19, 1863.³⁵⁷

During debates on the bill, Senator Clement C. Clay of Alabama proposed that a section be added to repeal Section 45 of the Judiciary Act of 1861.³⁵⁸ Clay's motion set off a series of debates on the question of whether Congress had the power to give a Supreme Court appellate jurisdiction over the final decisions of the highest state courts. Those debates were suspended on February 6, and resumed on March 16.³⁵⁹ On March 18, the Senate voted 16-6 to add Clay's amendment, and subsequently voted 14-8 to pass the bill.³⁶⁰

The next day the Senate bill was sent to the House of Representatives and referred to its Judiciary Committee. On April 9, 1863, the committee reported the bill with an amendment deleting the section repealing Section 45 of the Judiciary Act of 1861.³⁶¹ A motion to postpone consideration of the bill until the fall session passed, 39-30, with several members of the

354. *See id.* at 424-25 (quoting sections from Attorney General Watts's letter to President Davis on January 1, 1863, and two Secretary of the Treasury Memminger reports to the speaker of the House of Representatives on August 18, 1862 and January 10, 1863, respectively).

355. *Supra* note 349 and accompanying text.

356. *See* ROBINSON, *supra* note 281, at 424 (stating Attorney General Watts's letter to President Davis that the "many conflicting decisions, under confiscation, conscription, and other laws, from which appeals have been taken, show, but too plainly, the necessity for prompt action of Congress").

357. *Id.* at 426; *see* 3 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 20 ("Mr. Hill (by leave) introduced a bill (S. 3) to organize the Supreme Court of the Confederate States . . .").

358. ROBINSON, *supra* note 281, at 428.

359. *Id.* at 429, 432; 3 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 53, 56, 64, 66, 102, 106, 146, 164, 172 (noting when the Senate considered the bill to organize the Supreme Court of the Confederate States, and that further consideration of the bill was postponed between February 6, 1863 and March 16, 1863).

360. 3 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 176-77.

361. ROBINSON, *supra* note 281, at 433.

House absent.³⁶² In the fall session of 1863, the bill was once again postponed until the January 1864 session.³⁶³ It was not taken up during that session, and the First Congress of the Confederacy's term expired in February 1864.³⁶⁴ In the Second Congress, the Senate took no action on any bill to organize the court.³⁶⁵ Sporadic efforts to that end were made in the House: a bill in May 1864, which was referred to the Judiciary Committee and not reported; another on November 18 with the same effect; and a third on November 29, this time submitted by the House Judiciary Committee.³⁶⁶ That bill was not taken up by the full House until March 1865, and it was then tabled.³⁶⁷ The January 1865 session of the Confederate Congress subsequently adjourned, scheduling its next session for November 1865; by then the Confederacy had formally expired.³⁶⁸ Thus, the Confederate States of America went through its entire existence without a supreme court.

The deep reluctance on the part of members of the Confederate Congress to establish a supreme court for the Confederacy illustrates how persistently sensitive the issue of the Supreme Court of the United States's power to review the actions of the highest state courts had been from the 1820s through the 1850s.³⁶⁹ That issue surfaced with the Marshall Court's decisions in *Martin v. Hunter's Lessee*³⁷⁰ and *Cohens v. Virginia*.³⁷¹ In both cases the Virginia Court of Appeals declared that Section 25 of the Judiciary Act was unconstitutional, and declined to cooperate in producing

362. *Id.*; 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 320.

363. ROBINSON, *supra* note 281, at 434.

364. *See id.* ("With the expiration of the First Congress on February 17, 1864, the bill became a dead issue.").

365. *See id.* at 434 ("[T]he Senate of the Second Congress was free to pass a new [bill]. But the Senate had washed its hands of the Supreme Court for all time when it sent S. 3 to the House [of Representatives] during the third session of the First Congress.").

366. *Id.*

367. *Id.*

368. *Id.* at 435.

369. *See id.* at 439 (indicating that although Section 25 of the Judiciary Act of 1789 gave the Supreme Court the power to review judgments of the highest state courts, Southern Democrats in the 1820s and 1830s, as well as Northern Republicans in the 1850s, made efforts to have the Section repealed).

370. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 362 (1816) (holding that the Supreme Court is granted the power to question and revise the proceedings of state courts by the Constitution).

371. *See Cohens v. Virginia*, 19 U.S. 264, 447 (1821) (holding that the Supreme Court is granted the power to review the judgments of state courts in criminal prosecutions by the Constitution).

a record for appeal of its decisions to the Supreme Court of the United States.³⁷² Anonymous pamphlets in Virginia newspapers attacked the reasoning of both decisions, and Congress made efforts to repeal Section 25 of the Judiciary Act of 1789.³⁷³

A number of other significant Marshall Court decisions in the 1820s and 1830s affected the powers of the states, and engendered sharp protests.³⁷⁴ Representatives from Kentucky complained when the Court upheld a "compact" between that state and Virginia—fashioned when the new state of Kentucky was carved out of trans-Appalachian lands granted to Virginia—which provided that land titles in Kentucky were to be governed by Virginia law.³⁷⁵ Several states sharply protested against the Court's decision in *McCulloch v. Maryland*³⁷⁶ that states could not tax the Bank of the United States, and Ohio and Kentucky refused to comply with the decision, prompting a case in which the Court held that the Bank could sue a state official in the federal courts for improperly taxing it.³⁷⁷ When Georgia attempted to pass laws affecting the Cherokee tribe, which owned land within the state, the Court held that the tribe was an independent sovereign nation and thus Georgia had no jurisdiction over its territory.³⁷⁸ Georgia, which refused to argue its position before the Court, responded by

372. See G. Edward White, *The Marshall Court and Cultural Change, 1815–35*, in 3–4 *The OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 496 (1988) (stating that "[t]here was no 'seal' of the Virginia court [of appeals] annexed to the writ of error in *Martin*").

373. *Id.* at 504–24.

374. *Id.* at 485–86.

375. See *Green v. Biddle*, 21 U.S. 1, 92–93 (1823) ("Kentucky . . . being a party to the compact which guarantied to claimants of land lying in that State, under titles derived from Virginia . . . as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid.").

376. See *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) (holding that the act of the Maryland legislature purporting to tax notes of the national bank is contrary to the Constitution and void).

377. See *Osborn v. Bank of the U.S.*, 22 U.S. 738, 825–26 (1824) ("[The Bank's suit] is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority."); White, *supra* note 372, at 524–35 (1988) (discussing the events leading up to *Osborn* and the case itself).

378. See *Worcester v. Georgia*, 31 U.S. 515, 530 (1831) ("[T]he said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their own territory . . .").

declining to comply with the Court's mandate to release persons it had arrested on tribal lands until the Cherokees agreed to leave the state.³⁷⁹

Other issues that did not involve the Court directly in the 1820s and 1830s, such as the constitutionality of federal internal improvements legislation³⁸⁰ and South Carolina's effort to "nullify" tariff legislation passed in 1828 and 1832,³⁸¹ signaled that states were chafing under the Court's Section 25 jurisdiction.³⁸² As part of its strategy for "nullifying" the tariff legislation, South Carolina provided in its November 1832 "Ordinance of Nullification," that no appeal from the ordinance could be taken to the Supreme Court of the United States.³⁸³

By the 1850s, the politics of Supreme Court review of state high court decisions became more complicated with the growing sectional tension over slavery and its possible extension, resulting in northern as well as southern courts protesting against the power of the Court to engage in constitutional review of their actions.³⁸⁴ In 1854, the Court in a Section 25 case from Ohio held that an Ohio statute depriving a bank of an exemption from taxation, which was granted in the bank's charter of incorporation, violated the Contracts Clause of the Constitution.³⁸⁵ When the Ohio Supreme Court received notice of the Court's reversal and a mandate to enter judgment for the bank, the Chief Justice of the Ohio Supreme Court initially persuaded his colleagues to ignore the mandate; they did not do so

379. See White, *supra* note 372, at 737–38 (providing that the State of Georgia took no action to comply with the Court's directive in *Worcester*).

380. See DEROSA, *supra* note 191, at 86, 94–95 (stating that the Confederate framers were convinced that states should be responsible for their "respective intrastate infrastructures," which ran contrary to the federal internal improvement tendencies under the U.S. Constitution); see also MCPHERSON, BATTLE CRY, *supra* note 17, at 48–49 (discussing the debate on internal improvements in the 1840s).

381. See Douglas A. Irwin, *Antebellum Tariff Politics: Regional Coalitions and Shifting Economic Interests*, 51 J.L. & ECON. 715, 730 (2008) ("Having lost hope that tariff reform could ever be achieved at the federal level, the state legislatures of South Carolina passed the nullification act in November 1832 that declared that the tariff acts of 1832 and 1828 were unconstitutional . . .").

382. *Supra* note 369 and accompanying text.

383. See 1 DOCUMENTS OF AMERICAN HISTORY 261 (Henry Steele Commager ed., 7th ed. 1963) (stating in the South Carolina Ordinance of Nullification that no state court decision, state legislative act, or Congressional act giving effect to this ordinance is appealable to the Supreme Court of the United States).

384. White, *supra* note 372, at 740.

385. See *Piqua Branch of the State Bank of Ohio v. Knoop*, 57 U.S. 369, 392 (1853) (declaring an Ohio tax law to be void after determining that the state's acceptance of the charter constituted a binding contract which had been unconstitutionally impaired by it).

until 1856, when the case was reargued before them.³⁸⁶ In his dissent from the Ohio court's 1856 decision, Chief Justice Thomas Bartley argued that Section 25 was unconstitutional.³⁸⁷

Finally, in a celebrated episode that stretched between 1854 and 1860, the Supreme Court of Wisconsin declared the Fugitive Slave Act of 1850 unconstitutional,³⁸⁸ and overturned a federal district court's conviction of a newspaper editor who rescued a slave in violation of that Act.³⁸⁹ The Wisconsin Supreme Court then refused to recognize a Section 25 writ of error to the Court.³⁹⁰ Even after a unanimous opinion³⁹¹ by Chief Justice Taney demonstrated that state courts had no constitutional power to correct the decisions of federal courts on matters of federal law—nor to refuse to comply with the modes of appeal from state courts to the Supreme Court that Congress, pursuant to the Constitution, had prescribed—the Wisconsin Supreme Court refused to file the mandate to rearrest the editor.³⁹²

Thus by the time the members of the Confederate Congress came to consider organizing a Supreme Court, the federal judiciary's ability to affect the decisions of states through the exercise of its constitutional review powers, and the desire of states to resist such action by federal courts, had become recurrent issues in American jurisprudence.³⁹³ As

386. Carl B. Swisher, *The Taney Period, 1836–64*, in 5 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 478 (Paul A. Freund ed., 1974).

387. See *Piqua Branch of the State Bank of Ohio v. Knoop*, 6 Ohio St. 342, 380 (1856) (Bartley, C.J., dissenting) ("In asserting this appellate power over the state courts, the Supreme Court of the United States has not deducted it from the constitution by any clear and satisfactory interpretation.").

388. See *In re Booth*, 3 Wis. 1, 31 (1854), *rev'd*, 62 U.S. 506 (1858) ("We are . . . of the opinion that the act under consideration, by attempting to vest judicial power in officers created by [C]ongress and unknown to the [C]onstitution, is repugnant to that instrument, and for that reason void.").

389. See *id.* at 32 ("We think it is essential that the [petitioner's] right [to due process of law] should be maintained by all courts and all tribunals, and for the reasons above given, we must affirm the order made in this case, discharging the relator.").

390. Swisher, *supra* note 386, at 660–61.

391. See *Ableman v. Booth*, 62 U.S. 506, 525–26 (1848) ("[I]t was for the tribunals of the United States to revise and correct it, and not for the State court [T]he act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States.").

392. See Swisher, *supra* note 386, at 670–71 ("[T]he Wisconsin Supreme Court refused to file the mandates. . . . Their filing would have constituted recognition of their validity and of the validity of Booth's conviction. . . . Booth was finally arrested . . . nearly a year after the date of the Supreme Court decision . . .").

393. See *Ableman*, 62 U.S. at 517–20 (discussing the historical debate regarding the supremacy of the federal government over the states, including the desire of the Framers of

Taney put it in the Wisconsin editor's case, a federal supreme court was a symbol of a tribunal that had "appellate power in all cases arising under the Constitution and [federal] laws" so as to allow the "angry and irritating controversies between sovereignties" to be settled "in the peaceful forms of judicial proceeding."³⁹⁴ Without the opportunity to review the decisions of the highest state courts on constitutional and federal law issues, the Confederate Supreme Court would not have been such a tribunal.

In the Confederate Congress's debates on the organization of the Supreme Court, one can find echoes of the arguments that had swirled around the relationship between the federal judiciary and the states for more than forty years. Two excerpts from arguments for and against a supreme court with full Section 45 review powers reveal these echoes. When those arguments are placed alongside one another, they reveal that a supreme court possessed of Section 45 review powers was simply not an institution that a majority of the members of the Confederate Congress could bring themselves to establish.³⁹⁵

Augustus H. Garland of Arkansas, chairman of the House Judiciary Committee, made the argument in support of a supreme court with full Section 45 review powers on April 9, 1863.³⁹⁶ William L. Yancey, Senator from Alabama, made the opposing argument months earlier on February 4, 1863. Garland argued:

Look for a moment at the state of affairs if we had thirteen independent courts, whose decisions on [constitutional issues] should be final. Different states may well entertain different opinions on the true construction of the constitutional power of Congress Dispense with a common tribunal in the last resort, and leave these questions to State courts, and . . . [t]he uniformity of the laws—the very life blood of laws, desirable everywhere will be destroyed, and above all equality among the States, one of the symbols of *States rights*, will be lost sight of forever. . . . One State could relieve herself of any burdens of this war, and thus you would see the majesty of a government confessedly supreme in its sphere prostrated at the feet of any one State Certainly as to foreign powers the Confederate States are a nation. You tell France or England we will carry on commerce with them under a regular treaty, but if their vessels touch at Charleston or New Orleans

the Constitution that the federal government be "strong enough to execute its own laws by its own tribunals, without interruption from a State").

394. *Id.* at 521.

395. *Supra* notes 342–43 and accompanying text.

396. *See* ROBINSON, *supra* note 281, at 474–91 (reprinting and analyzing Garland's argument).

and some question arise under that treaty, South Carolina or Louisiana one will determine the dispute—a power not responsible in any manner to them, and not known in law to them! How long do you suppose they . . . would trade with a power that was thus uncertain as to its being a nation?³⁹⁷

Yancey countered:

Suppose for instance, this law [organizing the Supreme Court with Section 45 intact] remains, and as a consequence you have unity in the interpretation of Confederate laws by the decision of the Judicial power of the Confederate States. There will be constitutional questions arising affecting the rights of the States; and the State tribunals . . . may unite in declaring a Confederate law to be unconstitutional, which the Supreme Court will reverse and declare to be constitutional. The sovereignty—the reserved rights of the States—will in such event be made to yield to the decision of five office holders of the Confederate Government, appointed by the Confederate Executive Determine this to be the law, and that the construction of the Constitution by the Confederate Government shall be enforced against the decisions of the State courts, and on that day you will have planted the roots of the dissolution of this Confederacy; on that day you will have imported into this new Government the evils that destroyed the old. The lights of a sore experience—all the travails we have undergone—will avail naught if we are to tread the same path of aggression upon the rights of the States to the final disruption of this Government. Such will be the effect of giving to the Supreme Court the capacity to absorb within itself the Judicial power of the States on questions involving the reserved rights of the people.³⁹⁸

In those excerpts one sees how the long memory of Supreme Court decisions allegedly extending the powers of the federal government at the expense of the states, coupled with the conclusion by secessionists that the South was, and would remain, a political minority in the Union, had taken on such emotional force within the Confederacy that they obscured the practical facts to which Garland alluded. The Confederacy needed a supreme court to reconcile conflicting lower court decisions on issues involving its Constitution and laws.³⁹⁹ Without Section 45 jurisdiction the Confederate Supreme Court would be unable to reconcile those decisions, some of which would surely emanate from the state supreme courts. Without that reconciliation, some potential absurdities, such as varying constructions of a Confederate treaty with a foreign nation by state courts,

397. *Id.* at 486–87.

398. *Id.* at 468.

399. *Id.*

might result.⁴⁰⁰ To create a supreme court of the Confederacy without the power to review decisions from state courts would be to leave the interpretation of the Confederate constitution in a permanently unsettled state. Yet Yancey's excerpt suggested that to establish a court with Section 45 review powers was to reestablish the "seventy years of maladministration of the federal government" that advocates of secession had identified as a principal reason for southern states leaving the Union.⁴⁰¹

Given the choice of alternatives Garland and Yancey posed, the Confederate Congress elected not to organize a supreme court.⁴⁰² Its members would surely have done so eventually had the Confederate States of America remained in existence, but whether that court would have had the power to review decisions of the highest courts of states, and whether, if it did not, it would have been a tribunal of any significance in the legal and political history of the Confederacy, are questions whose answers cannot easily be extrapolated from Congress's consideration of the court between early 1862 and the winter of 1864. All that one can say, after examining the debates about the court in Congress, is that the very secessionist arguments that had inspired states to leave the Union were proving troublesome to the formation of institutions in the Confederacy that sought to represent the interests of those states as a collective body. However much as those who championed secession sought to identify that cause with the liberties of people residing in individual states, they were well aware that states seceding from one union needed to join together for some purposes: They needed the protection of a federal government, with a federal constitution and federal institutions such as courts. It seemed an easy step, in fact, for those who drafted the provisional and permanent Confederate constitutions to create a supreme court. But when it came to allowing that court power to review the decisions of the highest state courts in the Confederacy, the Confederate Congress balked because of the logic of their own states' rights arguments.

Thus the debate over a Confederate Supreme Court helps capture an endemic feature of the Confederacy itself. It was constantly struggling to establish its identity as a government that was separate from, as well as the agent of, the states that formed it. Although the Confederate Constitution explicitly identified its "federal" powers—such as declaring war, raising

400. *See id.* at 487 (illustrating Garland's fears that foreign countries "would laugh at and scorn [the Confederacy] as unworthy of either their respect or countenance" if treaties were controlled by the laws of states rather than federal law).

401. *Id.* at 469.

402. *Id.* at 490–91.

and supporting an army and a navy, laying and collecting taxes, engaging in foreign relations, and regulating commerce between the states—state concerns constantly shadowed those powers.⁴⁰³ It was as if, having conceded that some federal powers were necessary for any sovereign nation, those who formed the Confederacy continued to seek reassurance that those powers were being exercised with the states' interests in mind. When Yancey argued that the Supreme Court of the Confederacy's reversal of a decision of a state court on a constitutional issue was tantamount to "the sovereignty—the reserved rights of the States" being made "to yield to the decision of five office holders of the Confederate Government," he revealed that he could not countenance the idea of the states and the Confederacy as fully separate sovereigns.⁴⁰⁴ Yet for the Confederacy to act effectively as a representative of the collective interests of the states who seceded from the Union, it needed to exercise sovereign powers that were not merely extensions of state power. As we will see, that tension between the role of the Confederacy as a national government and the conception of it as an agent of secessionist states recurrently affected its representatives' treatment of legal issues.

IV. Central Legal Issues for the Confederacy

A defining feature of the experience of those who created the Confederate States of America was the dissonance between their initial expectations and the concerns that came to preoccupy their leaders. In the weeks in which secessionist sentiment swept through southern states and the government of the Confederacy was launched, it appeared to many participants in those ventures that within a short period the Confederate States of America would be recognized as an independent nation, some sort of peace with the Union government would be negotiated, and the residents of the Confederacy could turn their attention to the ordinary tasks of plantation and farm life.⁴⁰⁵ The prospects for successful commercial ties to Europe, centering on the world-wide demand for cotton, appeared

403. See CONF. CONST. of 1861, art. I, § 8 (listing the powers of the Confederate Congress); *id.* art. II, § 2 (listing the powers of the Confederate executive).

404. ROBINSON, *supra* note 281, at 468.

405. See ALBERT BURTON MOORE, CONSCRIPTION AND CONFLICT IN THE CONFEDERACY 1–2 (1924) [hereinafter CONSCRIPTION AND CONFLICT] (stating that volunteers "believ[ed] that the war would last only a few months" and "that secession could be accomplished without the shedding of blood").

favorable.⁴⁰⁶ Given the difficulties Union forces would face in fighting a war on southern soil, many anticipated that if Confederate armies massed troops in defense of southern cities and forts, while mounting forays into northern territory to threaten Washington, the Union government would welcome an early peace that would result in the official recognition of the Confederacy and the perpetuation of slavery.⁴⁰⁷ Accordingly, much of the work of the drafters of the Confederate Constitution was devoted to establishing the sort of government that would embody principles which had driven the movement for secession: strong, autonomous state governments; a federal Congress dependent on the states; a federal executive whose powers were circumscribed; and federal district courts of limited jurisdiction.⁴⁰⁸

Shortly after the Confederacy was established, however, it became apparent that the expectations of its leaders about the course of the war and independence were misplaced. The Union government responded to secession by calling up troops and blockading southern ports.⁴⁰⁹ England and France did not recognize the Confederacy. Union armies began invading the South on multiple fronts.⁴¹⁰ From almost the moment of its inception, the first priorities of the Confederate government were military priorities.

Consequently, the central legal issues with which Jefferson Davis and the members of the Confederate Congress concerned themselves during the Civil War were issues connected to the conduct of that war. Taken together, the issues demonstrated the need for Confederate policymakers to impose a superstructure of federal military power over the local and state institutions whose autonomy had been emphasized in the Confederate

406. See MCPHERSON, *BATTLE CRY*, *supra* note 17, at 382–87 (describing the ultimately frustrated hopes of the Confederacy that British and French worries over a cotton famine would be beneficial for the South's business and foreign policy).

407. See CONSCRIPTION AND CONFLICT, *supra* note 405, at 4 ("Enthusiasm ran high because of the general apprehension that the war would be terminated in a month or two by a grand march of the Confederate forces to Washington.").

408. ROBINSON, *supra* note 281, at 22.

409. See MCPHERSON, *BATTLE CRY*, *supra* note 17, at 369–87 (detailing the Union blockade of the southern shoreline with three dozen ships, and describing major battles in the early months of the blockade off Virginia's coast, as well as the effect of the blockade on the Confederacy's foreign relations with Britain and France).

410. See CONSCRIPTION AND CONFLICT, *supra* note 405, at 12–13 (explaining that, early on in the war, the Union had advanced upon the forts of the upper Mississippi, the cities of Nashville, Memphis and New Orleans, and was in a position to advance on Richmond at the end of the winter if the Confederacy continued to take no action).

Constitution.⁴¹¹ Although that superstructure was necessary to the Confederate war effort, it was periodically resisted by members of the Confederate Congress, who retained their commitments to the interests of their own states and their theoretical endorsement of state sovereignty.⁴¹² The result was a continuous tension between efforts on the part of Davis to further the war effort by extending the military power of the Confederacy over civilians and civilian institutions, and efforts on the part of the Confederate Congress to resist Davis's overtures.⁴¹³

A. *Martial Law and the Suspension of Habeas Corpus*

The Civil War period represented the first time since the framing of the Constitution that the "privilege of the writ of habeas corpus" was regularly suspended, and several of those suspensions took place in the Confederacy.⁴¹⁴ In order to understand the implications of suspending the

411. *Id.* at 13–14.

412. ROBINSON, *supra* note 281, at 359–419.

413. CONSCRIPTION AND CONFLICT, *supra* note 405, at 13–14.

414. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); CONF. CONST. of 1861, art. I, § 9, cl. 3 (same). During the Revolutionary War, "at least five states enacted suspension legislation." Amanda Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 622 (2009). In 1807, President Thomas Jefferson requested the suspension of habeas corpus in connection with the alleged conspiracy of Aaron Burr and others to encourage portions of the newly-acquired Louisiana Territory to detach themselves from the Union. *See id.* at 630 ("Jefferson is reported to have requested that Congress enact a suspension in the wake of the release by a habeas court of one of the Burr conspirators."). The Senate acceded to Jefferson's request, but the House of Representatives declined to support it. *See id.* at 631 ("Extensive debate on the Senate bill followed in the House, where it found little support, and the proposal quickly died."). Habeas corpus was not suspended during the War of 1812. *See* Stephen I. Vladeck, *The Field Theory: Martial Law, The Suspension Power and the Insurrection Act*, 80 TEMP. L. REV. 391, 421–22 (2007) (noting that Andrew Jackson was held in contempt and fined by the judge of a Federal District Court in Louisiana when, during the Battle of New Orleans, Jackson seized a writ of habeas corpus demanding the production of a prisoner and arrested the District Court judge for issuing the writ). It was temporarily suspended during the 1842 "Dorr War," in which two factions in Rhode Island claimed to be the legitimate government of that state. *See id.* at 425 ("[T]he Charter General Assembly proclaimed martial law on June 26, after which there were mass arrests and reprisals.").

Another instance in American history in which the writ of habeas corpus was suspended was in 1871, when Congress authorized suspension as a response against violence initiated by the Ku Klux Klan in South Carolina. Amanda Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 660 (2009). In 1902, the governor of the Philippines announced a suspension in response to an armed insurrection. *Id.* at 663 n.311. The final instance of suspension was in 1941, when the governor of Hawaii suspended habeas corpus

writ of habeas corpus in wartime, it is necessary to review the connection between habeas corpus suspensions and declarations of martial law. The term martial law serves to describe situations in which an ordinary civilian legal regime is replaced by one established and enforced by representatives of the military in territory that is contested or occupied because of a war or rebellion.⁴¹⁵

Martial law can encompass quite different settings, and did so in the Civil War. The Union imposed martial law in portions of Delaware, Pennsylvania, and Maryland in periods when Lee's army and the Army of the Potomac simultaneously occupied those areas.⁴¹⁶ It was also imposed in portions of Missouri, where guerilla fighting and efforts at sabotage were common among Union and Confederate partisans for much of the war, and in Kentucky, eventually encompassing the entire state.⁴¹⁷ It also existed in areas where Union forces had recaptured territory in Confederate states, most prominently in New Orleans.⁴¹⁸

On the Confederate side, martial law was first imposed in December 1861, around Knoxville, Tennessee.⁴¹⁹ The proclamation was made by a Confederate general without the authorization of the War Department.⁴²⁰ Subsequently, President Davis imposed martial law in the area encompassing Norfolk and Portsmouth, Virginia on February 27, 1862.⁴²¹ That same day, Congress authorized Davis to suspend habeas corpus "in such cities, towns, and military districts as shall, in his judgment, be in such danger of attack by the enemy as to require the declaration of martial law for their defense."⁴²² Shortly after issuing his February 27 proclamation suspending habeas corpus and declaring martial law in Norfolk and Portsmouth, Davis extended martial law to Richmond, Petersburg, and several counties fronting on the Chesapeake Bay east of Richmond.⁴²³ Over

and imposed martial law after the bombing of Pearl Harbor. *Id.* at 663 n.312.

415. See BLACK'S LAW DICTIONARY 1063 (9th ed. 2009) (defining martial law as "the law by which during wartime the army, instead of civil authority, governs the country because of a perceived need for military security or public safety").

416. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 170–71 (rev. ed. 1951).

417. *Id.* at 171.

418. MCPHERSON, BATTLE CRY, *supra* note 17, at 623.

419. ROBINSON, *supra* note 281, at 389.

420. *Id.*

421. *Id.* at 390.

422. Act of February 27, 1862, ch. 2, Confed. Pub. L., 1 Stat. 1.

423. ROBINSON, *supra* note 281, at 391. More information on the geographical extent of the proclamations is contained in their full text. See Jefferson Davis, General Orders, No.

the course of the war, Davis or Confederate generals imposed martial law in western Virginia; eastern Tennessee; areas of South Carolina; Mobile, Alabama; and parishes around New Orleans. Eventually, as more generals began choosing to place areas in which their troops were stationed under martial law, the Confederate War Department issued an order, on August 6, 1862, stating that generals had no authority to declare martial law absent presidential authorization.⁴²⁴

A month after that order was executed, the legislation authorizing Davis to declare martial law expired.⁴²⁵ Members of the Confederate Congress expressed concern about the relationship between martial law and the liberties of citizens of the Confederate states under the Constitution, and in October 1862, the House Judiciary Committee produced a bill that authorized the President to suspend habeas corpus but stopped short of giving him the power to declare martial law.⁴²⁶ The bill was also of limited duration: It was scheduled to expire on February 11, 1863.⁴²⁷ Martial law continued in portions of Arkansas, Texas, and Tennessee throughout 1863, but when the governor of Florida asked Davis to declare it in portions of that state in February 1864, Davis declined.⁴²⁸

As the above details suggest, the imposition of martial law and the suspension of the writ of habeas corpus are related, but do not perform identical functions. A declaration of martial law within a particular area

9 (Mar. 1, 1862), in 51 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. I, pt. II, at 482 (1897) [hereinafter 51 WAR OF THE REBELLION] (reprinting the order from President Davis to suspend habeas corpus in and around Richmond); Jefferson Davis, General Orders, No. 11 (Mar. 8, 1862), in 51 WAR OF THE REBELLION, *supra*, ser. I, pt. II, at 493 (reprinting the order from President Davis to suspend habeas corpus in and around Petersburg); Jefferson Davis, General Orders, No. 15 (Mar. 14, 1862), in 51 WAR OF THE REBELLION, *supra*, ser. I, pt. II, at 502 (reprinting the order from President Davis to suspend habeas corpus in the counties of eastern Virginia).

424. ROBINSON, *supra* note 281, at 396.

425. *Id.* at 398.

426. 5 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 508. The resolution was enacted on October 13, 1862. *See id.* at 557 ("The Senate have passed a bill of this House (H. R. 44) entitled 'An act authorizing the suspension of the writ of habeas corpus.'").

427. *See id.* at 517 (amending the resolution to read "the privilege of the writ of habeas corpus shall be, and the same is hereby, suspended from and after the passage of this act until after the expiration of thirty days from the commencement of the next session of this Congress").

428. ROBINSON, *supra* note 281, at 403. See Letter from John Milton to General G.T. Beauregard (Feb. 5, 1864), in 35 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. I, pt. I, at 563–64 (1891), for text of Governor Milton's letter.

replaces the civilian legal authorities in that area with military authorities.⁴²⁹ It does not require that all persons detained by the military be tried by military commissions as opposed to civilian courts.⁴³⁰ It does, however, assume either that civilian courts will be closed in the areas governed by martial law, or, if they remain open—as they did in many places in the Confederacy that were allegedly governed by martial law—military authorities will make the decision to keep them open.⁴³¹

Suspension of the privilege of the writ of habeas corpus has a different effect. It does not, in itself, institute martial law. It merely allows military or civilian officials, acting under orders from civilian authorities, to detain persons for the protection of the public safety without having to provide a reason for their detention.⁴³² The writ itself—the mechanism by which detained persons challenge the basis of their detention before a court—is not suspended; in areas or classes of cases governed by suspension proclamations, writs may still be issued. The effect of suspension is on the privilege: The authorities detaining the prisoner need not produce the prisoner's body before a court. When a suspension of the privilege exists, detained prisoners simply remain in custody until the suspension ends. After that occurs, they need to be released or brought to trial in civilian courts.

Habeas corpus suspensions thus have in some respects narrower impacts on civilians than declarations of martial law, since their chief impact is on cases in which the detaining authority wants to confine, on a preventive basis, persons ordinarily eligible for trials in civilian courts. When martial law is in operation, all detained persons within areas

429. See *supra* note 415, for a definition of martial law.

430. See ROBINSON, *supra* note 281, at 392–93 (describing advice given to Davis by the Attorney General that "[t]he usual civil jurisdiction should be allowed . . . the exception should only prevail when absolutely necessary. Orders should be so framed as to permit the normal business of the courts, except when such interfered with military operations").

431. See *id.* at 393 n.32 (quoting Davis's report to the Senate that the "action [of the civil courts] in all cases [is] regarded as an assistance and not an obstacle to the military authorities in accomplishing the purposes of the proclamations"). Davis's full report to the Senate expands on this premise. See 2 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 445, for the text of Davis's report.

432. See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Texts, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 598 (2008) (defining a traditional writ of habeas corpus *ad subjiciendum* as an order "directing the jailer to produce the body of the prisoner along with an explanation of the cause of the prisoner's detention"). Thus, suspension of the privilege of the writ of habeas corpus means the ability to arrest a person for any reason and not be required to prove to a court that the arrest was legal or justified.

governed by it are eligible for trial and possible punishment by military tribunals under the laws of war, whose offenses and punishments differ from civilian laws.⁴³³

In another respect, however, habeas corpus suspensions can be thought of as having a broader potential effect on the civil liberties of civilians in wartime than martial law declarations. Unless a civilian detained by authorities in an area governed by martial law qualifies as a prisoner of war—for which, under military law, there are technical requirements—the civilian will eventually need to be brought before a military tribunal, charged with an offense, and tried. In contrast, a civilian detained on a preventive basis in an area where the privilege of the writ of habeas corpus had been suspended would typically have no way of challenging his or her detention, and might be confined indefinitely in a civilian prison.

For the spring and summer of 1862, as northern armies began to invade the South in a variety of places, requests for the imposition of martial law grew, so that it was proclaimed not only in the western portions of Virginia but in various areas of North and South Carolina, Florida, Alabama, Tennessee, Louisiana, Mississippi, Arkansas, and Texas. But the administration of martial law by military commanders was uneven and caused resentment, and by the time Congress reassembled to consider renewing the February 27 legislation, which was set to expire in September 1862, opposition to martial law had surfaced. The Judiciary Committee of the House was instructed to not only report on the state of the law in areas of the Confederacy where martial law had been established, but also to "report what legislation is necessary to define 'martial law' and protect the constitutional rights of the citizens, and at the same time give to the Executive the powers necessary for the military police of invaded districts."⁴³⁴ The report eventually concluded that "[i]f martial law over the people be necessary in any case, it should be regulated and defined in a sense consistent with the Constitution by distinct enactments."⁴³⁵ It also doubted that "the phrase 'martial law'" was salutary, calling it "at best, ambiguous" and capable of "convey[ing] ideas dangerous to liberty," and suggested that "it is wiser in our legislation to substitute for it such positive regulations as may be deemed necessary."⁴³⁶ As we have seen, neither

433. See *Ex parte Milligan*, 71 U.S. 2, 54 (1866) ("[T]he proclamation of martial law renders every man liable to be treated as a soldier.").

434. 5 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 318.

435. *Id.* at 376.

436. *Id.* at 376–77.

Davis nor Congress declared martial law for the remainder of the Confederacy's existence, although military commanders continued to sporadically impose it.

Meanwhile, elements in the Confederate Congress were resisting the renewal of Davis's power to suspend habeas corpus.⁴³⁷ In the bill renewing that power, which Davis signed on October 13, 1862, Congress instructed Davis to appoint officials to determine whether persons had been properly detained by Confederate authorities.⁴³⁸ In addition, the authorization to suspend habeas corpus was of limited duration: It expired on February 11, 1863, thirty days after the beginning of the next session of Congress.⁴³⁹

When that session began, a bill was introduced to continue the authorization, but no action was taken.⁴⁴⁰ Opposition to the idea of suspension had been growing in Congress. In February 1863, the House of Representatives asked Davis for a list of civilians in custody with military authorities, which Davis did not furnish.⁴⁴¹ In April a Mississippi Congressman introduced a bill imposing a penalty for attempting to declare martial law within the Confederate States.⁴⁴² That bill was tabled in committee, but the session ended with Davis lacking authorization to suspend habeas corpus.⁴⁴³

When Congress reassembled in December 1863, a group of House members passed a bill providing for a committee to inquire whether there had been any intentional violations of the constitutional rights of citizens of the Confederacy by military authorities in the period when Congress had

437. See ROBINSON, *supra* note 281, at 401–02 (describing Congress's inaction on bills introduced to extend the authorization to suspend the writ of habeas corpus).

438. *Id.* at 402.

439. *Id.*

440. See 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 7 (documenting the introduction of a bill entitled "An act to continue in force an act authorizing the suspension of the writ of habeas corpus, approved October thirteenth, eighteen hundred and sixty-two" and its referral to the Committee on the Judiciary). The discussion of the bill and the ultimate decision to refer it to the Committee on the Judiciary instead of voting on it is reported later in the journal. See ROBINSON, *supra* note 281, at 352 (reprinting the motion in full).

441. See *id.* at 75 (reporting the House resolution "[t]hat the President be requested to communicate to this House a list of all civilians now in custody under authority of the War Department, giving . . . the offense charged against him, and the place of his imprisonment").

442. The bill was entitled "An act to declare that martial law can not exist within the Confederate States, and prescribing a penalty for declaring the same."

443. *Id.* at 427.

been in recess.⁴⁴⁴ Most of the members of the committee expressed their opposition to suspension and military control of civilians. Although the committee never issued a report, the action revealed that elements in Congress had become increasingly restive about the exercise of powers by members of the Confederate armed forces.

Concerned about the increased number of habeas petitions that had surfaced since Congress declined to renew his suspension authority, Davis submitted a message on February 3, 1864 to Congress, meeting in a secret session, asking that his suspension powers be renewed. In the message he referred to "citizens of well-known disloyalty" who were "holding frequent communication with [the enemy], and furnishing valuable information to our injury."⁴⁴⁵ He described suspension as "a duty [as important as the duty] to levy taxes for the support of the government."⁴⁴⁶

After debating the matter, Congress gave Davis limited suspension authority in a designated class of cases involving war crimes.⁴⁴⁷ The authority was to expire on August 1, 1864.⁴⁴⁸ After Davis signed the bill on February 15, opposition to it mounted over the course of the year, with state legislators in Georgia, North Carolina, Mississippi, and Alabama publicly criticizing it.⁴⁴⁹ After Davis delivered another address in November 1864 warning of the breakdown in authority in Virginia, North Carolina, and Tennessee, where habeas petitions were once again interfering with the efforts of military authorities, the House supplied another limited suspension bill, which was reported out in December 1864.⁴⁵⁰ But the Senate amended the bill and delayed its being reported, and eventually, when the House passed an amended bill in March 1865, the Senate took no action.⁴⁵¹ As a result, the privilege of the writ of habeas corpus was not

444. 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 516.

445. *Id.* at 744.

446. *Id.* at 746.

447. The full text of the Act of February 15, 1864 sheds more light on the types of war crimes for which the President could suspend the writ. ROBINSON, *supra* note 281, at 408 n.85.

448. *Id.* at 409.

449. See FRANK L. OWSLEY, STATE RIGHTS IN THE CONFEDERACY 176–202 (1925) (describing the aftermath of passage of the act as "one of the bitterest, and in some respects most disastrous, conflicts of the whole war between Confederate and state authorities," and then detailing the state reactions against the act's passage).

450. See 7 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 269, for the text of the limited suspension bill. The bill, approved by the House on December 10, 1864 by a vote of fifty in favor and forty-four opposed, was then sent to the Senate. *Id.* at 346–50.

451. 4 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 723.

suspended anywhere within the Confederacy after August 1, 1864. One historian has claimed that it is not coincidental that "1863—when there was no law to suspend the writ—was the turning of the tide against the Confederacy," and "that after August 1, 1864, when the last act suspending the writ had expired, the fortunes of the South never rose again."⁴⁵²

As the war lengthened and Union armies moved deeper into the South, conflict developed between the military needs of the Confederacy and the interest of secessionist states in defending their own territory. As early as 1862 the Confederate high command had given priority to keeping Union troops away from Richmond, and had promoted occasional forays into the North in the hope of gaining leverage for peace negotiations. This strategy meant that large numbers of troops were needed in Virginia, the base for both of those operations. The best supply of troops for the Confederate army was state militias, but as more members of those militias were mustered into Confederate regiments, fewer soldiers were available to defend home states. When members of state militias, for a variety of reasons, did not respond to conscription orders, one option for Confederate commanders was to arrest them for resisting the orders. Suspensions of the writ of habeas corpus facilitated those arrests.

In addition to concerns about the potential for government to trespass on the rights of states, members of the Confederate Congress were worried about the potential for suspensions to undermine the defense of their own localities. When the Vice President of the Confederacy, Alexander Stephens of Georgia, gave a speech to the Georgia legislature protesting against the renewal of Davis's suspension power in March 1864, he was not simply seeking to undermine Davis's presidency or to declare his commitment to states' rights.⁴⁵³ Along with the governor of Georgia, he was attempting to protect his state from the anticipated invasion of Sherman's army, which at the time was entrenched near Atlanta.

452. OWSLEY, *supra* note 449, at 202. That claim seems exaggerated. If one assumes that the principal benefit gained by the Union and Confederate governments from suspending habeas corpus was the ability to detain persons suspected of being disloyal to those governments, one would have to imagine a large number of such persons surfacing in the Confederate states during the later years of the war. Given the strong support for secession and war in those states at the outset of the war, it seems more likely that the diminished commitment to the war effort among residents of the Confederacy after 1863 was a product of war weariness and a sense of foreboding about the eventual outcome of the conflict. It is hard to imagine how preventive detention of residents of the Confederacy in the years after 1863 would have effectively distinguished turncoats from the general mass of the war weary, or improved Confederate military resistance to invading Union armies.

453. ROBINSON, *supra* note 281, at 412.

There was thus a dimension in southern resistance to the suspension of habeas corpus that did not, for the most part, occur in northern states. Habeas corpus suspensions were undertaken, in both the Union and the Confederacy, for two main reasons. One, as illustrated by Lincoln's 1861 suspensions in Maryland and Davis's 1862 suspensions in eastern and central Virginia, was concern about sabotage in connection with possible military invasions by enemy forces. The other was concern about resistance to military recruitment. Generally, the states of the Union and the Confederacy were situated differently with respect to the latter issue. Military recruitment was a difficult matter for both the North and the South, and suspension of the writ of habeas corpus facilitated the enforcement of recruiting orders by allowing military authorities to arrest and detain persons who resisted the orders. But in the North the recruitment of members of state militias or other residents of northern states into the Union army did not, for the most part, deprive those states of men who might defend their families and property from enemy attack.⁴⁵⁴ For the most part, those in the North who denounced habeas suspensions or openly resisted a military draft were not anticipating an imminent invasion of their localities. In the South that possibility was present for the entire duration of the war.

B. Conscription

A close look at the situations in which habeas corpus suspensions occurred during the Civil War suggests that the issue of suspending the privilege of the writ cannot be readily separated from another issue, that of compulsory military recruitment. The Civil War was the first in American history in which a longstanding tradition of voluntary military service was formally modified.⁴⁵⁵ "Voluntary" military service had been something of a misnomer, but legislation authorizing the national government to force eligible recruits to join the military services, which both the Confederacy and the Union government instituted during the course of the war, was unprecedented.⁴⁵⁶

454. Only three battles took place in the border states, and only one, Gettysburg, was in a state north of the border states. See CURT JOHNSON & MARK McLAUGHLIN, *CIVIL WAR BATTLES 6-7* (1977) (listing and depicting the location of battles).

455. See William L. Shaw, *Selective Service: A Source of Military Manpower*, 13 MIL. L. REV. 35, 40-46 (1961) (comparing the efforts to raise armies in the Revolutionary War with those of the Union and Confederacy in the Civil War).

456. See *id.* (explaining that able-bodied men served during the Revolutionary War either out of a voluntary sense of duty or in compliance with conscription laws drafted by

The advent of conscripted military service in the Civil War needs to be understood against the backdrop of that "voluntary" tradition. The tradition was a product of independence and the Revolutionary War experience.⁴⁵⁷ All the colonies that became independent states in 1776 had militias, which were created by acts of assemblies and commanded by governors. Militias typically included all able-bodied male residents of the colony or state that were within the ages of eighteen and forty-five.⁴⁵⁸ Not all those residents actually served in militias, and militias were active infrequently.⁴⁵⁹ The concept of a militia, however, presupposed that men eligible to serve in them were "on call" to be activated in emergencies.⁴⁶⁰

When the Continental Congress sought to establish an army after it declared independence from Great Britain, it imposed quotas for soldiers from each of the states based on population.⁴⁶¹ The states responded in various ways, but each drew on militia companies, offering their members bounties—typically in the form of cash payments, but sometimes in the form of warrants to tracts of land—if they volunteered to join the Continental Army.⁴⁶² If not enough members volunteered, lotteries were held in some companies, and those chosen had the option of serving or providing substitutes.⁴⁶³ Buying or otherwise providing substitutes was, from the beginning, a feature of militia or federal army service in America.

The Continental Army did its own recruiting, which consisted of creating two classes of volunteer soldiers.⁴⁶⁴ One joined the army as

individual colonies, while both the Union and the Confederacy passed federal legislation enforcing conscription).

457. *See id.* at 41 (quoting George Washington as saying "that every citizen who enjoys the protection of a free government, owes . . . [a portion] of his personal services to the defense of it").

458. *See id.* at 40–41 (describing the state laws requiring militia service for able-bodied males in Virginia, Massachusetts, and Connecticut).

459. *See id.* at 41 (stating that although Virginia, for example, "could issue quotas for drafts during the Revolution, the colony did not" exercise that option).

460. *Id.* at 40.

461. *See* Jeffrey R. Hummel, *The American Militia and the Origin of Conscription: A Reassessment*, 15 J. LIBERTARIAN STUD., no. 4, 2001, at 29, 36–39 (surveying the process by which the colonies and the Continental Congress raised armies, including a quota imposed by the Congress on the states).

462. *See id.* at 36 ("The Continental Army, the military force of the new national government, was initially composed entirely of volunteers. But, as the war dragged on, manpower shortages became acute, despite the monetary bounties and land grants offered by both the Continental Congress and the individual states.").

463. *Id.*

464. *See id.* at 34 ("Alongside the *common* militia . . . was what came to be called the

professional soldiers, remaining for indefinite durations. The other joined as volunteers for limited periods of enlistment. This process was retained after the Revolutionary War ended, so that in ordinary times the federal army was staffed by volunteers, but when emergencies developed the state militias, normally under state control, could be called into service by the federal government and become part of a federal army. The Constitution gave Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."⁴⁶⁵ The Constitution also gave the President power to serve as "Commander in Chief of . . . the Militia of the several States, when called into the actual Service of the United States."⁴⁶⁶ In 1795, Congress authorized the President to employ the militia of the several states when "combinations too powerful to be suppressed by the ordinary course of judicial proceedings" threatened "the laws of the United States."⁴⁶⁷ Unless individual members of state militias volunteered for longer periods of service, it was expected that they would not serve as part of the federal armed forces for more than three months.⁴⁶⁸

After relying on volunteers and call-ups from state militias during the first year of the war, the Confederate Congress moved toward conscription more quickly than its Union counterpart.⁴⁶⁹ That decision was a response to the short recruitments, many of them for no longer than a year, which characterized the first group of Confederate volunteers after Sumter.⁴⁷⁰ It was also a response to the dire military situation that the Confederacy appeared to be facing in 1862—New Orleans was about to be captured; Union forces were advancing southward in Tennessee; the Army of the Potomac had established itself on the Yorktown Peninsula and was advancing toward Richmond; and Union armies had gained control of

volunteer militia, consisting of privately recruited military units.").

465. U.S. CONST. art. I, § 8, cl. 15.

466. *Id.* art. II, § 2, cl. 1.

467. Militia Act of 1795, ch. 36, 1 Stat. 424, 424 (1795) (current version at 10 U.S.C. § 332 (2006)).

468. See Hummel, *supra* note 461, at 32 ("Colonial governments were not supposed to send drafted militiamen outside the colony, and the draftee's term of service was limited to three months.").

469. See Shaw, *supra* note 455, at 42–44 (stating that the first Confederate draft legislation was enacted in April 1862, while the first Union draft legislation was enacted in January 1863).

470. See CONSCRIPTION AND CONFLICT, *supra* note 405, at 13 ("President Davis urged conscription upon Congress for several reasons. First, he thought it was imperative as a means of retrieving the mistake of short term enlistments.").

major rivers in the West.⁴⁷¹ The prospect of having large numbers of troops leaving service after their one-year voluntary enlistments expired, coupled with a rapidly decreasing supply of volunteers, had prompted the Confederate Congress, as early as December 1861, to issue bounties and temporary furloughs for men who would re-enlist when their initial commissions expired.⁴⁷² By the spring of 1862 the new Congress resolved to move from voluntary recruitment to conscription.⁴⁷³

In a message on March 28, 1862, Davis argued that a system of conscription would result in longer enlistments, a more uniform and centralized military system, and a more equal distribution of the war's burdens.⁴⁷⁴ Congress, sensitive to the forthcoming expiration in May of the enlistments of soldiers from 148 regiments who had signed up for twelve months, voted by approximately two to one to make all able-bodied white male citizens of seceded states between the ages of eighteen and thirty-five available for three years of military service.⁴⁷⁵ The legislation extended the terms of one-year volunteers to three years. The process of administering the draft was similar to that in the Union. The Confederate Secretary of War was in charge of enrolling persons for the draft and establishing quotas for states.⁴⁷⁶ "Camps of instruction" were established in each state, to which persons identified as eligible reported, were processed, and eventually, if admitted into the service, trained.⁴⁷⁷

The first concerns of those who voted for conscription in the Confederacy were with extending the one-year enlistments of the first volunteers to three years before they expired, and with encouraging additional volunteers. Volunteering did increase after the passage of the act, spurred in part by a policy of allowing existing companies of volunteers

471. *See id.* at 12–13 (detailing the advancement of the Union army in the western, southern and eastern parts of the Confederacy).

472. *Id.* at 7.

473. Shaw, *supra* note 455, at 44.

474. *See, e.g.*, CONSCRIPTION AND CONFLICT, *supra* note 405, at 13–14 (describing the President's suggestion to Congress and his rationale supporting it (citing Message from Jefferson Davis to the Senate and House of Representatives of the Confederate States (Mar. 28, 1862), *reprinted in* 1 MESSAGES AND PAPERS OF THE CONFEDERACY 206 (James D. Richardson ed., 1905))).

475. The first conscription act of the Confederate Congress passed on April 16, 1862. *Id.* at 13–14.

476. *E.g., id.* at 15.

477. *E.g., id.* at 114 (citing the Confederate Senate's Passage of the Conscription Act (Apr. 11, 1862), *reprinted in* 2 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 154).

to reorganize themselves for thirty days after conscription went into effect.⁴⁷⁸ That meant that those eligible to be drafted had thirty days to join regiments and participate in the election of officers in those regiments, as opposed to being randomly assigned to companies by conscription officials.⁴⁷⁹ In the year that conscription went into effect, approximately 200,000 men joined the Confederate army, more than half of whom were volunteers.⁴⁸⁰

From the outset, conscription in the Confederacy included exemptions for various classes of persons, including those who bought substitutes.⁴⁸¹ The exemptions were both controversial and a basis for manipulating the system.⁴⁸² The practice of substitution had been followed in the first stages of the war, both with respect to volunteers and militia call-ups.⁴⁸³ It was retained in the 1862 conscription legislation.⁴⁸⁴ Substitutes needed to be lawfully exempt from military duty and fit for service,⁴⁸⁵ and efforts were made to limit the number of substitutes in each regiment.⁴⁸⁶ Those guidelines were difficult to enforce, and the system became susceptible to fraud. Moreover, there was no option of commuting service through a payment to the Confederate government, as there was in the North, so the market price for substitutes quickly rose, reaching as high as \$6,000 by 1863.⁴⁸⁷ In the fall of 1862, Confederate Secretary of War, George Randolph informed Congress that "the evils of the [substitution] system [were] . . . very great,"⁴⁸⁸ and shortly thereafter it raised the age limit for

478. MCPHERSON, *BATTLE CRY*, *supra* note 17, at 432.

479. *See, e.g.*, CONSCRIPTION AND CONFLICT, *supra* note 405, at 14–15 (describing the incentive structure set up by the enactment's provision allowing for the avoidance of random assignment); MCPHERSON, *BATTLE CRY*, *supra* note 17, at 432 (same).

480. *See* MCPHERSON, *BATTLE CRY*, *supra* note 17, at 432 ("During 1862 the total number of men in the Confederate army increased from about 325,000 to 450,000. Since about 75,000 men were lost from death or wounds during this period, the net gain was approximately 200,000. Fewer than half of these new men were conscripts or substitutes . . .").

481. CONSCRIPTION AND CONFLICT, *supra* note 405, at 15–16.

482. MCPHERSON, *BATTLE CRY*, *supra* note 17, at 431.

483. CONSCRIPTION AND CONFLICT, *supra* note 405, at 27 n.1.

484. *Id.* at 27 (citing War Department General Order No. 29 (Apr. 26, 1862), *reprinted in* 1 *WAR OF THE REBELLION*, *supra* note 178, ser. IV, at 1093).

485. *Id.* at 27–28.

486. *See id.* at 28 ("[N]o company should receive more than one substitute per month.").

487. *See id.* at 29–30 (describing the buoyant market for substitutes, where prices rose in response to the high demand).

488. *Id.* at 33 (citations omitted).

service to forty-five, thereby making men between the ages of thirty-five and forty-five eligible for the draft and disqualifying them as substitutes for the persons who had hired them.

That change had very little impact, and by the time Congress met for its winter session in December 1863, demands to abolish substitution came from many corners.⁴⁸⁹ Congress eventually abolished substitution in late December, and made all persons who had furnished substitutes eligible for service in accompanying legislation in early January 1864.⁴⁹⁰ Several persons who had hired substitutes challenged the constitutionality of the legislation, claiming that it interfered with the obligation of contracts they had made prior to the legislation's passage.⁴⁹¹ A few lower state courts agreed, but the highest courts of the states upheld it.⁴⁹² In one instance, however, Chief Justice Richmond Pearson of the Supreme Court of North Carolina, sitting in chambers, declared the legislation abolishing substitution unconstitutional and proceeded to exempt persons who had challenged the legislation from military service.⁴⁹³ Davis responded by asking Congress to suspend habeas corpus,⁴⁹⁴ which Congress did in February 1864,⁴⁹⁵ and in June of that year the North Carolina Supreme Court, with Pearson dissenting, upheld the constitutionality of the abolition act.⁴⁹⁶

Substitution was the most unpopular of all the exemptions from conscripted military service, but all of them raised concerns. Unlike substitution, which Congress eventually came to deplore, the policy of exempting several categories of persons from the draft was consistently reflected in conscription legislation, with the only major issue being

489. *Id.* at 36.

490. *See id.* at 44–45 (describing Congress's acts abolishing substitution and creating liability for service for principals shortly thereafter (citing the Senate Passage of "An Act to Amend the Law in Relation to Substitutes" (Dec. 30, 1863), *reprinted in* 3 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 499; House Passage of "An Act to Amend the Law in Relation to Substitutes" (Dec. 23, 1863), *reprinted in* 6 JOURNAL OF THE CONFEDERATE CONGRESS, *supra* note 197, at 561)).

491. *Id.* at 179.

492. *See id.* at 181 (explaining the state courts' responses to the abolition of substitution).

493. *Id.* at 46–47.

494. *See id.* at 188 (citing the President's February 3, 1864 request to Congress).

495. *Id.*

496. *See* Gatlin v. Walton, 60 N.C. 310, 332 (1864) (upholding the constitutionality of the abolition act).

whether Congress should create categorical exceptions or the executive should have discretion to create them on a piecemeal basis.⁴⁹⁷

The list of exempted persons included officers of the Confederate and state governments, ministers, printers, college professors and teachers with more than twenty pupils, druggists, hospital attendants, and workers in mines, foundries, wool and cotton factories, and members of state militias.⁴⁹⁸ In addition, "aliens" were exempted, that category being defined to include residents who had not become domiciled in a particular locality.⁴⁹⁹ Almost all of those categories were stretched by potential draftees and officials to enable persons to avoid military service, and when Congress increased the categories of exempted persons in October 1862, evasions also increased.⁵⁰⁰

Confederate policymakers were well aware that creating class-based exemptions, administered by a central government, on a matter as fundamental as compulsory military service would provoke the sorts of resentments that surfaced in the wake of conscription. But they were faced with a practical difficulty: The Union blockade threatened the already low levels of manufacturing and industrial activity in the Confederate states. To meet basic demands of war, agricultural households needed to be encouraged to produce goods to service larger populations, railroads needed to be maintained; factories needed to be encouraged to develop; and industrial production needed to be jump-started. Failure to exempt classes of persons with skills that could be used in industrial production and the supply of goods for the war effort would adversely affect the Confederate war apparatus.⁵⁰¹ Thus the legislation exempted miners, manufacturers, tanners, shoemakers, salt producers, millers, railroad workers, blacksmiths, wagon-makers, foundry workers, and carpenters.⁵⁰²

White men operating as overseers on plantations with at least twenty slaves were also exempted. This exemption, which allowed one white

497. See CONSCRIPTION AND CONFLICT, *supra* note 405, at 83, 101–03 (describing the back and forth between the executive and Congress over class exemptions and discretionary detailing).

498. 7 E. MERTON COULTER, THE CONFEDERATE STATES OF AMERICA 1861–1865 313 (1950) [hereinafter COULTER, THE CONFEDERATE STATES OF AMERICA].

499. CONSCRIPTION AND CONFLICT, *supra* note 405, at 61.

500. *Id.* at 62.

501. *See id.* at 53.

502. *Id.* at 67–68 (citing Act to Amend "An Act to Provide Further for the Public Defense" (Sept. 27, 1862), reprinted in 2 WAR OF THE REBELLION, *supra* note 352, ser. IV, at 160).

overseer on each plantation to avoid military service, was the most controversial exempted class provided for by the Confederate Congress. On its face, the exemption was an apparent effort to favor planters over farmers who owned no slaves. The exemption's "influence upon the poor," one member of Congress wrote to Davis in December 1862, "is most calamitous, and has awakened a spirit and elicited a discussion of which we may safely predicate the most unfortunate results."⁵⁰³ Congress subsequently modified the exemption, but never abolished it.

Over the course of the war increased pressure was placed on exemptions, and Congress began to clash with Davis over them.⁵⁰⁴ Congress had delegated the administration of exemptions to Davis and the War Department, and in doubtful cases exemptions were given until Congress clarified the matter.⁵⁰⁵ This resulted in some abuses, and Congress initially responded, in October 1862, by increasing the number of exempted categories.⁵⁰⁶ The Secretary of War continued, however, to engage in the practice of "detailing," or assigning persons enrolled in the draft to skilled labor jobs that would service the war effort but did not involve combat. By the fall of 1863 the number of "detailed" persons had grown so large that the Confederate Bureau of Conscription estimated that they amounted to fifty percent of the draftees in Virginia, North Carolina, South Carolina, and Georgia.⁵⁰⁷

In a December 1863 message to Congress, Davis responded by proposing that exemption categories be abolished, that all persons eligible for the draft be enrolled in the military, and that the executive branch be given authority to detail persons in war-related industries. In addition, he proposed creating "collateral" ranks of servicemen who were not fit for field duty, including slaves.⁵⁰⁸

Congress responded by modifying the conscription system in February 1864, but not along the lines Davis recommended.⁵⁰⁹ It made the required

503. *Id.* at 71 (citations omitted).

504. *Id.* at 83, 101–03.

505. *Id.* at 83–94.

506. *Id.* at 67.

507. *Id.* at 79–80 (citing Letter from Colonel T.P. August to Major S.W. Melton, Bureau of Conscription (Nov. 7, 1863), reprinted in 2 WAR OF THE REBELLION, *supra* note 352, ser. IV, at 939–40).

508. See COULTER, THE CONFEDERATE STATES OF AMERICA, *supra* note 498, at 321 ("President Davis asked Congress . . . to enact legislation to bring in deserters, put a stop to substitutes, modify exemptions, and replace many able-bodied men in nonmilitary positions with the incapacitated, old men, and Negroes.").

509. CONSCRIPTION AND CONFLICT, *supra* note 405, at 83.

term of years for "all white men, residents of the Confederate States, between the ages of seventeen and fifty" the duration of the war, abolishing term enlistments.⁵¹⁰ It also reduced the number of exempted classes and gave the executive branch authority to detail into productive non-military occupations only those persons in exempted categories.⁵¹¹ Details were to come, presumptively, from the ranks of men deemed not fit for field service.⁵¹²

The measure was designed to increase the ranks of soldiers and at the same time permit the use of persons eligible for the draft, but not fit for combat, in military-related occupations. It did not work well in practice because it transferred the critical decision of determining military status to local boards of eligibility, which would make the initial decision as to whether a draftee was fit for combat.⁵¹³ Detailing only came into play once that decision was made. Those discretionary elements of the enrolling process, and the fact that reducing the number of exempt categories increased the number of persons between eighteen and fifty who needed to be processed, resulted in pressures of various kinds on the eligibility boards.⁵¹⁴ Since service for a state or the Confederacy remained an exempted category, the governors of some states certified large numbers of persons as necessary for the administration of state affairs.⁵¹⁵ In addition, a significant number of persons managed to get physical exemptions from eligibility boards by obtaining certificates of disability from local physicians.⁵¹⁶ As the administration of the new system unrolled, the military prospects of the Confederacy deteriorated, resulting in more draftees wanting to be placed in the non-combatant ranks of the service or to avoid service altogether.

In this atmosphere Davis and Congress clashed over conscription policy. Both agreed that given the Confederacy's troubled military situation, as many eligible men as possible needed to be funneled into

510. An Act to Organize Forces to Serve During War (Feb. 17, 1864), *reprinted in 3 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, ser. IV, at 178 (1881) [hereinafter 3 WAR OF THE REBELLION].

511. *Id.*

512. See CONSCRIPTION AND CONFLICT, *supra* note 405, at 86 (noting that the system required "that details should be made from the ranks of the senior reserves and from the ranks of those . . . who were not able to do active field service").

513. *Id.* at 85–90.

514. *Id.* at 85.

515. *Id.* at 94.

516. *Id.* at 93–94.

active field service.⁵¹⁷ Whereas Davis believed that the way to achieve that was to retain the practice of detailing, but abolish categorical exemptions,⁵¹⁸ the House Committee on Military Affairs stated that "experience has demonstrated that the power of detail as heretofore exercised has afforded more unnecessary immunity from military service than the well-guarded legislation upon the subject of exemptions."⁵¹⁹ At the same time a committee of the Senate reported that executive branch detailing had exempted over 22,000 men in states east of the Mississippi, and proposed removing the Davis administration's discretionary detail power.⁵²⁰

On March 11, 1865, Congress passed a bill reestablishing class-based exemptions and revoking most of the Davis administration's authority to detail draftees for non-military service.⁵²¹ Davis vetoed the bill on the ground that it would "throw the whole machinery of the government into confusion and disorder," and asked Congress to propose amendments.⁵²² At the same time he called for "[a] law of a few lines repealing all class exemptions."⁵²³ Congress responded only by eliminating an exemption for mechanics and artisans and altering the procedure for medical examinations.⁵²⁴ When the war ended two months later, the initial system of categorical exemptions to conscription had been largely restored.

Of all the measures the Confederate Congress passed, conscription was the least popular. The reasons for this unpopularity revealed much about the tenor of life in secessionist states during the Civil War.⁵²⁵ By being a universal measure imposed by a central government, conscription brought to the surface conflicts among regions and classes in the South that the

517. *Id.* at 105.

518. *Id.* at 102 (citing Message of President Davis to Congress (Nov. 7, 1864), reprinted in 3 WAR OF THE REBELLION, *supra* note 510, ser. IV, at 790).

519. *See id.* at 99 (quoting the House Report of the Committee on Military Affairs (Mar. 16, 1865), reprinted in 3 WAR OF THE REBELLION, *supra* note 510, ser. IV, at 1145).

520. *Id.* at 99–100 (citing the House and Senate Reports of the Committee on Military Affairs (Mar. 16, 1865), reprinted in 3 WAR OF THE REBELLION, *supra* note 510, ser. IV, at 1145, 1149).

521. *Id.* at 102–03.

522. *Id.* at 103.

523. *Id.* at 104 (quoting Message from Jefferson Davis to the Senate and House of Representatives of the Confederate States (Mar. 13, 1865), reprinted in 3 WAR OF THE REBELLION, *supra* note 510, ser. IV, at 1133).

524. *Id.* at 104–05 (citing the Senate Report of the Committee on Military Affairs (Mar. 16, 1865) and An Act to Regulate the Business of Conscription (Mar. 7, 1865), reprinted in 3 WAR OF THE REBELLION, *supra* note 510, ser. IV, at 1149, 1176).

525. *Id.* at 17.

widespread enthusiasm for secession and the initially favorable response to the prospect of war against the North had concealed.⁵²⁶ Conscription was, above all, an effort by a government based in Richmond to compel young men all over the Confederacy to expose their lives in battle.⁵²⁷ Some of those men lived in regions that did not have a high percentage of slaves, and thus found the preservation of a slave-owning economy less imperative.⁵²⁸ Others resided in states whose officials believed that the appropriate unit for staffing and fighting a war was the state government.⁵²⁹ Others resented the exemptions to draft eligibility, believing that they favored the wealthy classes or various interest groups.⁵³⁰ Still others simply did not want to serve in the military.⁵³¹

Once the Confederate Congress resolved to substitute conscription for a voluntary, state-run system of staffing the military, it ensured that policymakers in Richmond would be making decisions on who, in localities across the Confederacy, would be going to war.⁵³² On the one hand, that form of centralization, as Davis pointed out, seemed necessary to coordinate a collective military effort and to ensure a rough equality of participation among residents of secessionist states.⁵³³ On the other hand, it ran counter to the localist, individualist thrust of attitudes in the antebellum South.⁵³⁴ Moreover, it seemed inconsistent with a principle many secessionists had identified with their decision to leave the Union: That it was intolerable for a national government to tell citizens of states how to conduct their lives.⁵³⁵ And as the war unfurled, the policy of conscription in the Confederacy suffered from a double disadvantage: It was not only being imposed on states and localities from Richmond, it was forcing young men to participate in military operations whose danger was apparent and whose prospect of success was diminishing.⁵³⁶

526. *Id.* at 228.

527. *Id.* at 354.

528. *Id.* at 228.

529. *Id.* at 296.

530. *Id.* at 18–19.

531. *Id.* at 53.

532. *See id.* at 16 (noting that conscription "dispensed with the instrumentality of the States in the recruitment of the armies").

533. *Id.* at 13–14.

534. *Id.* at 13.

535. *Id.* at 256.

536. *Id.* at 3–4.

The Confederacy arguably needed many of its categorical exceptions to conscription in order to create incentives for members of its population to work in jobs necessary to the war effort.⁵³⁷ Even some of the categories that seemed to reinforce existing status hierarchies, such as the exception for overseers on plantations with over twenty slaves, could be seen as connected to war production.⁵³⁸ If one made the assumption that plantations produced more excess food and goods for soldiers if the slave labor on them was supervised by overseers, exempting overseers who supervised twenty or more slaves arguably contributed to the war effort.⁵³⁹ The Confederacy needed to create defense industries in a hurry.⁵⁴⁰ Its categorical exemptions to conscription were seen as a way of doing that, and arguably they succeeded.⁵⁴¹ One commentator concluded that the Confederacy's Ordinance Bureau, which was charged with stimulating the manufacture of war supplies by private businesses throughout the South, "achieved phenomenal results in the conversion of an agricultural economy to some semblance of adequate war production by industry."⁵⁴²

Even though the constitutionality of conscription legislation was not a major issue in the Confederacy,⁵⁴³ the advent of a universal draft was nonetheless a defining marker of American culture during the Civil War. Standing armies were anathema to the Revolutionary and framing generations.⁵⁴⁴ Volunteers had fought previous wars, and in peacetime the regular army and navy had been kept small in size and maintained by

537. *Id.* at 53.

538. *Id.* at 70–71.

539. *Id.* at 70.

540. *Id.* at 12–13.

541. *Id.* at 53.

542. William L. Shaw, *The Confederate Conscription and Exemption Acts*, 6 AM. J. LEGAL HIST. 368, 401 (1962).

543. CONSCRIPTION AND CONFLICT, *supra* note 405, at 168 (citing *Barber v. Irwin*, 34 Ga. 27 (1864); *Burroughs v. Peyton*, 57 Va. 470 (1864); *Ex parte Hill*, 38 Ala. 429 (1863); *Jeffers v. Fair*, 33 Ga. 347 (1862); *Ex parte Coupland*, 26 Tex. 386 (1862)). The argument for constitutionality rested on the power of Congress to raise and support armies, which is given without limitation. *See* U.S. CONST. art. 1, § 8, cl. 12 (granting the power to raise and support armies). The argument against constitutionality sought to build on the fact that Congress's power over state militias is limited to calling them up in emergencies and governing them when in "actual service" of the United States. U.S. CONST. art. 1, § 8, cls. 15, 16 (describing the limited power over state militias). Bringing state militiamen within a universal draft arguably exceeded those limits.

544. *See, e.g.*, U.S. CONST. amend. III (prohibiting government troops from having access to private houses).

professional soldiers.⁵⁴⁵ Before the Civil War there was not only no tradition of universal military service, there was a tradition of sharply separating the military from the rest of the population.⁵⁴⁶

After Union efforts to invade Richmond and Confederate efforts to surround Washington failed in the early years of the war, it became apparent to both sides that the conflict would not be limited to "quick strikes," and that peace negotiations would not occur unless one side showed a decisive advantage.⁵⁴⁷ The war was going to consist of long, casualty-ridden campaigns through large stretches of territory, and civilians as well as soldiers were going to be involved.⁵⁴⁸ The Confederate Conscription Act of 1862 anticipated the regulation and taking of property as well as the compulsory enlistment of men in military service, although Congress failed to enact price control provisions.⁵⁴⁹ By 1863, something like "total war," in which the destruction of persons and property was not confined to battlefields, had emerged.⁵⁵⁰ With its vastly increased commitment of men and resources, total war required the constant replenishing of the soldier population on both sides.⁵⁵¹ Conscription, therefore, was one of the symbols of total war.

The close connections between conscription, the suspension of habeas corpus, and the imposition of martial law can serve as reminders of the total war dimensions of a universal draft. After the government initially declared martial law and suspended habeas corpus (both instituted as defensive measures in the face of perceived threats to the Union and Confederate capitals), later impositions of martial law or the suspension of habeas corpus (in both Union and Confederate territory) tended to occur when policymakers confronted problems with the administration of the draft against the backdrop of what they perceived as a perilous military situation. Both the suspension of habeas corpus and the imposition of martial law in those situations were reminders that the logic of total war could lead to military control of civilian populations. A universal draft was a signal that a climate of total war had appeared. These defensive measures were further

545. See generally Timothy J. Perri, *The Economics of U.S. Civil War Conscription*, 10 AM. L. & ECON. REV. 424 (2008).

546. CONSCRIPTION AND CONFLICT, *supra* note 405, at 1.

547. *Id.* at 9–10.

548. *Id.*

549. Shaw, *supra* note 542, at 399; COULTER, THE CONFEDERATE STATES OF AMERICA, *supra* note 498, at 234–35.

550. CONSCRIPTION AND CONFLICT, *supra* note 405, at 226.

551. EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 4, 87 (1947).

signals that in such a climate, if military needs were not being met, the military itself might be given authority to ensure that they would be. Thus it is possible to see conscription legislation and proclamations suspending habeas corpus and imposing martial law as a collection of interrelated governmental activities in a climate of total war. That climate was unprecedented in the experience of Americans, and in that sense the Civil War was a decisive turning point in American history, and the first episode in which American citizens, on both sides of the conflict, felt the presence of an expansive federal state.

V. Conclusion

After the Civil War concluded, commentators likened it to the medieval practice of trial by battle.⁵⁵² Under that practice, parties to private criminal or real property disputes could elect the option of a "wager of battle" in which the winner of a physical contest was deemed to have told the truth in the dispute.⁵⁵³ Trial by battle was in wide use in England from the eleventh through the thirteenth centuries, and persisted in a limited fashion until the early nineteenth century.⁵⁵⁴ It rested on the assumption that since legal proceedings were designed to carry out God's will, and God knew which person was telling the truth in disputes, God would have given the party who won the ordeal sufficient strength to prevail.⁵⁵⁵

Although that assumption may have been alien to many mid nineteenth-century Americans, a reconstituted version of it was not. In that version victors in war won because their cause had been noble and just, so a decision to settle a conflict in battle was an effort to vindicate the honor of the combatants. We have seen that many Southerners embraced secession because they believed that they needed to defend their individual liberties and their way of life.⁵⁵⁶ Many Northerners volunteered for the Union army because they wanted to defend the United States government against those

552. See, e.g., Cynthia Nicoletti, *The American Civil War as Trial by Battle*, 28 LAW & HIST. REV. 71, 77 (2010) (noting that nineteenth-century intellectuals in America characterized the Civil War as a "trial by battle").

553. *Id.*

554. *Id.* at 77–78 (citing ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL 103–26 (1986)).

555. *Id.* at 82.

556. CONSCRIPTION AND CONFLICT, *supra* note 405, at 13; MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 27.

who sought to undermine it.⁵⁵⁷ So long as neither side was prepared to accept the others' views on slavery and secession, ordeal by battle was another option. Moreover, a resolution of at least one of the incompatible issues in which the honor of both sides seemed at stake, the "right" of secession, would be mandated by the war.

In their discussions of the war as a trial by battle, some northern commentators argued that the secessionist states, by starting the war, had demanded a trial by battle, and had failed since their cause was flawed.⁵⁵⁸ Some commentators from the South were unrepentant on the theoretical legitimacy of secession, but conceded that since the Confederacy had lost the battle, the doctrine of secession had now been repudiated.⁵⁵⁹ Some, on both sides, used the trial by battle analogy to suggest that the "ultimate ratio," force, had prevailed once legal conflict had become irreconcilable.⁵⁶⁰ Others believed that former Confederates would never become reconciled to rejoining the Union unless they could rationally be persuaded as to the folly of the argument for secession.⁵⁶¹

The widespread use by nineteenth-century commentators of the legal trial by battle analogy in describing the outcome of the Civil War suggests that they perceived that the war had been a transformative event in the legal history of America. An extended phase in that history had suddenly come to a conclusion with the end of the war, and it was possible to see the dissolution of the Union, and the creation of the Confederacy that accompanied it, as the last stages in that phase.

The phase had included a secession from the British Empire and the articulation of republican theories of sovereignty on which that secession rested. It had encompassed the creation of a federal union of former British colonies to promote unity among those involved in the secession; the astounding physical and economic growth of that union; the increasingly disintegrative effects of that growth; and, in an ironic culmination, another episode in secession. Deep cultural commitments to individual liberty and resistance to governmental authority, taken to be uniquely American credos that helped define the laws as well as the mores of a new nation, had interacted with two other unique themes of colonial, Revolutionary, and antebellum America: The displacement of Amerindian natives and the

557. MCPHERSON, WHAT THEY FOUGHT FOR, *supra* note 95, at 28.

558. Nicoletti, *supra* note at 552, at 101–03.

559. *Id.* at 82–84.

560. *Id.* at 85–87.

561. *Id.* at 74–89.

enslavement of transported Africans and their descendants. By 1860, that interaction had put extreme pressure on the major American legal institutions, resulting in the dissolution of the Union. By 1865, the Union was on the cusp of restoration, but it could not resemble its predecessor. A finding that secession violated the Constitution of the United States was a way of relegating the government of the Confederacy to the American past, and thereby confining it to oblivion.