ABSTRACT

Title of Dissertation: "A LIGHT WHICH REVEALS ITS TRUE MEANING": STATE SUPREME COURTS AND THE CONFEDERATE CONSTITUTION

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During the Civil War, Confederate wartime legislation, chiefly conscription, exemption, and impressments statutes, raised fundamental constitutional issues. These actions by the national government became a prolific source of litigation in many southern states. Yet, in the absence of a national Confederate Supreme Court, it fell to *state* supreme courts and state jurists to resolve these challenges to the national government's exercise of constitutional war powers and to enunciate key constitutional principles and explain the tenets of Confederate political philosophy. As a result, southern *state* supreme courts became the primary venues in which *national* constitutional issues were adjudicated.

The constitutional purposes and goals of the Confederacy were national- rather than state-oriented and provided for limited but effective national government, a truly federal union in which state and national governments were to both operate effectively and energetically, and within the

national government, the powers of the national government were to be separated to promote efficiency and prevent usurpation.

In these cases, state supreme courts enunciated key Confederate constitutional doctrines and principles namely, limited government or constitutionalism, federalism, the separation of powers, and national purposes. State jurists established that the Confederate Constitution was a substantive and purposeful constitutive consisting of conservative principles and innovative forms and features. Operating as a *de facto* supreme court, these state supreme courts considered scores of wartime decisions. Consistently, across jurisdictions, these justices rejected states' rights as the political philosophy of the Confederacy, they upheld the exercise of *constitutional* Confederate war powers within a carefully articulated doctrine of federalism, they limited national government within its delegated authority without handicapping its capabilities to fulfill its duties, and maintained a strict separation of government powers between the three national branches.

State supreme court cases have been largely ignored by Civil War scholars. However, these decisions reveal the substantive and normative nature of constitutional principles in the Confederacy. The specific holdings in these cases contradict earlier historiographical understandings of the Confederacy as a loose confederation of states with each acting independently.

“A LIGHT WHICH REVEALS ITS TRUE MEANING”: STATE SUPREME COURTS AND THE CONFEDERATE CONSTITUTION

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For my babydoll,

Anna Christina,

and her brothers and sisters to come.

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Introduction

"A Light Which Reveals Its True Meanings"

On February 18, 1861, on the steps of the Alabama state capitol in Montgomery, Jefferson Davis was inaugurated as Provisional President of the Confederate States of America. As he approached the capitol, crowds reportedly numbering up to ten thousand cheered loudly for him and he was, at times, showered with flowers by the ladies of Montgomery. It was a day filled with pomp and ceremony; leading his inaugural procession were the colorful Columbus Guards, wearing their "beautiful uniform of sky-blue pants and bright red coats [and] carrying a banner with the Georgia Coat of Arms."[1] In his inaugural address, Davis paused to reflect upon the substantive nature of Confederate constitutionalism and, in direct reference to the recently completed Provisional Constitution, he declared, "We have changed the constituent parts, but not the system of our Government. The Constitution formed by our fathers is that of these Confederate States, in their exposition of it, and in *the judicial construction it has received* [italics added], we have a light which reveals its true meaning."[2] Here, Davis claimed legitimacy for the new republic, *in constitutional terms*, by explaining an historical connection and consistency between the newly drafted Constitution of the Confederate States of America and the normative political tradition and principles of

[1] T.R.R. Cobb to Marion Cobb, February 18, 1861, T.R.R. Cobb Papers, University of Georgia, Athens, GA. Howell Cobb Papers, University of Georgia, Athens, GA. See also *Weekly Mail*, March 22, 1861, op cit. in Albert N. Fitts, "The Confederate Convention: The Constitutional Debate, "*The Alabama Review* (July 1949):189-210, 204.

[2] Davis was speaking of the Provisional Constitution, approved February 8th, 1861. The Permanent Constitution was approved three weeks later on March 11th, 1861.

framers of the Constitution of 1787.

In addition to the claim of constitutional legitimacy for the Confederate Constitution, Davis underscored the critical role of the judiciary in explicating the national constitutive principles of the Confederacy, reminding his listeners that judicial review had been the means by which Americans had been able to understand fully the Constitution of 1787. So too, by design and by operation during the war, judicial review would become the means to explicate fully the nature of the Confederate Constitution, especially under the pressure of wartime measures and the assertion of national government war powers. The Confederacy's conscription and exemption acts—the first such legislation in American history—as well as suspensions of the writ of habeas corpus and military impressments raised fundamental constitutional issues.[3] These became a prolific source of litigation in many states throughout the Confederate South, raising for the courts the dual challenge of adjudicating local or state legal claims and enunciating*national* constitutional principles and doctrines.[4]

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[3] Richard F. Bensel refers to these wartime measures as "the most significant state power-enhancing measures ever adopted by the Confederate state" in *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York, NY: Cambridge University Press, 1990), 135.

[4] Though there were many cases which raised legal and constitutional issues concerning conscription, exemption, and the suspension of the writ of habeas corpus, only one case in Georgia challenged the impressment legislation directly. Curtis Arthur Amlund, *Federalism in the Southern Confederacy* (Washington, DC: Public Affairs Press, 1966), 88. There were two impressments statutes, the first passed on March 26, 1863, which allowed for the military's seizure of necessary stores, "An Act to Regulate Impressments," Chapt. X, in James M. Matthews, ed., *The Statutes at Large of the Confederate States of America, Passed at the Third Session of the First Congress; 1863. Carefully Collated with the Originals at Richmond. Public Laws of the Confederate States of America, Passed at the Third Session of the First Congress; 1863. Private Laws of the Confederate States of America, Passed at the Third Session of the First Congress; 1863.* (Richmond, VA: R.M. Smith, 1863), 102-104. This was followed by a

Yet, in the absence of a national Confederate Supreme Court, it fell to *state* jurists to resolve these challenges to the national government's exercise of constitutional war powers, to articulate the tenets (and limits) of Confederate political philosophy, and to define and maintain the Confederate constitutional order.[5] The "constitutional order" refers to an understanding of, reverence for, and adherence to constitutive principles by members of a political community. With significant implications during the war, it also includes a concern for the authority and stability of institutions and processes provided for in the constitutive document, especially the allocation of governmental power and authority, issues which were raised regularly and directly in wartime litigation.

Defining the Confederate "constitutional order" was a significant responsibility for state supreme courts for they faced the challenge of rendering authentic judicial review on national constitutional matters simultaneous with an additional challenge to

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second act passed on February 16, 1864 which provided procedures for establishing "fair and just" compensation and an appeals process, see "An Act to amend 'An act to regulate impressments,' approved March twenty-sixth, eighteen hundred and sixty-three, and to repeal an act amendatory thereof, approved April twenty-seventh, eighteen hundred and sixty-three," Chapt. XLIII, in *The Statutes at Large of the Confederate States of America, Passed at the Fourth Session of the First Congress; 1863-4. Carefully Collated with the Originals at Richmond. Public Laws of the Confederate States of America, Passed at the Fourth Session of the First Congress; 1863-4. Private Laws of the Confederate States of America, Passed at the Fourth Session of the First Congress; 1863-4* (Richmond, VA: R.M. Smith, 1864), 192-193. J.G. DeRoulhac Hamilton, "The State Courts and the Confederate Constitution," *The Journal of Southern History*, vol. 4 (November 1938):425-448, 432.

[5] "Order" in nineteenth century America referred to "a condition in which the people were convinced that those institutions were secure that stabilized the protean nature of their society, restrained the potential for conflict in an environment that encouraged avarice, harmonized the diversity of opinions and influences fostered by a free society, and gave them a voice in determining their future." Phillip S. Paludan, "The American Civil War Considered as a Crisis in Law and Order," *American Historical Review* (1972): 1013-1034, 1014.

remove themselves from the influence of political and local issues that had long shaped state jurisprudence and jurisprudential traditions. In a series of cases prompted by wartime measures, southern *state* supreme courts became the primary venues in which *national* constitutional issues were adjudicated. Though some constitutional cases were decided by Confederate District Courts, most were heard in state supreme courts, with the result that the Confederate Constitution received its only "definitive judicial interpretation" during the war by southern state supreme court justices.[6] In these judicial interpretations of the Confederate Constitution, we may find a "light which reveals *its* [italics added] true meaning" and gain insight into the "principles and purposes of those who established the Confederate Government."[7]

In order to understand the principles and purposes that made up Confederate political philosophy and constitutionalism, this dissertation will examine wartime decisions by state supreme courts in which they enunciated key Confederate constitutional doctrines and principles—namely, limited government or constitutionalism, federalism, the separation of powers, and national purposes. The methodology to be employed is distinctive from other studies of Confederate constitutionalism because of its focus upon state supreme court decisions as a means to uncover a more substantive and revealing doctrinal development of Confederate constitutional principles and political

[6] Hamilton, "The State Courts and the Confederate Constitution," 425.

[7] J.L.M. Curry, *The Southern States of the American Union Considered in their Relations to the Constitution of the United States and to the Resulting Union* (New York, NY: G.P. Putnam's Sons, 1894), 91.

theory.[8] Individual cases are analyzed and synthesized into a comprehensive account on each of these four principal constitutional doctrines.[9] Though these cases have been often ignored or discounted by historians of the Confederacy, it is in these decisions that one finds the most extensive and detailed construction of the principles and doctrines of Confederate constitutional government.[10]

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[8] Cases need to be understood in context of constitutionalism and constitutive and political principles and ideas in which they were formed. William Jeffrey, Jr., "The Constitution: 'A Firm National Government,'" in Robert Goldwin and William A. Schambra, eds., *How Federal Is the Constitution?*, (Washington, DC: American Enterprise Institute for Public Policy Research, 1987): 16-37, 16.

[9] The availability of wartime cases is problematic. In some southern jurisdictions decisions were never published while in others, decisions were destroyed by advancing Union forces, as in Mississippi, leaving unknown the outcome of wartime cases in some states. The Louisiana court was removed from New Orleans in 1862 and subsequent cases heard by the court have never been printed. Following the war, seventy-three of the wartime decisions of the court were de-published. William Robinson, *Justice in Grey, and A History of the Judicial System of the Confederate States of America* (New York, NY: Russell and Russell, 1941; reprint ed., Philadelphia, PA: National Publishing Company, 1968), 635-639. For many jurisdictions, an informed examination of newspaper accounts may result in obtaining additional information about unreported decisions while in Texas, Charles Robards, former clerk of the court, provided a synopsis of wartime cases and revealed that there were eighteen wartime habeas corpus cases that were never reported in the state's official court reporters. These unreported cases are difficult to locate and research but provide a broader understanding of doctrinal development on the state supreme courts and the nature of the legal and constitutional order in the Confederacy. Charles L. Robards, *Synopses of the Decisions of the Supreme Court of the State of Texas* (Austin, TX: Brown and Foster, 1865).

[10] Mark Neely argued that Confederate constitutionalism was a "myth," based upon his analysis of Confederate habeas corpus cases and his contention that the Confederacy failed to protect the individual liberties of its citizens. His analysis of Confederate constitutional principles was limited to Confederate habeas corpus cases and only one state, North Carolina, for which he drew heavily from Jennifer Van Zant, "Confederate Conscription and the North Carolina Supreme Court, *The North Carolina Historical Review*, vol. 72, no. 1 (1995):54-75. Mark E. Neely, Jr., *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (Charlottesville, VA: The University Press of Virginia, 1999). J.G. DeRoulhac Hamilton singled out few cases as being important and considered the rest of the corpus of state court cases as "unimportant" in "State Courts and the Constitution," 435, footnote 44, 434-437. Curtis

National Constitutional Issues Adjudicated by State Courts

These state supreme court cases, as a whole, are important to understanding the nature of Confederate political philosophy, particularly because it was *state* jurists and not *national* politicians that enunciated the purpose of the Confederacy and its essential constitutional doctrines of limited government, federalism, and the separation of powers. In 1861 and 1862, though, it was unclear how state supreme court justices would interpret the Confederate Constitution or whether these state jurists, many of whom had participated in the secession of their states from the Union, might assert the supremacy of their states over Confederate authority. Equally uncertain was whether the state supreme courts might succumb to state government pressures or interests to control military forces raised within the state by asserting a doctrine of concurrent war powers as a constitutive principle to nullify national conscription, exemption, or impressment legislation.[11] No one could predict what political or wartime pressures and interests might influence these justices. It was unclear whether these men would enforce limitations on the national government or, as Northern invasion threatened their

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Amlund devoted a whole chapter to the courts in the South, but examined state courts only generally and mentioned only two cases by name; Amlund, *Federalism in the Southern Confederacy*, 80-93. Frank Owsley mentioned state court cases only a few times and generally so; Frank L. Owsley, *States Rights in the Confederacy* (Chicago, IL: University of Chicago Press, 1925).

[11] According to Paul Finkelman, there were four general applications of "states' rights": the assertion of "independent or state concurrent power," "the denial of interstate cooperation and comity," "state noncooperation with…or nullification of federal law," and secession. Paul Finkelman, "States' Rights North and South in Antebellum America," in *An Uncertain Tradition: Constitutionalism in the History of the South*, ed. Kermit L. Hall and James W. Ely, Jr. (Athens, GA: The University of Georgia Press, 1989), 126. Three of these--state concurrent power and noncooperation with and nullification of federal law—would be refuted by southern state supreme court jurists in enunciating the principles and provisions of the Confederate Constitution.

constituencies, whether they would permit an unlimited and consolidated government to emerge to address the exigencies of war. Equally uncertain was whether southern state supreme court justices could or would decide wartime cases with substantial uniformity in view of the diversity of social, educational, and political backgrounds in their states and the differences within their state legal traditions.

In 1861, when Davis delivered his inaugural address, there was little to indicate that state supreme court justices would be able to maintain their political objectivity on national issues and resist being influenced by state politics. Courts operated within intensely political environments, often under significant influence from localized state politics, and had to balance the influences of "political sectionalism and legal nationalism" in their unique roles as "guardians of constitutional principles."[12] It was highly possible that state interests and local politics together would make state supreme court justices more inclined to favor the interests of their states rather than those of the national government.[13] These state jurists, important figures in distinctly state institutions, could have proclaimed wartime legislation such as conscription and impressment as unconstitutional and asserted the primacy of state sovereignty and the

[12] Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890* (Athens, GA: University of Georgia Press, 1999), 1, 2, 4, 6-7. There was a tradition of "persistent localism" in southern constitutionalism which purported that "local democracy offers the best opportunity to secure a responsible political order more sensitive to individual ambition and worth than a federal government, distant and out of sight" and this persistent localism resulted in the emergence of an oligarchic system rather than a democratic system. Hall and Ely, "The South and the American Constitution," in *An Uncertain Tradition*, 6-7, 10.

[13] This "paradox" of government that provided for both centralized national government and state sovereignty was a component in antebellum southern constitutionalism. Ironically, there was a "legacy of ambivalence" or a "tradition of uncertainty" in the South in which southerners sought to be a part of the constitutional system but also removed from it, see *Ibid*.

supremacy of state government over national government. However, in their unique and critical role as enunciators of Confederate fundamental law, state courts balanced state and national interests within a text-oriented framework of Confederate constitutionalism.[14]

With remarkable consistency, these state justices formed a de facto Confederate Supreme Court, rendered judicial review of the Confederate Constitution's provisions, articulated the goals and values of the Confederate political community, and when in accord with the nation's constitution, the national government's exercise of war powers and the constitutionality of the wartime acts.[15] In their wartime decisions, state court justices were compelled to analyze the text of the Confederate Constitution, to discern its key constitutive principles (limited government, federalism, the separation of

[14] George Rable studied the Confederacy and its "revolution against politics" as a substantive development where "assumptions, values, and beliefs" should be considered as foundational and constitutive to the Confederacy's political culture and inherent in the political crises which Confederate leaders had to face, even though historians have largely ignored or "not thoroughly evaluated the complex interaction of state and 'national' politics in the Confederacy." There was "the constant tug between political ideology and political practice that formed the basis for conflict and exacerbated differences between often ambitious and highly individualistic political leaders." Confederate political culture "was not simply created, it evolved in an atmosphere of crisis and conflict." George C. Rable, *The Confederate Republic: A Revolution Against Politics* (Chapel Hill, NC: University of North Carolina Press, 1994), 1-3.

[15] There were general patterns of interpretation across the Confederacy, with southern state supreme courts generally sustaining the decisions and actions of the Confederate government while deemphasizing states' rights. Sidney Brummer concluded that this is one reason why there was not a more effective effort to establish the national supreme court; see Brummer, "Judicial Interpretation of the Confederate Constitution," 133. However, J.G. deRoulhac Hamilton was more definitive on the issue of uniform interpretation, concluding "that so much uniformity of construction was finally attained and the Confederate government so generally upheld" that "the Confederate States derived no benefit from the absence of a national supreme tribunal." Hamilton, "State Courts and the Confederate Constitution," 448.

powers, and national purpose), and to define the crucial relationship between the states and the Confederacy.[16] Unlike Confederate or state politicians, for whom the vagaries of politics could lead to calculated indecision or self-interested politicking, state supreme court justices were compelled to resolve legal and constitutional issues quickly and consistent with established national constitutional doctrines. State supreme court justices could not know whether the Confederate "revolution" would succeed, yet they had to render decisions that could be upheld, as a matter of law, even after Confederate independence. Consequently, their decisions were more likely to reflect constitutive principles and ideas rather than political or military exigencies.

Law and Constitutive Principles

The legal opinions handed down by these state supreme courts offer an important understanding of the Confederate constitutional order because law operationalized important ideas and principles that were constitutive of the Confederate nation and its constitutional order.[17] Law was a means to measure the legitimacy of

[16] According to Albert Moore, the absence of a strong Confederate court system was a negative development and Confederate laws were "twisted, warped, applied with indifference or partiality, and in some instances flaunted by the State courts." Albert Burton Moore, *Conscription and Conflict in the Confederacy* (New York, NY: Hillary House Publishers, Ltd., 1963), 189.

[17] Fundamental law operates not only to provide a "framework of government" for a particular political community but also to restrict legislative power. In the American tradition, the fundamental law of the nation is comprised of the "standards of reason, virtue, and justice that were the final cause of the political life" revealed in a written document that would also be enforceable. Yet, the fundamental law may also include unwritten and constitutive ideas, principles, and values of the political community such as a national consensus on the nature of the Union. Herman Belz, A *Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective,* (New York, NY: Rowman & Littlefield Publishers, Inc., 1998), 3-7.

force exercised within the constitutional order and, as the instrument of review for the exercise of secular power, the mechanism to impose constitutionalism or the structural limitations upon government power.[18] There are few legal and constitutional studies of the Confederacy and, of these, few are comprehensive and substantive legal or constitutional analyses of these cases or of the workings of the courts.[19] Few of the major studies of Confederate politics and constitutionalism consider the tremendous importance of state court constitutional opinions on the development of Confederate constitutional doctrines.[20]

Yet, in order to fully understand the key constitutional principles and developments within the Confederacy, it is necessary to study and understand the legal issues raised in wartime cases, arguments presented before the court, the courts'

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[18] *Ibid*, 518; Paludan, "The American Civil War Considered as a Crisis in Law and Order," 1013, 1021.

[19] State supreme courts in Alabama, Georgia, North Carolina, and Texas handed down more decisions on wartime measures than other state jurisdictions. Fewer constitutional law decisions were handed down by the courts in Virginia, Florida, Mississippi, and South Carolina. Arkansas's court issued no constitutional law decision addressing conscription or exemption. No court loyal to the Confederacy was established in Kentucky or Missouri. The court in Louisiana reported cases only from its January to June, 1861 and November, 1861 to February, 1862 terms. Robinson, *Justice in Grey*, 635-639.

[20] Amlund's work on Confederate federalism relies almost solely upon secondary sources and the *Official Records of the War of the Rebellion*. Though a critical issue in state supreme court cases, Amlund largely ignored the importance of these state courts enunciating constitutional doctrines. Sidney Brummer acknowledged that "in the short period of time during which the Confederate States existed, we see its constitutional law developing" and that this development mirrored the significant legal and constitutional developments that occurred in the United States immediately following the Revolution. However, Brummer limited his analysis of cases to the last eighteen months of the war and concluded that they were a sign of "the growing opposition to the Davis administration." Brummer, "Judicial Interpretation of the Confederate Constitution," 131.

decisions, and their role in the enunciation of Confederate constitutional doctrines.[21] These state supreme court decisions, comprising the most substantive corpus of Confederate constitutional adjudication, help to determine the legitimacy of claims that the Confederacy was a constitutional revolution and reform effort and that Confederate constitutional philosophy and practices were distinctly within the American constitutional tradition.[22]

Although the tradition of constitutional jurisprudence in the United States provides for the adjudication of relevant issues by federal district and appellate courts, including a national Supreme Court, the Confederate experience was markedly different. No national Confederate court was formed because the Confederate Congress could never agree on the membership of the Confederate Supreme Court. At its first session in March of 1861, the Confederate Provisional Constitution passed enabling legislation for the court, the Judiciary Act of March 16, 1861.[23] The legislation defined

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[21] The value of these cases has largely been discounted or ignored. Hamilton stated that the only important constitutional cases in Texas were *Ex Parte Coupland*, 26 Tex. 397 (1862); *Ex Parte Turman*, 26 Tex. 708 (1863); and *Ex Parte Meyer*, 27 Tex. 715 (1864) in "State Courts and the Constitution," footnote number 44, page 435 and generally, 434-437. Other works in which state court decisions are discussed include Moore, Conscription and Conflict in the Confederacy; J.G. deRoulhac Hamilton, The North Carolina Courts and the Confederacy," *North Carolina Historical Review*, No. 4 (October 1927):366-403; Memory Mitchell, *Legal Aspects of Conscription and Exemption in North Carolina, 1861-1865* (Chapel Hill, NC: The University of North Carolina Press, 1965); Neely, *Southern Rights*.

[22] Donald Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," in Hall and Ely, *Uncertain Tradition*, 202.

[23] This arose under Article 3, sec. 1, para. 3 of the Provisional Constitution. The enabling legislation was "An Act to establish the Judicial Courts of the Confederate States of America," Chapt. LXI, in R.M. Matthews, ed., *The Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862, Inclusive; Arranged in Chronological Order. Together with the Constitution for the Provisional*

the role of the Confederate Supreme Court and its relationship with the state supreme courts and provided in section 45, national appellate jurisdiction over the state courts. Opposition to this section resulted from the fear that such jurisdiction would centralize the national and state court systems as had been done in the early national period on the U.S. Supreme Court under John Marshall. However, sessions of the court were precluded until the government could be established under a Permanent Constitution.[24] This act was later suspended until the ratification of the Permanent Constitution.[25] Throughout the war, several bills were presented before the Confederate Congress for the

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Government, and the Permanent Constitution of the Confederate States, and the Treaties Concluded by the Confederate States with Indian Tribes (Richmond, VA: R.M. Smith, 1864), 75-87.

[24] Resolution No. 82 in *Acts and Resolutions of the First Session of the Provisional Congress of the Confederate States* (Richmond, VA: Enquirer Book and Job Press, 1861), 128; Hamilton, "State Courts and Confederate Constitution," 426; *Journal of the Congress of the Confederate States of America*, vol. I (Washington, DC: Government Printing Office, 1904), 136-137. Marshal L. DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* (Columbia, MO: University of Missouri Press, 1991), 105. The drafters of the Confederate Constitution had attempted to resolve the issue almost two weeks earlier, on March 7, when an amendment had been offered, removing cases originating in state courts from the jurisdiction of the Confederate high court. On March 8, 1862, Confederate Senator Thomas J. Semmes of Louisiana introduced a bill to repeal these two sections of the March 16, 1861 act. Several days later, on March 11, 1862, he reported out from the Senate Judiciary Committee another bill to organize the court but on March 26, moved for its postponement. In September it was postponed again; see *Journal of the Congress of the Confederate States of America*, I, 369.

[25] Though the Confederate Supreme Court had been created on paper with the initial enabling legislation on March 16, 1861, the court was prevented from convening by a subsequent bill which mandated that the court first be organized under the Permanent Confederate Constitution, almost a year later, on February 18, 1862. "An Act to establish the Judicial Courts of the Confederate States of America," Chapt. LXI, *Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862, Inclusive*, 75-87.

establishment of the national Supreme Court but were never passed.[26]

The failure to create a Confederate Supreme Court caused great concern amongst Confederate political leaders who feared that the absence of an authoritative voice on constitutional issues might lead to usurpations of the judicial function by the executive or legislative branches. In January of 1863, one year after the Permanent Constitution had been approved, Attorney-General Thomas H. Watts urged the Confederate Congress to organize a national court, reminding them that the organization of the national government was yet incomplete without all three branches of government fully formed and functioning: "when the framers of our Constitution divided all the delegated powers into the three great departments, Legislative, Executive and Judicial, they never contemplated the system fully organized until each of the departments should be provided with a head." Watts further admonished Congress, reminding them that "uniformity in the construction of statutes, the preservation of constitutional landmarks, and justice to the property and person of the citizen, all call for the establishment of the Supreme Court, the head of the Judicial Department of the Government."[27]

Doctrinal uniformity in constitutional decisions was critical and its importance for articulating national constitutive principles that would guidepolitical action was

[26] In April of 1862, the Confederate House introduced an organization bill, but nothing was ever produced, even after a September 1862 resolution was passed ordering the House Judiciary Committee to produce an organization bill; see Sidney D. Brummer, "The Judicial Interpretation of the Confederate Constitution," in *Studies in Southern History and Politics* (New York, NY: Columbia University Press, 1914), 107; *Acts and Resolutions of the Third Session of the Provisional Congress*, 6-7; Robinson, *Justice in Grey*, 420-34, 474-91; Bensel, *Yankee Leviathan*, 132.

[27] *Report of the Attorney General* (Richmond, VA: 1863), January 1, 1863; Hamilton, "State Courts and Constitution," 427.

even raised by state politicians. Governor Zebulon Vance of North Carolina pointed out that the lack of a national supreme court to address constitutional issues created difficult delays for state and Confederate authorities. Quite possibly, important constitutional questions would have to be resolved *in each state* before the enforcement of national laws could be legitimated and enforced in that state. In a letter to Secretary of War Seddon in February of 1864 Vance said "however unfortunate it maybe to the efficient and equal working of the Government that the laws of Congress are at the mercy, so to speak, of the various judges of the various states, I submit that it is not possible to avoid it, in the absence of the Supreme Court of the Confederacy, to give harmony and uniformity of construction."[28] But, because political differences between states' rights advocates and pro-Confederate nationalists made impossible any agreement on the jurisdictional relationship between the Confederate District Courts in each state and the respective state courts, the creation of the high court was consistently defeated.[29] The issue of the jurisdictional relationship between the Confederate Supreme Court and the state courts continued to play such a significant role that, by war's end, the national court was still

[28] Zebulon B. Vance to James A Seddon, February 29, 1864, *Official Records of the War of the Rebellion*, series IV, volume III, 176.

[29] The monumental issues affecting the states and their citizens could not be settled by a national court, but only by state courts which were independent from federal interference and supreme in their jurisdictions. Charles E. George, "The Supreme Court of the Confederate States of America," *Virginia Law Register*, New Series 6 (December 1920), 595-596. Under the Confederate Constitution and the Confederate Judiciary Act of March 13, 1861, the Confederate courts were given much broader jurisdiction for judicial review than that provided to federal courts under the Judiciary Act of 1789. Fitts, "The Confederate Constitution: The Constitutional Debate," 201.

waiting to be formed.[30] Yet, even though the Congress failed to organize a national supreme court, state supreme courts continued until the end of the war to render decisions and with considerable consistency across jurisdictions.

It was because of, not in opposition to constitutional principles that the court failed to be formed. Concerns over limiting government and preventing the national court from expanding its own powers beyond the Constitution were substantive concerns for the framers. Influential states' rights political leaders voiced their fear and paranoia that a strong national supreme court, resembling the Supreme Court of John Marshall, might usurp power and remove important limitations on government power and authority. They worried that such a national government might consolidate political power, in a manner resembling that of the antebellum Washington government, and subjugate the interest of the states to those of the national government.[31] The Confederate framers "resolved this problem by providing easy access to the ultimate source of sovereign authority, the electorate" and provided the national court with "a temporary vote, subject to appeal to two-thirds of the states, meeting in convention upon call of any three states.[32] The result was that "the hierarchy of laws remained, flowing

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[30] See Amlund, *Federalism in the Southern Confederacy*, chapter 7.

[31] Moore, *Conscription and Conflict*, 165. There were significant political and personal reasons, too. For example, Henry S. Foote of Tennessee had proclaimed on the floor of the Confederate House that he would not support any effort to organize the Supreme Court if Judah P. Benjamin was to have any influence over the naming of the justices while J.W. DuBose had attributed the House refusal to pass an organization bill was due to the fear that John A. Campbell would be appointed the Confederate court's Chief Justice. J.W. DuBose, *Life and Times of William L. Yancey* (Birmingham, AL: Roberts and Son, 1892; reprint, New York, NY: Peter Smith, 1942), 713 and Hamilton, "State Courts and Constitution," 430.

[32] Confederate Constitution, Article 5, Section 1, part 1.

naturally from the federal system, but the tyranny of courts over law and government was destroyed by providing ready appeal to the sovereign power."[33]

There was significant support in Congress for the formation of the court, including Senator Benjamin H. Hill of Georgia who clearly saw a need to create a strong judiciary department, and fellow Georgian T.R.R. Cobb, who believed that a national court, comprised of the District Court Judges sitting *en banc*, would be formed under the Permanent Constitution with Joseph Henry Lumpkin of Georgia (Cobb's father-in-law) as the new Chief Justice.[34] Confederate political leaders such as Louis T. Wigfall, William L. Yancey, Robert Toombs, Rhett, Edward Pollard and Senator Clement C. Clay feared that the creation of a Confederate States Supreme Court would promote an extreme nationalist understanding of the Constitution and only serve to centralize the Confederate Government.[35] J.L.M. Curry feared that a powerful central government might not be

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[33] Fitts, "The Confederate Convention: The Constitutional Debate," 206.

[34] T.R.R. Cobb to Marion Cobb, February 9, 1861, T.R.R. Cobb Papers, University of Georgia, Athens, GA.

[35] DeRosa, *The Confederate Constitution of 1861*, 105; Bensel, *Yankee Leviathan*, 124; *Journal of the Confederate Constitutional Convention*, contained in *Journal of the Congress of the Confederate States of America*, 880-81; Charles R. Lee, Jr., *The Confederate Constitutions* (Chapel Hill, NC: University of North Carolina Press, 1963), 108; *Journal of the Congress of the Confederate States of America, 1861-1865*, 3:20, 32, 36, 38, 42, 44-48, 50, 53, 56, 64, 66, 106, 146, 172, 174, 176-177. In response to this bill, William Yancey of Alabama said "when we decide that the state courts are of inferior dignity to this Court, we have sapped the main pillar of the Confederacy." *Acts and Resolutions of the Provisional Congress of the Confederate States*, No. 82, Section 45, 128; see also DeRosa, *Confederate Constitution of 1861*, 107. In support of the establishment of a Confederate Supreme Court and in opposition to a bill by Senator Clement C. Clay of Alabama to repeal sections 45 and 46 of the act, Senator James Phelan of Mississippi stated: "if each state was entitled to its own construction of what laws were constitutional, the Confederate Government was at an end," *Proceedings of the First Confederate Congress* in the *Southern Historical Society Papers* (Richmond, VA: H.J. Eckenrode, 1925), vol. 48, 4; DeRosa, *Confederate*

guided by the interests of the states or the people while Oldham considered the discussion of the Confederate Supreme Court to be a bit too "Federalist" for him.[36]

In January, when Clement C. Clay introduced another bill to repeal sections 45 and 46 of the March 16, 1861 act, an animated debate began, with violence between Yancey and Hill erupting on February 4, resulting in the Senate's censure of both legislators.[37] On March 18, the bill was passed by a vote of 14 to 8 and went to the House where it was continuously postponed until tabled in March of 1865.[38] The battle over the composition of the Supreme Court brought to the fore an inherent problem, that the southern nationalism from the antebellum period, which was localistic and independent, conflicted with the Confederate nationalism which emphasized a strong central government.[39] This

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Constitution of 1861, 107. Senator Phelan's remarks were answered by William Yancey, who retorted that "the powers of the Government must not be strained against the sovereign States, and no jealousies and animosities will be produced. But when you strain the powers of the Government against the States you will have a war of intellect, which will soon become a moral war." *Proceedings of First Confederate Congress*, vol. 48, 15; DeRosa, *Confederate Constitution of 1861*, 107. Finally, in March of 1863, the Confederate Senate voted on the repeal measure, passing it by a vote of 16 to 6, and denying the national Supreme Court the appellate jurisdiction over the states. *Ibid*.

[36] Moore, *Conscription and Conflict*, 84.

[37] *Journal of the Congress of the Confederate States of America*, 3:176-177.

[38] *Ibid*., for names of votes cast & discussion. The House reported out the bill favorably on April 9, 1862, but it was postponed to the next session, then postponed again in December. *Journal of the Congress of the Confederate States of America*, 6:319-320, 537. A new bill, introduced to the Judiciary Committee in May of 1864, died in committee but was followed by another attempt in November of 1864, which was subsequently tabled. *Journal of the Congress of the Confederate States ofAmerica*, 7:310. A final attempt at the bill was introduced on March 14, 1865 but was tabled as well. *Ibid*., 758.

[39] Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South* (Athens, GA: University of Georgia Press, 1989), 70.

conflict would have to be overcome by state supreme courts enunciating Confederate constitutional principles.

Because of the failure to create a Confederate Supreme Court, many litigants quickly realized that they stood a better chance of winning their case in state court and most Confederate constitutional cases were litigated and adjudicated before state supreme courts.[40] Without a national supreme court, the Confederate judiciary consisted of only the Confederate District Court in each state, providing to Confederate citizens an incomplete national judiciary with no effective appellate review from Confederate courts and seriously impairing the reputation and efficacy of the Confederate District Courts. Even the Confederate government prosecuted in the state courts due to the better opportunities for review and the perception that the opinion of the state court would be more respected than those of the Confederate courts.[41] The major constitutional issues being litigated involved the exercise of the Confederate Government's war powers, whether conscription and impressments were consistent with constitutional grants of power, whether exemptions provided for in Confederate legislation amounted to a contract between the national government and the individual that could not be breached under the Confederate Constitution's Contracts Clause, and whether the exercise of war

[40] During the war, Confederate District Courts adjudicated sequestration, admiralty, prize cases, and on a few occasions, issues related to conscription. There were many reasons why litigants preferred state courts: they were perceived as having an established legal tradition and a permanence that equated to a credibility which the Confederate judiciary did not yet enjoy, state courts were more popular, the incomplete Confederate court system "impaired the dignity" of the District Courts, and Confederate courts possessed no appellate jurisdiction over state courts without creation of national Supreme Court. Moore, *Conscription and Conflict*, 166-167.

[41] *Ibid*.

powers by the War Department and other Executive Branch agencies amounted to an usurpation of legislative powers and thereby violated the constitutional doctrine separating government powers.

Conscription was the most litigious constitutional issue and one of the most politically charged issues for the courts to address. There was opposition to conscription from some of the "most eminent jurists and statesmen of the country" who considered the act unconstitutional and challenged the necessity of the act.[42] However, here not all opposition was due to sincere devotion to ideological principles; some southern governors were motivated to oppose conscription as a Confederate policy because of their own ambitions to preserve state patronage powers and control the appointment of military officers.[43] Reaction to the enforcement of conscription could be violent, especially in areas with strong Unionist sentiment.

There was also popular support for conscription. In a speech published in the *Charleston Mercury* on April 2, 1862, Wigfall identified the importance of

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[42] These included Alexander H. Stephens, Robert Toombs, Joseph E. Brown, James L. Orr, Henry S. Foote, Chief Justice Richmond Mumford Pearson, Williamson S. Oldham. Moore, *Conscription and Conflict*, 23. Supporters of conscription included Davis' cabinet, Rhett, Yancey, Wigfall, Pollard; see *Official Records of the War of the Rebellion*, ser. IV, vol. I, 1133. Moore referred to popular support for conscription with a piece from the Clarke County, Alabama *Democrat* in December of 1862: "The discussion in Georgia respecting the conscription law is disappearing...The decision of the Supreme Court in its behalf has reconciled the people to it--at least for the present." *Ibid.*, 171.

[43] Georgia's Governor Joseph E. Brown's opposition was due to his belief that conscription represented a "bold and dangerous usurpation by Congress of the reserved rights of the States." *Official Records of the War of the Rebellion*, series IV, volume II, 130-131. The major issue driving Brown was that of preserving patronage powers and the authority to appoint officers of state units. This was "the milk in the cocoanut" [sic] according to Linton Stephens' speech before the Georgia Legislature, as quoted in the *Augusta Constitutionalist* on October 30, 1862 and the *Southern Confederacy* on November 15, 1862. Moore, *Conscription and Conflict*, 24-25.

constitutional ideas and principles, declaring that the Confederacy was not founded upon an agreement to join a "loose league" but to form a nation that had to be protected. The Virginia Legislature was cited in the April 18, 1862 edition of the *Columbus Sun* as endorsing conscription, expressing their support for it and desire to cooperate with Confederate authorities, underscoring the importance of the federal arrangement in their thinking. Herschel Johnson of Georgia articulated the priority of the nation over the ideology of states' rights when he confessed that he could do nothing more than acquiesce in conscription because "the only other alternative, he warned, was annulment [of the nation], but 'nullification is folly, and secession is disintegration.'" Leading newspapers, including states' rights papers such as the *Charleston Mercury* and the *Richmond Examiner*, supported the measure, doing so in the interest of preserving the Confederate nation. Others, such as the *Southern Confederacy* and the *Columbus Sun* favored conscription as a principle but disapproved of its practice as an exercise of Confederate power, believing that the Executive branch and Congress should be held to strict accountability with conscription and identifying here the importance of dividing national government powers under the separation of powers doctrine.[44]

When the first conscription bill became law on April 16, 1862, it did so under the gravest of situations. At that time, the Confederate Army was composed chiefly of twelve-month enlistments whose terms of enlistment were to expire very soon; Forts Henry and Donelson had fallen in February causing the abandonment of all defenses on the upper Mississippi; Nashville and Memphis became subject to Federal raids and attacks,

[44] The *Columbus Sun* (April 22, 1862), the *Southern Confederacy* (April 20, 1862 and October 7, 1862) and the *Savannah Republican* (May 15, 1862); Moore, *Conscription and Conflict*, 21-22, 26.

Confederate forces in the West were in retreat back into Alabama and Mississippi; New Orleans had fallen; Confederate forces had experienced the defeat at Shiloh on April 6th with its resulting retreat to Corinth; Roanoke Island, North Carolina had been captured; and public and official views pointed to the need to fill the Confederate ranks with conscripts since volunteering was not meeting military needs. The Confederate Congress called into service for three years (unless the war were to end sooner) white men between the ages of 18 and 35 in order to meet the manpower requirements of the Confederate military and there was significant popular support for the measure.[45] Military manpower needs made conscription a necessity if the Confederacy, as a nation, was to survive and subsequent legislation expanded the class of individuals liable to conscription.[46]

Individual litigants, hoping to secure discharges from military service, initially

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[45] The *Columbus Sun* (July 12, 1863), *Official Records of the War of the Rebellion*, ser. IV, vol. II, 42, 279; Moore, *Conscription & Conflict*, 12. The passage of the conscription act preceded by the expiration of the term of enlistment for 148 regiments of 12-months' men. The Act on April 16th, 1862 provided that every able-bodied white male from age 18 through 35 was subject to Confederate service and allowed the hiring of substitutes who were themselves not liable to conscription. The Confederate Congress passed the act by a margin of 2-to-1. *Statutes At Large of the Confederate States of America*, 1st Cong., 1st Sess., chapt. 31 (1862), 29-33; *Journal of the Congress of the Confederate State of America*, II, 154 and V, 228. President Davis' support of conscription was evident in his Message to Congress on March 28, 1863. Richardson, *Messages and Papers*, I, 206.

[46] Congress amended the first act on September 27, 1862 and expanded the age range of liability to those ages 18 to 45 and making substitutes who fell into these age ranges now liable for military service. Matthews, *Statutes At Large of the Confederate States of America*, 1st Cong., 2nd Sess., chapt. 15, 61-62. In February of 1864, the Congress passed its final amendatory act, expanding the age range to include men ages 17 through 50, although the additional men drafted were to be employed as reserve troops in their home states; see *Official Records of the War of the Rebellion*, series IV, volume III, 178.

asserted arguments based upon various states' rights theories—including a state-oriented theory of federalism—to contest the exercise of conscription power by the Confederate government.[47] These efforts to challenge conscription constitutionally on a doctrinal level largely failed and litigants and their attorneys altered their legal strategies, pleading upon procedural grounds and seeking to invoke the protection and issuance of "the Great Writ," the writ of habeas corpus.

The writ of habeas corpus became the chief means for bringing conscription and statutory exemption cases before the state courts by those seeking discharges from military service.[48] There was a substantive reason for asserting the writ—to produce the body of the individual to the court without delay in order to allow the court to determine the lawfulness of the detention of the petitioner and the deprivation of their personal liberty—and it could be issued by a state court or an individual state supreme court justice to order a law enforcement officer or other individual, civil or military, to comply.[49]

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[47] Moore, *Conscription and Conflict in the Confederacy*, 163, 354. There was resistance to conscription in the North, as well, and state supreme courts adjudicated claims alleging that conscription in the North was unconstitutional in Pennsylvania (*Henry S. Kneedler v. David M. Lane, Charles B. Barrett, J. Ralston Wells, and Isaac Ashmead, Jr. Francis B. Smith v. David M. Lane, Charles B. Barrett, J. Ralston Wells, and Christian Young. William Francis Nickels v. William E. Lehman, N. N. Marsellis, Charles Murphy, and Ebenezer Scanlan*, 25 Pa. 238 (1863)), Indiana (*Griffin v. Wilcox*, 21 Ind. 282 (1863)), and Wisconsin (*In Re Griner and others*, 16 Wis. 382 (1863) and Brodhead *and Others v. The City of Milwaukee and others, Porter v. The Same*, 19 Wis. 624 (1865)). Brummer, "Judicial Interpretation of the Confederate Constitution," 109.

[48] The habeas corpus clause of the Confederate Constitution was found in Article 1, Section 9, clause 3. It provided that "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." Conscription as the chief source of cases during the war is also addressed by Neely in *Southern Rights*, 59.

[49] Kermit Hall, *Oxford Companion to the Supreme Court of the United States*, (New York, NY: Oxford University Press, 1992), 357-358.

During the war, more than 212 applications were presented before state supreme court justices and more than 122 were issued.[50] In North Carolina, the writ's importance in protecting against unlawful detention and the Chief Justice's willingness to use the court's original jurisdiction over applications for writs of habeas corpus resulted in the justices' ability to hear applications without a long delay or the process of appeal through the state court system.[51]

There were serious abuses of the writ for purposes other than determining the lawfulness of detention. In Richmond, Edward A. Pollard condemned the use of the writ before [Confederate] courts, calling it "remarkable" that the Confederate Attorney General in the city had been called upon to try eighteen hundred cases in which petitioners had sought discharge from conscription through use of the writ of habeas corpus. Pollard would declare that the "honored writ" had been reduced to "the vilest instrument of the most undeserving men" and that "attached to it [the writ] [there was] a record of shame for the South that we would willingly spare." He complained bitterly of the opportunism of Congressman Humphrey Marshall from Kentucky, representing the soldier and refugee vote in the Second Congress, who reportedly "added to his pay as a legislator the fees of an attorney to get men out of the army" by rendering his legal skills as a "famous advocate in Richmond in cases of habeas corpus" where he "is reported to

[50] More than 37 applications were presented before North Carolina's Chief Justice Richmond Mumford Pearson.

[51] Van Zant, "Confederate Conscription and the North Carolina Supreme Court," 62.

have boasted that his practice yielded him an average of two thousand dollars a day!"[52] The writ became the favorite legal weapon of attorneys who, with less civil legal business to attend to in the courts because of the war, saw the writ practice as an opportunity to earn money from individuals who had the financial resources both to hire substitutes for military service and to pay for legal services to assist them with their claims for military discharges in the courts.[53]

Yet, despite the broad use of the writ of habeas corpus as a mechanism for giving state courts jurisdiction over Confederate prisoners, state courts upheld the procedural and substantive integrity of the writ practice, remanding back to Confederate custody a significant number of appellants and overturning many habeas corpus cases raised upon original jurisdiction.[54] Justices asserted limitations on their own exercise of such jurisdiction, holding that they considered it "the exercise of a special jurisdiction conferred by the [Confederate] Constitution and laws," that it was to be used only for the prompt relief of the citizen against any improper interference with his personal liberty,"[55] and that the courts were to maintain strict standards and reject those petitions that clearly lacked sufficiency.[56] State supreme court justices did assert a concurrent

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[52] Neely, *Southern Rights*, 43-44; Ezra J. Warner and W. Buck Yearns, *Biographical Register of the Confederate Congress*, (Baton Rouge, LA: Louisiana State University Press, 1975), 167-168 where there is a great deal more complexity and disagreement about Marshall.

[53] Neely, *Southern Rights*, 56-57.

[54] *Ex Parte Lee and Allen*, 39 Ala. 457 (1864).

[55] *Jason McFarland v. G.W. Johnson* (1863), reported in *Ibid*., 8.

[56] *Ex Parte Hill, In Re Armistead v. Confederate States & Ex Parte* Dudley, 38 Ala. 458 (1863); *Ex Parte J. W. Ainsworth*, 27 Tex. 731 (1865).

jurisdiction over writ of habeas corpus cases, particularly their ability to exercise such jurisdiction over Confederate prisoners.[57] However, this was not the positive assertion of states' rights ideology; the use of the writ by states courts to acquire jurisdiction over federal prisoners was a practice well established in American constitutional and legal traditions by 1861.[58] For southern state supreme court justices, the writ of habeas corpus, often invoked by litigants, was to remain a substantive tool of individual liberty from wrongful detention rather than the convenient mechanism for avoiding military service and was consistent with their understanding of the Confederate Constitution as a substantive and constitutive national document.

Substantive Nature of Confederate Constitutionalism

In 1861, southerners chose to turn their backs on what they regarded as "the deterioration of American constitutionalism, a deterioration initiated and sustained by their political rivals in the North."[59] They were convinced that the governmental arrangement and institutions provided for in the U.S. Constitution had been corrupted. Many southerners professed that state sovereignty was threatened by an increasingly intrusive government in Washington and constitutional rights could no longer be

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[57] In *In Re Bryan*, 60 N.C. 1 (1863), the North Carolina court held that state and Confederate courts and judges held concurrent jurisdiction in issuing writs of habeas corpus. Hamilton, "The State Courts and the Confederate Constitution," 373-374.

[58] Ji-Hyung Cho, "The Transformation of the American Legal Mind: Habeas Corpus, Federalism, and Constitutionalism, 1787-1870," (Ph.D. Dissertation, University of Illinois at Urbana-Champaign, 1995).

[59] DeRosa, *The Confederate Constitution of 1861*, 1.

protected, especially the property rights in slaves. Consequently, southerners departed from the Union and re-constituted themselves under the terms and principles of a new, more innovative constitution. Yet, in 1861, it wasn't clear what principles from the Old Union were to be invoked in this endeavor nor what role would states' rights and secession play in the creation of a new constitutional order. Equally unclear as they defined a new form of constitutional government was how southerners would re-structure their polity both in response to the errors of the past and to facilitate a more effective management of conflict in the future.[60]

The new American constitution they created was designed to remedy the shortcomings experienced in the old one and stimulate a new direction towards a more effective and federal governmental system.[61] Confederate constitutionalism, as a reform effort, was both *conservative and innovative*, looking to both *the past and the future* to retain essential elements while also reforming those elements that required change.[62] Davis had referred to the character of Confederate constitutionalism as both innovative

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[60] *Ibid*. In 1861, southerners drafted and adopted a Provisional Constitution, a national charter which, though at first glance appeared to be very similar to the United States Constitution, was actually a very distinct document. Fehrenbacher contends that the Confederate Constitution had a "derivative" character, based upon the U.S. Constitution, but also containing distinctively southern constitutional doctrines. Fehrenbacher, *Constitutions and Constitutionalism*, 58-62.

[61] *Ibid*.

[62] The extent to which the Confederate Constitution addressed the relevant political and constitutional issues of the antebellum period led William Robinson, author of *Justice in Grey*, the comprehensive work on the Confederate legal system, to declare that "the Constitution of the Confederate States marked a high point in American constitution-making," due to the attempt by its drafters to improve upon the American governmental machine and to "set at rest moot questions," that had plagued the United States in prior decades. William M. Robinson, Jr., "A New Deal in Constitutions," *The Journal of Southern History*, vol. 4, (November 1938):449-461, 454.

and conservative when he pointed out that the significant changes made by the Montgomery convention included the *preservation* of a more federal republic comprised of both state and national governments and the alteration of "constituent parts" to provide greater specificity about government authority and powers.

In this Constitution, southerners attempted to safeguard a political philosophy which included individual liberty and equality as well as the "rule of law, including a constitution as a permanent, paramount, and binding political law."[63] Casting themselves as conservators of the republican ideal, southerners in 1860-1861 aimed to preserve tenets they considered to be enshrined in the Constitution of 1787. In this sense, Confederate constitutionalism was conservative, for it looked to the past and sought to preserve a tradition of libertarian government which was understood as having taken form with the political traditions of the founding era. Several historians have interpreted this development as indicative of the traditionalist nature of the Confederate constitutionalism. Clement Eaton argued that Confederate framers purposely avoided framing a new constitution, that the Confederate Constitution was the product of profoundly conservative constitutionalism and simply added more stringent protection for slavery and state sovereignty to the Constitution of 1787.[64] Secession was the action undertaken by "conservators" of an American constitutional system and they sought to free this system

[63] Herman Belz, "The South and the American Constitutional Tradition at the Bicentennial," in Hall and Ely, eds., *An Uncertain Tradition,* 20.

[64] Clement Eaton, *A History of the Southern Confederacy* (New York, NY: Macmillan, 1954), 43-45.

from the corruptive influences of Northern abolitionism and commercialism.[65]

The conservative nature of Confederate constitutionalism is the subject of much disagreement amongst historians. George Rable contends that the Confederacy was conservative because it sought to restore American constitutionalism to its eighteenth century origins. Confederate constitutionalism was conservative because of its preference for slaveholders and the objective of reducing social class conflicts over the institution of slavery.[66] DeRosa also considers the Confederate Constitution as conservative, but not because of slavery. He, in fact, rejects the argument that the Confederate Constitution was an effort to sustain the political power of slaveowners. Rather, secession was in response to the centralizing tendencies of the antebellum federal government and the Confederate Constitution was designed to prevent the centralization of the national government.[67] However, as the wartime decisions of the state supreme courts reveal, the Confederate Constitution was more than a conservative reform effort.

To facilitate constitutional reform, the Confederate charter included a number of innovations which were designed to rectify what southerners perceived of as the corruption of the old constitutional system of governing the United States.[68] While some

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[65] Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 62.

[66] Rable, *Confederate Republic*, 39-63.

[67] DeRosa, *Confederate Constitution of 1861*.

[68] This corruption included partisan politics, executive privilege, patronage, and the dominance of the national government in Washington, D.C. As the editor of the Richmond *Daily Dispatch* opined in March 2, 1861, there was "nothing imperfect in the instrument which bound us together. But there was corruption, undermining, and weakening the main pillars which supported one part of the edifice; there was fanatacism [sic] which was endeavoring to destroy another."

state authority was retained under the Confederate Constitution, Confederate framers placed a greater emphasis on efficiency in national government, strong executive leadership, and a more parliamentarian form of government.[69] This represented an effort by the framers to combine "the best in the European parliamentary system without breaking down the distinctively American separation between the executive and legislative functions, to eliminate political and judicial waste, to promote economical administration, and to keep each echelon of a complex system of government within its appointed orbit."[70] These were significant innovations, designed to facilitate a constitutional system with meaningful doctrines on federalism, the separation of powers, and limited government but in which both the national and state governments possessed sufficient authority and powers. The "fundamental dilemma" in Confederate constitutionalism was achieving a balance between "respect for tradition and the need for innovation," a dilemma which made Confederate constitutionalism a "conservative revolution" and the Confederate Constitution "both progressive *and* [emphasis added] reactionary, designed both to reform politics and to restore a mythic past."[71]

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[69] In Article 1, the framers did include important state-oriented features by vesting legislative powers in Congress as *delegated* rather than *granted* powers. While some historians have contended that this underscored the theory that government operated as the agent of the people, the wartime decisions specifically rejected this conclusion. Confederate Constitution, Article 1, Section 1. Prior to the Confederate Constitution, the term *delegated* had only appeared in the United States Constitution in the 10th Amendment. Robinson, "New Deal in Constitutions," 452. The Permanent Constitution placed restrictions on congressional appropriation bills, internal improvements, and tariffs.

[70] Robinson, *Justice in Grey*, 624.

[71] Rable, *Confederate Republic*, 44, 63; Nieman, "Confederate Constitution," 204; Fehrenbacher, *Constitutions and Constitutionalism*, 65-66; Emory Thomas, *The Confederate Nation:1861-1865* (New York, NY: Harper Torchbooks, 1979); Emory

In wartime state supreme courts decisions, the Confederate Constitution was given substantive meaning as the constitutive document of the nation, outlining the mechanisms of governance and the purposes of the new nation. In their wartime opinions, state court justices attempted to refine and develop legal and constitutional doctrines which would facilitate procedural reforms and substantive ideas included in the Confederate Constitution. Southern state supreme courts held that Confederate constitutionalism was substantive, that the national Constitution embodied the political philosophy and principles under which the states and the people of the Confederacy had manifested themselves to be bound, and that legal disputes about the Confederate Constitution would be adjudicated by interpreting carefully the text and principles of the national charter rather than deciding constitutional cases according to political preferences or military exigencies.[72]

What held these two seemingly irreconcilable concepts (conservative and innovative constitutionalism) together was the distinct purpose, embodied in the Confederate Constitution, to establish a separate nation. While slavery was a part of southern society and the economy, it was not the only reason for secession nor the sole consideration in Confederate state-building.[73] Creating an independent state which

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Thomas, *Confederacy as a Revolutionary Experience* (Englewood Cliffs, NJ: Prentice-Hall, 1971).

[72] Several historians have argued that as the war progressed, constitutional principles became displaced by military exigencies and a balance of power between state and national governments was replaced by a consolidated Confederate government. Amlund, *Federalism in the Southern Confederacy*.

[73] In August of 1864, John M. Daniel, editor of the Richmond *Examiner* publicly asked president Davis to send a message to foreign nations informing them that slavery was not the reason for secession, that "the question of slavery is only one of the minor

provided for individual liberty, state sovereignty, and efficient national government was a primary constitutional purpose for the Confederate nation, as is suggested by wartime jurisprudence in the state supreme courts.

A Federal Balance of Authority and Power

In 1861, Confederate framers stated in their Constitution's Preamble that they were committing themselves to the creation of a *permanent* and *federal* government in which the supremacy of the Confederate Constitution and Confederate laws was unquestionable.[74] The power and authority of the national government were nevertheless limited within its proper sphere to preserve the authority of the states.[75] The Confederate Constitution preserved the integral role of the states in national governance but also guaranteed to its national citizenry that national policies could and would be implemented efficiently. The Confederate system of federalism, embodied in the Confederate Constitution, provided for more than states' rights. Yet, at the war's beginning, it was unclear whether states would assert a state sovereignty ideology to nullify national wartime measures or to claim concurrent war powers. Alternatively, in the name of wartime military necessity, would state jurists permit an unlimited and consolidated

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issues; and the cause of the war, the whole cause, on our part, is the maintenance of the sovereign independence of these States." Fehrenbacher, *Constitutions and Constitutionalism*, 58.

[74] Preamble to the Confederate Constitution. Donald Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," in Hall and Ely, eds., *Uncertain Tradition*, 203. Fitts, "The Confederate Convention: The Constitutional Debate," 189-210; Confederate Constitution, Article 6, sections 3 and 4. The supremacy clause under Article 6, Section 3 was identical to the supremacy clause found in the U.S. Constitution.

[75] Confederate Constitution, Article 5, Article 6, Sections 4, 5, and 6.

government to emerge during the war? If Confederate constitutionalism could be maintained, it was unclear whether a consistent doctrine of federalism could be maintained without becoming heavily influenced by military need and government consolidation or states' rights and state supremacy.

During the war, Confederate legislation prompted new and difficult constitutional issues, particularly about the nature of Confederate federalism.[76] In their wartime decisions, state court justices were compelled to analyze the text of the Confederate Constitution in order to construe the federal principle and define the relationship between the states and the Confederacy. Several key federalism issues emerged in this wartime litigation, including whether the states were supreme over the national government so that the national government was little more than the agent of the states, and whether state sovereignty or states' rights was the essential political philosophy of the Confederacy. Individual litigants, still holding to these ideals, contested the authority of the Confederate government and the state courts found themselves having to enunciate the precise parameters of Confederate federalism. The promulgation of wartime measures such as conscription, exemption, the suspension of the writ of habeas corpus and impressments appeared to contradict the concern for a well-defined federalism. If states' rights was the constitutive political philosophy of the Confederate States of America, these wartime conscription and exemption cases provided an excellent opportunity for individual state supreme courts—as state

[76] Federalism a constitutional doctrine in which administrative and governmental functions is allocated or divided between national and state/local governments. Each governmental entity operates according to its own separate sphere of responsibility and within each respective sphere of responsibilities, each possesses primacy and complete authority. Paludan, "The American Civil War Considered as a Crisis in Law and Order," 1016.

institutions--to enunciate principles that would circumscribe the power and authority of the Richmond government and assert the supremacy of state governments.

Wartime jurists did not do this. Rather, they manifested a determined intent to interpret carefully the provisions of the Confederate Constitution, enunciating a doctrine of federalism that while it did not dispel the important role of states in Confederate constitutional governance, undermined the preeminence of states' rights in the Confederate political philosophy.[77]

The basic question they would confront was whether the political purpose of the Confederacy was to create a nominal national government for the purpose of serving state rights and interests,[78] or whether the Confederacy was founded upon a commitment to create a federal republic. Southern state jurists were compelled to define carefully the doctrine of federalism in the Confederacy and, quite surprisingly, enunciated a doctrine in which both national and state governments were to operate effectively within their respective spheres of responsibility—as with dual federalism—but the spheres were to be, at times, flexible enough to facilitate *national* purposes.[79]

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[77] Confederate federalism in no way was intended to reduce the power of the states. The framers of the Constitution introduced several measures which supplemented state powers such as the right of impeachment of federal officials (Article 1, section 2, clause 5), the simplified system of amending the Constitution (Article 5), the prohibitions against bounties, protective tariffs, and internal improvements (Article 1, section 8, clause 1); Fitts, "The Confederate Convention: The Constitutional Debate," 195-204. However, state jurists in the South were not generally willing to assert state sovereignty as a constitutive doctrine or "a constitutional article of faith." Huebner, *The Southern Judicial Tradition*, 6-7. The focus on states' rights has obscured an appreciation of the relevancy and importance of the innovations made in 1861 and to the configurative effect of the document. Nieman, "Republicanism, the Confederate Constitution and the American Constitutional Tradition," 201.

[78] Owsley, *States Rights in the Confederacy*.

State courts also were called upon to examine the nature of Confederate federalism, deciding whether the states exercised powers that were largely concurrent with those of the national government, especially whether state governments and officials could exercise concurrent powers over military forces.[80] A related issue was whether the state courts had concurrent jurisdiction to hear these cases, and state courts upheld their jurisdiction over these cases unless it was specifically denied under Confederate laws or the Constitution, especially in the absence of a national supreme court.[81]

Conscription led to two "radical changes in the method of raising armies in the Confederacy" which presented larger questions about the federal balance of power in the Confederacy. First of all, conscription eliminated the states as the instrument of military recruiting and created a means by which the central government operated directly upon the individual to effect responsibilities and allegiance to the nation.[82] Secondly, it made compulsory enlistment the "cardinal principle of military service" in the Confederacy (though voluntary enlistments were still allowed thereafter).[83] The state justices articulated, as an article of Confederate constitutionalism, that state interests and authority

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[79] Confederate federalism and its development by state supreme courts is the subject of Chapter Four in this dissertation.

[80] Prior to the first Confederate conscription act, four states, including South Carolina, had enacted conscription statutes themselves as means of satisfying quotas for Confederate service, see *Official Records of the War of the Rebellion*, series IV, vol. I, 1140; vol. II, 73; Moore, *Conscription and Conflict*, 122.

[81] Moore, *Conscription and Conflict*, 167-168.

[82] Especially *Asa O. Jeffers v. Fair*, 32 Ga. 347 (1862) and *Ex Parte Coupland*, 26 Tex. 386 (1862).

[83] Moore, *Conscription and Conflict*, 16-17.

could be eclipsed by those of the national government. They would enunciate that the constitutional source for this authority was the Necessary and Proper Clause, making purposeful the provisions of the national charter, even in wartime, and making clear that there were national purposes at work in Confederate constitutionalism. In so doing, these justices articulated a political philosophy that provided for significant national powers and responsibilities and that elevated the importance of the duties of Confederate citizens to their nation.

When state jurists enunciated principles of federalism and enforced the war powers of the Confederate government, they facilitated the implementation not the alteration of constitutional principles. Contrary to the Civil War Confederate historiography, state court justices articulated a national doctrinal development in which the supremacy of the national war powers resulted neither from military necessity nor political exigency. These decisions were not based on wartime exigencies, but reflected an adherence by state courts—a commitment— to national constitutional principles. In their decisions, justices articulated principles at odds with states' rights but derived from the Constitution, and, most notably, the creation of "a more perfect *federal* government," even amidst war, one more balanced, more efficient, and more clearly defined than that under the Constitution of 1787.

Federalism became an increasingly important doctrine during the war because it defined the creation of the Confederacy, it laid down a structure for Confederate governance, and it contained a philosophy about the national purpose of the Confederacy. In partitioning sovereignty into two parts, one being vested with the state and the other with the national government, justices made the principle of federalism a

viable tenet of Confederate constitutionalism and reduced the preeminence of states' rights in the South as a constitutional matter of faith. Sovereignty now was vested by the people of the Confederacy in state *and* national governments. Their decisions contradict an understanding of the Confederacy as a loose confederation of states, each acting independently, because they articulated these principles as constitutional doctrines, which could not be easily changed after the war. As such, the Confederate experience at war represented "an interesting new chapter...in the history of constitutional government."[84]

Preserving Limitations Under the Separation of Powers Doctrine

On April 21, 1862, only five days after passing its first conscription act, the Confederate Congress provided for statutory exemptions from conscription and military service for Confederate and state officials and for certain additional classes of professions and specific circumstances.[85] As with the conscription laws, the exemption acts raised legal and constitutional issues from Confederate citizens who challenged the wartime power of the national government in state courts, specifically the authority of the executive branch to exercise what were alleged by some litigants to be legislative

[84] Fehrenbacher, *Constitutions and Constitutionalism*, 67.

[85] "An Act to exempt certain persons from enrollment for service in the Armies of the Confederate States," Chapt. LXXIV, in *The Statutes at Large of the Confederate States of America, Passed at the First Session of the First Congress; 1862. Public Laws of the Confederate States of America, Passed at the First Session of the First Congress; 1862.*

functions.[86] Conflicts emerged as state governments and individual litigants challenged the War Department's authority to declare whether the statutory requirements for exemption had been met and the more restrictive terms for exemptions from Confederate military service. The challenge for the courts was to determine how to separate the national government to prevent usurpation and provide for political liberty yet also to ensure that each branch remained effective with sufficient powers to carry out its duties according to its constitutional charge.

In these wartime cases, state courts were called upon to enunciate the Confederacy's doctrine of the separation of powers and to explain the scope and extent of the duties and functions of each branch.[87] Yet, it was not always evident how to separate

[86] The first exemption act would be repealed on October 11, 1862 and replaced with a much more limited and specific statue, "An Act to exempt certain persons from military duty, and to repeal an Act entitled "An Act to exempt certain persons from enrollment for service in the army of the Confederate States," approved 21st April, 1862." Chapter XLV in *The Statutes at Large of the Confederate States of America, Passed at the Second Session of the First Congress; 1862. Public Laws of the Confederate States of America, Passed at the Second Session of the First Congress; 1862*. The final acts were passed on December 28, 1863 (abolishing substitutes), January 5, 1864 (abolishing the exemptions of those who had previously provided substitutes), and February 17, 1864 (abolishing all exemptions), Chapt. III, Chapt. IV, and Chapt. LXV in *The Statutes at Large of the Confederate States of America, Passed at the Fourth Session of the First Congress;1863-1864. Public Laws of the Confederate States of America, Passed at the Fourth Session of the First Congress;1863-1864*, 172, 213.

[87] The Separation of Powers is a constitutional doctrine in which government possesses the primary responsibilities of making and enforcing laws but each branch of government is distinct and charged with different functions and responsibilities. The purpose for the doctrine is to assert the supremacy of the people's representatives in lawmaking and, by denying the executive branch any share in the highest and most important power of government, to confine him to merely an administrative function. In a republican form of government, the separation of powers established a measure of popular control, elevating the people's representatives to a dominant role in contrast to the executive and vesting in them the sole responsibility for lawmaking. Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins*

governmental powers while also ensuring sufficient powers to prosecute a modern war. It wasn't clear whether the separation of governmental powers could be articulated let alone maintained due to the continuous demands to mobilize men and material and when responsibilities and duties of carried over to other branches and the separation of power could become blurred.

Innovations in the Confederate governmental structure, with its emphasis upon greater efficiency, cooperation, and "the smooth operation of the system" made Confederate government more parliamentary in form than in the earlier U.S. model and also raised additional challenges for state supreme courts trying to demarcate the division between branches and the assignment of national government powers.[88] Confederate framers had included in the Constitution a provision allowing cabinet members to sit in Congress and debate on issues relevant to their portfolios and had diminished the use of negative minorities in Congress.[89] This "non-separation of branches" was an interesting innovation that actually provided for the inclusion rather than separation of the Executive in congressional affairs. Alexander Stephens referred to this development as more honest and straightforward for the public benefit since "'Our heads of department can speak for themselves and the administration…without resorting to the indirect and highly

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and Development, 7th edition, vol. 1 (New York, NY: W.W. Norton and Company, 1991), 71-73.

[88] Alexander Stephens to Linton Stephens, February 17 and March 10, 1861, in the Alexander Stephens Papers, op cit. Nieman, "Republicanism, The Confederate Constitution, and the American Constitutional Tradition," 214-215.

[89] Confederate Constitution, Article 1, Section 6 provided that "Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department."

objectionable medium of a newspaper…It is to be greatly hoped that under our system we shall never have what is known as a Government organ.'"[90] This had the effect of encouraging greater cooperation— "working majorities"—between the Congress and the Executive Branch, particularly on issues of appropriations, appointment, and treaties but making the demarcation of governmental boundaries difficult.

The Civil War also brought with it new constitutional issues about separated powers and new needs to interpret provisions and enunciate principles. Under the exemption legislation, the War Department was provided with the opportunity to create regulations—including procedures for adjudicating claims for exemptions under the statutes—for the *efficient* administration of exemptions. When the first legislation was passed in 1862, it wasn't clear whether the courts would interpret the secondary legislative functions that had been conveyed by Congress to the War Department as substantive and purposeful to facilitating constitutional goals. It wasn't clearwhether the courts would become restrictive and resist such executive action as usurpation and instead allow for greater access to exemptions, perhaps even due to localized interests and pressures. Courts followed the rigid lines separating the branches and facilitated the larger *national and constitutional goals and purposes*, refusing to allow litigants to seek legal remedies before they had exhausted these procedures provided by the War Department under the exemption legislation. The courts were equally adamant about preserving the judicial authority to interpret statutes.

Southern justices were very conscious of the dangers to constitutional

[90] See the *Milledgeville Southern Federal Union*, April 2, 1861, op cit. Nieman, "Republicanism, The Confederate Constitution, and the American Constitutional Tradition," 215.

government during war and the pressures to violate the separation of powers doctrine because of wartime needs. In a series of decisions the state supreme court courts in Virginia, Georgia, North Carolina, and Texas manifested their intent to preserve the doctrine and rejected the *unconstitutional* expansion of executive authority to raise Confederate armies and Executive usurpation of congressional war powers. State supreme courts would be compelled to render decisions that identified the boundaries of governmental authority and power in more sophisticated ways and according to the larger principles ensconced within the national charter. The justices would hold that, under the Confederate Constitution, the system of checks and balances upon government branches was specific and they refused, as unconstitutional, any perceived usurpations of constitutional authority or powers by government branches. These courts even vigorously applied the separation of powers doctrine to themselves, in their role as a surrogate for the third branch of the Confederate government, refusing to enlarge their own power at the expense of the Executive Branch.

This unique separation of powers under the Confederate Constitution pitted the Executive and the Legislative branches against each other on some wartime issues yet facilitated increased cooperation and efficiency in national governance, especially when facilitated by judicial review. If government was to operate smoothly, like its parliamentary form in Great Britain, it would require a "unity of responsibility," Congress and the President working together, and a more unified national sense of purpose.[91] State

[91] Fitts, "The Confederate Convention: The Constitutional Debate," 209. Nieman argued that these developments were connected to local politics in that "they were deeply rooted in popular political-constitutional attitudes and state constitutional practice. Moreover, they anticipated the direction of constitutional change in post-Civil War

supreme courts would articulate a separation of powers doctrine that sought to separate governmental power, but would do so in a flexible manner, utilizing as the measure of necessary flexibility the responsibility all branches owed to the Confederate people and the larger national goals and purposes in the Confederate Constitution.

In 1861, Confederates created a "new national ideology" which was "a political and social act," drawing southerners into a common effort to "work together for the Confederate cause" and to ensure Confederate national survival.[92] This national ideology was given form and expression in the Confederate Constitution and it identified the reasons for the creation of the Confederacy, the structure for Confederate governance, and the philosophy and national purpose of the Confederacy. But, as Jefferson Davis had indicated in 1861, the principles and ideas of the Constitution and this "national ideology" would not be understood without judicial review.

State jurists understood the Confederate Constitution as something substantive and, operating as a *de facto* supreme court, they considered its text and principles seriously in scores of wartime decisions. They upheld the exercise of *constitutional* Confederate war powers, limited government within a carefully balanced system of nation-oriented dual federalism, and strict separation of powers, all in order to facilitate distinctly national purposes. Their decisions

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America." Nieman, "Republicanism, The Confederate Constitution, and the American Constitutional Tradition,"204.

[92] Drew Gilpin Faust, *Creation of Confederate Nationalism* (Baton Rouge, LA: Louisiana State University Press, 1988), 10-15.

contradict an understanding of the Confederacy as a loose confederation of states with each acting independently and the frequency and consistency of these court opinions reveals the substance and character of the Confederate constitutional thought and politics as a shared set of values and principles across southern jurisdictions.

Because many southern jurisdictions articulated these principles as essential to constitutional doctrines, they could not have been easily changed after the war, making their enunciation of Confederate constitutional principles more established and less likely to be altered by political interests. For a nation that existed only at war and was affected by the dynamic political challenges of modern war, these state supreme court decisions may also be considered our best definition as to the essence of Confederate constitutionalism and political ideology. These decisions have been often ignored in our understanding of Confederate constitutionalism. Yet, as Jefferson Davis revealed to the Confederate nation in his Inaugural Address in February of 1861, in these decisions on the Confederate Constitution by the justices of the state supreme courts of the Confederacy, we may have our light "to reveal its true meaning."

Chapter Two

Conservative Constitutional Commitments

In February of 1862, as he adjourned the Provisional Congress, Howell Cobb, president of the Confederate Congress, declared that the Confederate *constitutional order* and political revolution were founded upon *conservative* tenets and ideas: "ours is the first revolution which history records, wherein the tendency has been to conservatism and stability."[93] Jefferson Davis, in his inaugural address as the First President of the Confederacy, likewise asserted conservative constitutional tenets, proclaiming that the framers of the permanent Confederate government were committed "to perpetuate the principles of our Revolutionary fathers."[94] In 1861, southerners removed themselves from the political community of the United States and re-constituted themselves as the Confederate States of America. This was a significant step but it was unclear whether this represented the establishment of a political community based upon a *new* constitutional order, constitutive purposes, and "moral" political principles.[95] It is the wartime decisions of the state supreme courts, though, that reveal that the Confederate constitutional order was significant as a conservative constitutional reform movement in American constitutionalism by addressing, correcting, and strengthening traditional

[93] "Adjournment of the Provisional Congress," Richmond *Daily Dispatch*, February 16, 1862. The importance of order to the essence of a constitution was evident in the writings of Russell Kirk, who defined a constitution as "a system of fundamental institutions and principles, a body of basic laws, for the governing of a commonwealth. It is a design for *permanent political order* [italics added]." Russell *Kirk, Rights and Duties: Reflections on Our Conservative Constitution* (Dallas, TX: Spence Publishing Company, 1997), 3.

[94] Jefferson Davis, *Rise and Fall of the Confederate Government*, (New York, NY: D. Appleton and Co., 1881), 2:232-236.

[95] Rable, *Confederate Republic*, 39-63.

constitutional principles, including republicanism, limited government, and national purpose.[96]

The Confederate Constitution and constitutional order were "conservative" because they were designed to facilitate the conservation of important values and principles held to be constitutive of the American political tradition and to stabilize and preserve the political order.[97] Within this conservative constitutionalism, "the basic law preserves the pattern of political order through time and change." Understanding the constitutional history of the Confederacy and its political philosophy rests upon an understanding of the Confederate Constitution. But, this conservative constitutionalism is more than a blind positivistic application of the "black letter law" or textual original intent. Like the U.S. Constitution, which was "rooted in the experience and the thought of earlier times," Confederate constitutional conservativism sought to re-implement national stability and order over time by looking backward to the foundational ideas and principles of the American nation, chiefly republican values of preserving the common good, virtuous politics, and individual obligations to safeguard the republic.[98]

The Confederate Constitution, like other constitutive documents, reveals not only the governmental forms and relationships—the "descriptive" components—but also the purposes and goals for which the nation was created and the ideology and tenets

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[96] Constitutionalism is that "complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law." Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 1.

[97] Conservative did not mean that the framers were "neophobic" or "resistant to change." Kirk, *Rights and Duties: Reflections on Our Conservative Constitution*, xiv, 6.

[98] *Ibid.*, xv.

according to which those states making up the political community of the Confederacy chose to constitute themselves and be governed.[99] A constitution, generally, is something substantive and purposeful for it is related to "making or establishing something, giving it legal status, describing the mode of organization, locating sovereignty, establishing limits, and describing fundamental principles."[100] It is "a document of political founding or refounding [that] amounts to a comprehensive picture of a people at a given time."[101] In the American context, including the experience of the Confederacy, a constitution is something very specific, "the summary of our political commitments and the standard by which we assess, develop, and run our political system." Like other American constitutive documents, the Confederate Constitution "describes the framework and parts of government or the overall composition of the polity" and, it includes "the principles, institutions, laws, practices, and traditions by

[99] A constitution "prescribes official conduct and provides a standard of legitimacy for assessing the validity of governmental action" and "constitutional government has usually been described as limited government." Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. 1, xix, xx. The substance of the constitution as document was to be measured, according to Lutz, by eight purposes for which a constitution might be written, including: 1) to "define a way of life" (this includes "the moral values, major principles, and definitions of justice toward which a people aims"; 2) to "create and/or define the people of the community so directed"; 3) to "define the political institutions, the process of collective decision making…to define a form of government"; 4) to "define the regime, the public, and citizenship"; 5) to "establish the basis for the authority of the regime"; 6) to "distribute political power"; 7) to "structure conflict so it can be managed"; and 8) to "limit governmental power." Donald Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16. Each of these purposes would be made manifest in state supreme court decisions during the war and give shape and character to Confederate constitutionalism.

[100] Lutz, *Origins of American Constitutionalism*, 21; Belz, A *Living Constitution or Fundamental Law?*

[101] Lutz, *Origins of American Constitutionalism*, 3.

which a people carried on their political and governmental life."[102]

The Confederate Constitutions were the cornerstones of Confederate nation-building and reflected the purposes of its framers. Jabez Lamar Monroe Curry said of the Confederate Constitution, "as the instrument of government, [it] is the most certain and decisive expression of the views and principles of those who formed it, and is entitled to credence and acceptance as the most trustworthy and authoritative exposition of the principles and purposes of those who established the Confederate Government."[103] The document represented the merging of an historical republican ideal with the innovative pragmatism and efficiency in national administration of governance required of modern politics.[104] This constitution became the central focus in the state supreme court decisions on Confederate conscription and exemption statutes which became the only legally definitive interpretation of the Confederate Constitution.

In these state cases, as Jefferson Davis stated in his First Inaugural, historians possess "a light that reveals the true meaning" of the Confederate Constitution, specifically two key constitutional commitments. First, Confederate constitutionalism was the product of a commitment to preserve republican principles, especially a national common good and virtue in politics.[105] The Confederate Constitution differed

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[102] Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. 1, xix.

[103] Curry, *The Southern States of the American Union Considered in their Relations to the Constitution of the United States*, 91.

[104] Robinson, Jr., "A New Deal in Constitutions," 454.

[105] The enunciation of a national common good and its priority over the rights of the states and individual citizens was evident in cases challenging restrictive application of the exemption statutes. This was a major constitutional idea expressed by courts in

from the U.S. Constitution because of the revision of several articles in the original document designed to facilitate the reform of American constitutional government and eradicate the abuses and excesses southerners believed had perverted the federal government during the antebellum period. This conserving propensity is rooted chiefly in the "unwritten constitution," consisting of many different ideals, purposes, habits, and practices which are only partially expressed in the written artifact."[106] While reformist in nature, Confederate conservative constitutional commitments "were within the mainstream of American constitutional development."[107]

Secondly, Confederate constitutionalism was designed to bring about limited national government, chiefly through the interpretation and implementation of the provisions and restrictions that appeared in the written constitution.[108] Antebellum fears about national government abuse led to a great effort to limit government in order to stem the tide of corrupt, partisan practices that many southerners (and northerners) believed had come to characterize mid-nineteenth century American government. In an

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cases where the Contracts Clause was invoked by litigants as a bar against the elimination of substitutes for military service, as in *Gatlin v. Walton*, 60 N.C. 310 (1864); *Weems v. Farrell*, 33 Ga. 413 (1863); *Burroughs v. Peyton*, 16 Va. (Gratt.) 470 (1864); and *Daly & Fitzgerald v. Harris and Harwell v. Cohen*, 33 Ga. 38 (1864). Brummer, "Judicial Interpretation of the Confederate Constitution," 112-113.

[106] Kirk, *Rights and Duties: Reflections on Our Conservative Constitution*, xv.

[107] Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 202. Fehrenbacher agreed with Nieman that Confederate constitutionalism reflected an adherence to eighteenth century republicanism. Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 65.

[108] Three other constitutional principles or doctrines were also essential to Confederate constitutionalism. These were federalism (the focus of chapters four and five), the separation of powers (the focus of chapter six), and national purpose (contained within chapters two through six).

improved Article I, Confederate framers placed limitations upon the national government in an effort to conserve the tenets of American constitutionalism and restore uncorrupt government without handicapping national government from completing its goals and objectives.[109] These provisions of the Confederate Constitution facilitated the conservative effort to restore the principles espoused by the framers in 1787 and the political ideas found in eighteenth century republicanism.[110]

Conservative purposes could be both written and unwritten. Russell Kirk argued that in the American constitutional tradition, the unwritten constitution existed "side by side" with the written constitution. Of these two constitutions, "one…is the formal written constitution of modern times; the other constitution is the old 'unwritten' one of political compromises, conventions, habits, and ways of living together in the civil social order that have developed among the people over the centuries."[111] This tradition of drawing upon written and unwritten constitutions was evident in the decisions of the state supreme courts where they interpreted and enunciated the principles and operation of the Constitution *and* the constitutional order of the Confederacy. State supreme courts drew upon textual provisions and the shared unwritten values, principles, and

[109] Particularly the enumerated powers of Congress under Article I, Section 8.

[110] DeRosa, *The Confederate Constitution of 1861*, 17; Nieman, "Republicanism, the Confederate Constitution," 204-205. DeRosa argued that "the C.S.A. Constitution is essentially a traditional Whig-Antifederalist document, designed not to thwart republicanism (government premised upon the consent of its citizenry) but to secure the states from uncontrollable and perhaps authoritarian central government." DeRosa, *The Confederate Constitution of 1861*, 132.

[111] Kirk, *Rights and Duties: Reflections on Our Conservative Constitution*, 4.

ideas of the Confederate nation.[112]

A Confusing Historiographical Tradition

The historiography about the Confederate Constitution and Confederate constitutionalism is undecided about the essential character of the Confederate constitutional order and a general survey of the major works in this field reveals a rather varied, confusing, and often inconsistent scholarly tradition. One reason why historians' arguments about Confederate constitutionalism and the importance of the Confederate Constitution have been so contradictory and confusing may be due to the brief life of the document or the desire to reduce Confederate constitutional thought into the doctrinaire framework of states' rights.[113] Since the Permanent Confederate Constitution existence lasted a little more than three years, some historians may "have either disregarded or understated its importance and have tended to belabor the

[112] *Ibid*., xvii.

[113] States Rights is a political doctrine or philosophy in which the states possessed sovereignty prior to the creation of the American nation and, when the nation was founded, the states never relinquished sovereignty, entering into a national compact to create a central government which was to be the agent of the states. Because the states retained sovereignty, they had to remain vigilant against encroachment upon state power by the national government and, if they believed that the national government had acted upon powers or authority that had not been delegated to it, the states possessed the ability to determine the constitutionality of the act and to nullify any national laws. Forrest McDonald, *States' Rights and The Union: Imperium in Imperio, 1776-1876*, (Lawrence, KS: University Press of Kansas, 2000), 4-5; Lacy K. Ford, Jr., "Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought," *The Journal of Southern History*, Volume 60, Issue 1 (February, 1994):19-58, 20, 21, 35, 49, 52; Arthur Bestor, Jr., State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860," *Journal of the Illinois State Historical Society*, Volume 54 (1961):117-180. Emory Thomas argued that the purposes of the Confederate government were to "affirm state sovereignty in general terms" and to codify "the Southern status quo." Thomas, *The Confederate Nation*, 64-66.

similarities between it and the United States Constitution."[114] Reviewing the historiography about the Confederate Constitution and constitutionalism reveals three basic arguments: no distinctive Confederate constitutionalism existed; Confederate constitutionalism lacked substance and was simply the product of wartime needs; and Confederate constitutionalism was based upon a corpus of substantive political ideas and an ideology solely based upon states' rights.

Those historians who argue that no distinctive Confederate Constitution or constitutionalism existed, contend that the southern constitution was "in most respects a copy of the U.S. Constitution" and that the general "verbatim" adoption of many provisions of the U.S. text is evidence that both documents were practically identical.[115] One reason for this conclusion, or at best, the lack of appreciation for the distinctive character and form of the Confederate Constitution may be due to its similarity to the U.S. Constitution.[116] At first glance, the document appeared to be very similar to the United States Constitution in existence at that time, with the exception of the substitution of the word "Confederate" for "United" whenever the phrase "United

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[114] Edward L. White, III, "The Constitution of the Confederate States of America: Innovation or Duplication?" *The Southern Historian*, Vol. 12 (1991):5-28, 6.

[115] James McPherson, *Ordeal By Fire, Volume I: The Coming of War*, 3rd edition (New York, NY: McGraw-Hill, 2001), 150 and *Battle Cry of Freedom: The Civil War Era* (New York, NY: Ballantine Books, 1988), 258; Bruce Catton stated that the Confederate Constitution was "very much like the Constitution of the United States" in *The Civil War* (New York: NY, The Fairfax Press, 1971), 16; Jesse Carpenter, *The South as a Conscious Minority* (New York, NY: The New York University Press, 1930); Bensel, *Yankee Leviathan*, 99.

[116] Retaining some language from the U.S. Constitution was part of a determined political strategy rather than a lack of creativity. White contends that the Confederate framers were able to provide for "a smoother transition for the Southern people from the Union to the Confederacy." White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 6.

States" appeared. Emory Thomas characterized the Confederate Constitution as "an altered version of the U.S. Constitution."[117] However, the Confederate Constitution was more than "mere imitation" of the U.S. Constitution. It was "a living and workable document that had the capacity to establish a form of government, which, because of its innovative forms, would have halted political wastefulness, stimulated an economical government, and restrained each governmental branch to its designated field of authority."[118] Yet, despite its apparent similarities to the U.S. Constitution of the period, the Confederate Constitution was a distinctive document that attempted to reform American constitutional government and redefine the balance of power and authority between the state and central governments.

For a second group of historians, the commitment to Confederate constitutional principles was weak and the development of constitutional arrangements, powers, and relationships was shaped by the war.[119] These historians have contended that the exigencies of America's first modern war proved to be the most significant influence upon the shape and character of Confederate constitutionalism and the meaning of the Confederate Constitution. Confederate leaders left the Union because they believed the federal government was undertaking actions that encroached on states' rights and the

[117] Thomas, *The Confederate Nation*, 64-66.

[118] White, III, "The Constitution of the Confederate States of America: Innovation or Duplication?," 6; Robinson, "A New Deal in Constitutions."

[119] Historians who have argued that Confederate constitutionalism lacked a substantive basis in ideas have included Curtis Amlund, Emory Thomas, Jesse Carpenter, and Richard Bensel.

resulting constitution "was established in the urgency of conflict."[120] But, according to Curtis Amlund, the war forced Confederate leaders to sacrifice the nation's constitutional principles established in the Confederate Constitution (most notably, federalism) in order to successfully prosecute the war. [121] This development caused a "practical expansion" that so empowered the national government that it became the dominant governmental entity, exceeding the separate and respective sphere of power to which it was limited under the Confederate charter.[122] Amlund maintained that Confederate officials in Richmond manipulated constitutional principles, chiefly the Confederate supremacy clause, "to gain political and constitutional ascendancy over the states."[123] Taking a rather limited view of the wartime state supreme court decisions, Amlund contended that state jurists interpreting the Constitution were compelled by the war effort to sacrifice principles for victory.[124] While Amlund argued that

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[120] DeRosa, *The Confederate Constitution of 1861*, 22-25.

[121] The Confederate government was an agent of change, transforming a revolution for states' rights into a centralized modernization effort led by a modern, central national government, see Thomas, *The Confederacy as a Revolutionary Experience*, 58-59.

[122] Amlund argued that "An effort was made at Montgomery to incorporate into the 1787 document a similarly worded constitution with differently intentioned meanings, but it did not work out well in practical terms. In reality the intent of the Confederate framers evolved into a conception of governmental responsibilities that approximated the conception of Washington leaders. Realistically, the full extent of the constitutional powers given Richmond signified that it would be able to assert itself against the states and exceed the sphere of action outlined for it in the Constitution." Amlund, *Federalism in the Southern Confederacy*, 27.

[123] *Ibid*. However, Amlund did not analyze the wartime cases that analyzed and explained the Confederate Supremacy Clause or the extent of government war powers under its provisions, as articulated by the courts.

[124] *Ibid*., 94.

constitutional principles were established but had to be sacrificed during the war, later historians of this school concluded that the demands of mobilization and modern war made virtually impossible any real sustained commitment to constitutional principles.

Richard Bensel's *Yankee Leviathan* is perhaps the best example of this understanding of the Confederate constitutional order as the product of mobilization and ongoing war-related exigencies. Bensel examined both the Union and the Confederacy as modern states and argued that there was very little difference in their constitutional orders, that they "started the American Civil War with almost identical governmental structures and developed their modern states in "close similarity," so "that their expansion and development during the war was almost *solely* the product of the nature of the challenge presented by the war itself."[125] Bensel, borrowing from Amlund's analysis of the Confederate constitutional order, saw no real difference between the Confederate and U.S. Constitutions, concluding that the Confederate framers "adopted a constitutional framework that was almost a verbatim copy of the federal model."[126] Bensel's assessment of the significance of states' rights was also shaped by his belief

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[125] Bensel, *Yankee Leviathan*, 12-13, 99-100.

[126] *Ibid*., 12, 99; Amlund, *Federalism in the Southern Confederacy*, 17-27; Thomas, *The Confederate Nation*, 64; and Lee, *The Confederate Constitutions*, 82-140. Bensel stated that three innovations provided for in Article I of the Confederate Constitution—"prohibitions against government subsidized internal improvements," the protective tariff, and state legislative powers to impeach Confederate officials—amounted to "little more than cosmetic adornments" because they were not used during the three years of war. He concluded that within this constitutional framework, the Confederate Congress "passed legislation that adopted without change almost all antebellum federal statutes." However, Bensel includes no analysis of state supreme court decisions or other provisions of the Confederate Constitution. Confederate conscription, exemption, suspension of the writ of habeas corpus, and other wartime statutes certainly broke with any antebellum legislative traditions and raised serious debates in the Confederate Congress about constitutional principles and values and national goals and objectives. Bensel, *Yankee Leviathan*, 12, 99-100.

that there were no configurative constitutional principles in the Confederacy; states' rights proved to be "a pragmatic political program" and once the southern states seceded from the Union, they "jettisoned states' rights and built a central state much stronger than either the antebellum or post-Reconstruction federal governments, a government to mobilize resistance to the military forces of the Union."[127]

Continuing Bensel's argument about the vacuous quality of Confederate constitutionalism, Mark Neely, in his study of political prisoners and civil rights in the Confederacy, argued that "under the pressures of a war for national existence, the Confederate Constitution proved as 'flexible' as the Constitution of the United States, on which it was modeled" and that the Confederate state was more committed to the successful prosecution of the war than the preservation of individual rights and liberties. Neely concluded that the Confederate constitutional order was so shaped by wartime demands that Confederate constitutionalism amounted to little more than a "myth."[128]

A third group of historians have maintained that the Confederate Constitution was distinctive, comprised of substantive ideas and principles, though their conclusions about the source of these have differed considerably. The configurative effect of the states' rights and state sovereignty ideologies on Confederate constitutional ideas has

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[127] Bensel, *Yankee Leviathan*, 13. Bensel does not see state building and constitutional principles as having an interrelated quality. He argued that "ultimately…most of the bureaucratic expansion of the Confederate state was built upon new foundations that had little or no precedent in antebellum experience. Much of this expansion was attributable to the central state mobilization of men and materiel for war." *Ibid.*, 103.

[128] Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*, 169.

shaped much of twentieth century historiography. [129] J.G. Randall, David Donald, and Forrest McDonald argued that the only modifications that Confederate framers made to the U.S. Constitution were those to accommodate states' rights.[130] Like Randall and Donald, Charles Lee ascertained that states' rights and state sovereignty played an important role in the Confederate constitutional order, but Lee argued that these were not the only configurative and substantive principles. Lee, though, perceived of the Confederate Constitution as part of the ongoing development of American constitutionalism as well as a southern political document. It was "the reform of the machinery of government that is manifested in the Confederate Constitutions" and, as a reform document, the Confederate Constitution was directed against the spoils system perpetuated by antebellum political parties, and in support of the fiscal integrity of the government. Lee, argued that the Confederate Constitution represents "a significant constitutional legacy" and "a milestone in the constitutional development of the United

[129] "A preponderance of Southerners saw in the preservation of slavery, in the sovereignty of the states, and in the creation of the Confederacy the application of basic American values: freedom and voluntarism (for whites); individualism, limited government, and local self-determination." Morton Keller, "Power and Rights: Two Centuries of American Constitutionalism" *The Journal of American History*, Vol. 74, No. 3 (Dec., 1987):675-694, 682; Roger D. Hardaway, "The Confederate Constitution: A Legal and Historical Examination," *The Alabama Historical Quarterly* (Vol. 44, Nos. 1 & 2, Spring & Summer 1982):18-31 and Paludan, "The American Civil War Considered as a Crisis in Law and Order," 1020.

[130] Randall and Donald argued that the creation of the Confederate Constitution "moved in old grooves; and in framing the new instrument for the Southern nation little originality was shown. In its general pattern the constitution closely resembled that of the United States; indeed at most points its wording was precisely the same. The main differences were in those features which looked to the guaranteeing of state rights…The emphasis upon state rights was made evident at the outset." J.G. Randall and David Donald, *The Civil War and Reconstruction*, 2nd edition (Lexington, MA: D.C. Heath and Company, 1969), 157-159.

States."[131]

In some agreement with Lee's conclusion about the Confederate charter being part of a developmental process, George Anastaplo argued that the Confederate Constitution was both "a commentary upon the United States Constitution" and "a challenge to its principles," addressing controversial issues and interpretations that had been the source of many antebellum problems.[132] Yet, Anastaplo broke with Lee on whether the Confederate Constitution differed from the U.S. Constitution, arguing instead that the Confederate Constitution reflects "a *radically different* [italics added] approach to the governance of a country from that found in the 1787 Constitution." Though Anastaplo did not specify how, it is clear from the enunciation of Confederate constitutionalism by the state supreme courts, that this difference existed both philosophically and operationally.[133]

Political scientist Marshall De Rosa also argued in favor of an understanding of the continuity of Confederate constitutionalism with the American tradition, drawing connections between "the fundamental issues of 1787 and 1861 (issues such as American

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[131] Lee, *Confederate Constitutions*, 150; Robinson, *Justice in Grey*, 149, 623-624. Cooper and Terrill likewise argued that there were notable differences between the two constitutions chiefly due to the emphasis in the Confederate charter to eradicate political corruption and protect slavery. William J. Cooper and Thomas E. Terrill, *The American South: A History*, 2nd edition (New York, NY: The McGraw-Hill Companies, Inc., 1996), 326-328.

[132] George Anastaplo, *The Amendments to the Constitution: A Commentary*, (Baltimore, MD: John Hopkins University Press, 1995), 126.

[133] Evident in the Confederate Constitution, as enunciated by the state supreme courts, was the fear and suspicion of special interests, commerce, and government subsidies, the diminished role of the Chief Executive as head of their respective party, the importance of federalism, and divided national government. *Ibid*., 127-131.

federalism, fiscal responsibility, and even republican government itself)."[134] DeRosa argued that the constitutional principles of the Confederacy bore a striking resemblance to Antifederalist ideas and principles on limited national government because "the primary concern of the Confederate framers was the centralization of political power at the national level to the detriment of the states; it was this centralization inherent in the political principles of the Federalists which they rejected."[135]

Although DeRosa understood Confederate constitutionalism as conservative, he did not dismiss its serious and substantive nature; the Confederacy "was neither simply a historic accident initiated by radicals attempting to prolong the life of an anachronistic system of labor nor the product of 'fire-eating' political opportunists seeking personal aggrandizement at the expense of their fellow citizens." Rather, "the Confederate States of America was the consequence of a constitutional crisis the origins of which could be traced back to the U.S. Constitution of 1789. It was not a crisis for constitutional government per se, but the consequence of an incrementally changing constitutional arrangement increasingly unacceptable to the southern section of the Union" and southerners "reaffirmed their *commitments* [italics added] to constitutional government under the auspices of the Confederate Constitution."[136] Confederate constitutionalism

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[134] DeRosa, *The Confederate Constitution of 1861*, 4.

[135] *Ibid.*, 5.

[136] *Ibid.*, 1. DeRosa warned against focusing on the slavery issue so that Confederate constitutional ideas and principles become reduced to legitimizing slavery as a social and economic system, that this would "slight a crucial period of American constitutional development." DeRosa argued for greater appreciation for Confederate constitutionalism since "many of the Confederate principles are indigenous to the American constitutional system of government…the Confederate Constitution is relevant

was a conservative reform effort designed to preserve a distinctly American constitutional form of government and the commitment of the framers to conserve American constitutional principles was rooted in their devotion to the principles of the Revolution but from which the antebellum U.S. government had strayed.[137]

In 1860-1861, Howell Cobb and many other southern political leaders characterized themselves as conservators of the American constitutional tradition and set about re-constituting a government they believed would adhere to and preserve those tenets enshrined in the Constitution of 1787 but that had been eroded by partisan politics during the antebellum period.[138] In the winter and spring of 1861, southerners chose to leave behind "the deterioration of American constitutionalism, a deterioration initiated and sustained by their political rivals in the North."[139] Southern leaders resisted the "inevitable changes that the political, social, and economic forces were thrusting upon the U.S. Constitution, transforming the community of states into a national community of individuals."[140] The resulting constitutions that Cobb and his colleagues created in Montgomery in 1861 and 1862 were very conservative reform

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because it raised, and continues to raise, pertinent questions that cannot be glossed over if American constitutionalism is to be placed on terra firma." *Ibid*., 2-3.

[137] In an 1862 public tract, Robert H. Armisted, of Virginia complained about the threat of "despotic power" that the Republican administration would visit upon the South, see *Soldiers of Our Army*, (Williamsburg, VA: Macfarlane & Fergusson, Printers, March 1862), 1, 3.

[138] DeRosa argued that the Confederates "were seceding on behalf of the U.S. Constitution, not against it." DeRosa, *The Confederate Constitution of 1861*, 17.

[139] *Ibid*., 1.

[140] *Ibid*., 17.

documents, part of their conservative effort to return to the constitutional principles of the founding.[141] Southerners believed that they were escaping from a system of constitutionalism which had so deteriorated by 1861, that the essential quality of American governance—that government rested upon the consent of the governed—had been eradicated from the political system and that the Constitution, which was to embody the philosophy and mechanics of this principle, had been perverted.[142]

Commitment to Preserve Republican Principles

Throughout the antebellum period, the U.S. Constitution remained the focus of federal government and national politics and, as sectional differences mounted in the United States during the 1840s and 1850s, many Southerners looked to the Constitution for resolutions. In 1860, the ascendancy of a sectional party to the Presidency and in the Congress meant to many southerners that the guarantees that they could expect and enjoy under the U.S. Constitution would no longer be protected and in drafting their new national charter, Confederate framers attempted to preserve constitutional protection and guarantees by imposing limitations upon the national government. To southern U.S. congressmen like Howell Cobb, a firm believer in conciliation and

[141] *Ibid.*, 1. The Permanent Confederate Constitution of March of 1862 has been characterized as a "reactionary document." As southerners opined in March of 1861, there was "nothing imperfect in the instrument which bound us together. But there was corruption, undermining, and weakening the main pillars which supported one part of the edifice; there was fanatacism [sic] which was endeavoring to destroy another," as portrayed in "A Strong Government," Richmond *Daily Dispatch*, March 2, 1861. One of the responsibilities inherent within this concept of conservatorship, and an integral part of constitutional law decisions on conscription and exemption statutes, was the insistence upon the "traditional" limitations of power of the central government.

[142] DeRosa, *The Confederate Constitution of 1861*, 1-2.

compromise with Northern politicians and statesmen, the Republican victory in 1860 had serious constitutional implications for it meant that Northern sectionalism and anti-slavery "nullifiers" of "constitutional obligations" had become the dominant political power in Congress, threatening the delicate balance of interests and compromise in Congress.[143] The South would face "doctrines and principles violative of her constitutional rights, humiliating to her pride, destructive of her equality in the Union, and fraught with the greatest danger to the peace and safety of her people." [144]

Southerners perceived the demise of a *national* understanding of "the common good" by the Republican Party as "wanton violation" of the tenets of the U.S. Constitution. They considered this "a declaration of the purpose and intention of the people of the North to continue, with the power of the Federal Government, the war

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[143] Howell Cobb, *Letter of Hon. Howell Cobb to the People of Georgia on The Present Condition of the Country* (Washington, DC: M'Gill and Witherow, Printers, 1860), 14.

[144] *Ibid*., 15. In December of 1860, Robert Toombs wrote of the "wrongs" of the crisis in constitutional terms, that "we shall be driven out of the Territories by law. Upon this Mr. Lincoln and his party are unanimously agreed" and "This they propose to do in violation of the Constitution of the United States as generally construed from the beginning of the Government and in express violation of that instrument as expounded by the Supreme Court of the United States." Ulrich Bonnell Phillips, ed., *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*. (New York, NY: Da Capo Press, 1970), 520-521. David Clopton, Alabama's commissioner to Delaware, in his January 1, 1861 letter to Delaware's Governor, cited the Republican victory as a primary threat to the constitutional rights of southern citizens. He also referred to an ongoing threat of corruption that might accompany Lincoln's election and a dominant Republican Party: "The fact that it is a sectional party includes the additional fact that its aim will be, by all the means & legislation and of the administration of the Government, to promote and foster the interests and internal prosperity of one section, see *Official Records of the War of the Rebellion*, series IV, vol. 1, 34. The same sentiment was echoed by the Carroll County Resolution in support of secession: "'They have the power and the will to trample under foot, and totally disregard the rights guaranteed to us, by our forefathers in the Constitution, leaving us no position in the Union, but one of inequality, degradation and misrule.'"

already commenced by the ten nullifying States of the North, upon the institution of slavery and the constitutional rights of the South."[145] The inability to protect the institution and expansion of slavery and maintain the traditional system of *national* political compromise within the framework of the Constitution prompted many southerners to believe that the republican ideals of virtuous government, a national government facilitating the common good and interests of the entire people, and national virtue, had been overcome by sectional politics. This encouraged southerners to abandon the federal government through secession.[146]

Howell Cobb complained of an increasingly sectional Northern prejudice in 1860; northerners had "trampled upon the Constitution of Washington and Madison, and will prove equally faithless to their own pledges. You ought not—cannot trust them. It is not the Constitution and the laws of the United States which need amendment, but *the hearts* [italics in original] of the northern people." Cobb was not optimistic about any constitutional resolution because of the belief that the common bond of national purpose and a national sense of a common good was lacking and this

[145] Cobb, *Letter of Hon. Howell Cobb to the People of Georgia on The Present Condition of the Country*, 15.

[146] Despite antebellum criticisms of the national government's broad interpretation of implied powers, the Confederate framers did not do away with implied powers nor did they limit the national government to only those powers expressly delegated to it. Rather, they attempted to forestall abuses of such powers by specifying which express powers were to be delegated to the national government while refusing to handicap the national government from facilitating its responsibilities in the national sphere. Anastaplo, *The Amendments to the Constitution: A Commentary,* 126-127. This represented an effort to perfect constitutional for the sake of preserving principle and purpose.

was essential to a common understanding of the constitutive document.[147] He called the amendment of the U.S. Constitution "a hopeless undertaking" and the amendment of the hearts of northerners "an impossibility" and concluded that "[n]othing now holds us together but the cold formalities of a broken and violated Constitution. Heaven has pronounced the decrees of divorce, and it will be accepted by the South as the only solution which gives her any promise of future peace and safety."[148]

It was this fearful reaction to partisan and sectional politics that had led Southern state governments, charged with the responsibility of protecting the constitutional rights of their citizens, to protect them by drastic means, even if secession was the means to accomplish this.[149] Antebellum southerners believed they were the

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[147] C.F. Jackson wrote to "My Dear Shields" in December of 1860 raising the issue of remaining in the Union, only if constitutional protections would be guaranteed through constitutional amendments: "I do not know that we should ask this by way of amendment, but rather as an explanation of the tine meaning of the Constitution. We should also require a proper penalty of every State that has failed to comply in good faith with the Constitution and laws upon this subject," *Official Records of the War of the Rebellion*, series IV, vol. 1, 27.

[148] Cobb, *Letter of Hon. Howell Cobb to the People of Georgia on The Present Condition of the Country*, 15.

[149] When Alabama Governor A.B. Moore addressed the members of the [U.S.] House of Representatives in January of 1861, he declared that the state leaders were bound to protect the interests of their citizens from threat by a sectional and consolidated government, see *Official Records of the War of the Rebellion*, series IV, volume I, 48. Other southern states followed in similar fashion, citing the disintegration of the American constitutional system, especially due to partisan politics. Florida's governor stated that the "sectional party" [the Republican Party] had "destroyed the Government and buried the spirit of the Constitution" see *Ibid.*, 87. In Virginia's convention it, too, was "convinced that those rights [constitutional rights], cannot be secured in the Federal Union." *Ibid.*, 89. Jonathan Gill Shorter, writing to Georgia Governor Joseph E. Brown in January of 1861, believed about the Republican Party that "under the forms of the Constitution and the laws, they will usurp the machinery of the Federal Government and madly attempt to rule, if not to subjugate, and ruin the South." *Ibid.*, 16. Additional concerns about Republican victory in 1860 were raised in a

true heirs and conservators of the traditional republican ideology of the Revolution, a political philosophy that included "the right of the people to govern themselves as free political communities through the separation and division of power and the rule of law, including a constitution as a permanent, paramount, and binding political law."[150] Having withdrawn themselves from the Union because of the perceived threats to their constitutional guarantees because of a lack of an understanding of the common national good, Confederate framers drafted a constitutive document more committed to specifying the nature and features of American limited government and with a philosophical idea of the common good that was national in character.

In 1860-1861, having cast themselves in the role of conservators of the republican ideal, many southerners set about creating a government that would adhere to and, most importantly, preserve in the national constitutive document those principles inherited from the Revolution, specifically virtuous and uncorrupt representation and limited national government. In April of 1861, Confederate Congressman Thomas Reade Rootes Cobb told his constituents in Clark County, Georgia that the Confederate effort was "A bloodless revolution," a monumental event "from which the future

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resolution before the Georgia State Convention in which it was declared "while the State of Georgia will not and cannot, compatibly with her safety, abide permanently in the Union without new and ample security for future safety, still she is not disposed to sever her connection with it precipitately nor without respectful consultation with her Southern confederates. She invokes the aid of their counsel and co-operation to secure our rights in the Union if possible, or to protect them out of the Union if necessary." *Ibid.*, 58.

[150] Belz, "The South and the American Constitutional Tradition at the Bicentennial," 20.

historian will mark a new era in the progress of man."[151] Cobb explained that, almost a century after the Revolution, the Confederacy would realize "the full fruition of that theory of self-government which the Revolution of 1776 presented to an incredulous world" and the founding principles of limited government would be realized more completely; "soon the principles of *this* [emphasis in original] Revolution will be so far acknowledged that the oppressed of the world shall feel that the calm voice of the people may peacefully overturn the government which withholds from the governed the protection for which it was established."[152] The idea of civic virtue in politics remained an important one throughout the war. In its January 1864 "Address to the People of the Confederate States, the editorial staff of the *Atlanta Register* referred to this vision of the republican past and the importance of republicanism and a common good towards the creation of a constitutive national charter, describing how "the whole population has been condensed into one mighty incarnation of valor, and, for the first time in the annals of humanity, men, women, children, have been joint-participants in a grand conflict, and

[151] The imagery and identification with the Revolution was significant in shaping the understanding of the Confederate constitutionalism. Even a year after Cobb's comments, the identification with the Revolution proved to be strong. *The Daily Picayune* of New Orleans indicated that the war was a cause that "contains every element of the struggle for freedom and property and rights which marked the struggle of 1776," New Orleans, *The Daily Picayune*, February 19, 1862. On its front page of February 23, 1862, in large capital letters, the daily referred to the war as the "Second American Revolution," New Orleans, *The Daily Picayune*, February 23, 1862.

[152] The constitutional protection of the institution of slavery was a serious issue with serious constitutional implications for other aspects of southern life because it fell under the category of domestic tranquility. Any failure, or worse yet, any partisan effort by the executive and legislative branches to interfere with the domestic tranquility of the southern institutions represented a serious breach of constitutional guarantees and purposes. "Substance of An Address of T.R.R. Cobb, To His Constituents of Clark County," April 6th, 1861, 6.

joint heirs of its illustrious renown." Rallying the people in a national common cause, the serial declared "towards one another, towards our political institutions we are all republicans—the same republicans as when in 1789, we shaped the American Constitution to be the embodiment of the popular will."[153]

In their wartime decisions, state supreme courts articulated these distinctive national republican values and principles, especially a common, national majoritarian good that was held to be more important than state interests and individual rights. These values and principles became very important in the state court decisions on substitution and addressing whether the repeal of substitution had breached a contract between the principal and the Confederate government established under the conscription acts.[154]

In the Second Conscription Act, passed in September of 1862, the Confederate Congress made substitutes between the ages of 35 to 45 years subject to conscription, with the added result that their principals were thereby subject to conscription and national military service since the substitute serving in their place was now liable on their own.[155] A subsequent statute, passed January 5th, 1864, abolished substitution altogether, a development that raised serious questions about the constitutionality of such an act. The question was whether the repeal of substitution breached a contract between the principal

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[153] "Address of the *Atlanta Register*, to the People of the Confederate States," *Atlanta Register*, January 1, 1864.

[154] Moore, *Conscription and Conflict*, 179.

[155] "An Act to amend an act entitled 'an act to provide further for the public defense,' approved 16th of April, 1862," see *Public Laws of the Confederate States*, 1st Cong., 2 Sess., 1862, Chapt. XV.

and the Confederate government established under the conscription acts. The answer depended upon whether a contract had actually been created and whether the national government was precluded, by constitutional provision, not to impair the obligation of such a contract if it did exist.[156] The cases that resulted from the repeal of substitution compelled the state supreme courts to define the Contracts Clause of the Confederate Constitution. Courts enunciated the importance of republican values on public virtue, public duties, and common good in Confederate constitutionalism. For a nation founded in secession, states' rights, and the assertion of vested property rights, the resulting doctrinal development enunciated the priority of national purpose and a national common good over individual rights as a matter of public policy. This is significant because it underscores the Confederate purpose of creating a new nation that was to be more than the agent of the states and serve the larger *national* political community.

In 1863, North Carolina's Chief Justice Pearson insisted that the initial understanding between the Confederate government and principals who had previously hired substitutes was a binding contract that, under the Confederate Constitution, Congress could not impair and therefore he issued writs of habeas corpus to discharge principals held by enrolling officers.[157] Pearson was unwilling to consider the substitution as a "legislative contract" but his opinion was overruled in 1864 by the court en banc in *Gatlin*

[156] The Contracts Clause is found in Article I, Section 10, clause 1 of the Confederate Constitution. It provides that "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, or ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility."

[157] *In Re Bryan*, 60 N.C. 1 (1863).

v. Walton,[158] where the North Carolina court addressed the issue of whether the Confederate government had bestowed upon principals a contract guaranteeing them substitution and exemption from military service.

In *Gatlin v. Walton*, Associate Justice Battle, borrowing from Chief Justice Pearson's decision in *Ex Parte Walton*,[159] extended the principle of public duty. He found government possessed the power to invalidate a contract between the principal and the Confederate government "by virtue of the power inherent in all governments whose organic power does not expressly deny them that power."[160] In Pearson's original decision, *Ex Parte Walton*, he chastised those who sought to extend the language of the Constitution to fit their needs, reminding them that "...the Confederate States was a *written Constitution*, which all officers *are sworn to support*. This Constitution, and laws made in pursuance thereof, is 'the supreme law.' The Constitution, being *written*, can neither bend nor stretch, even in a case of extreme necessity."[161]

On February 19, 1864, when the court, sitting en banc, finally addressed the issue of whether substitution conveyed a contractual obligation upon the national government, it did so amongst great public interest and anticipation. In the days before the case was to be

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[158] *Gatlin v. Walton*, 60 N.C. 310 (1864).

[159] *Ex Parte Walton*, 60 N.C. 205, 222 (1864). Walton was conscriptedn August of 1862 under the April Conscription Act, obtained a substitute (as provided for under section 9 of the act), and was discharged from service. Walton was later conscripted under the act of January 5, 1864 and claimed that by virtue of his obtaining a substitute for conscription under the first conscription act, he was discharged from any further military duty for the war.

[160] 60 N.C. 310; Moore, *Conscription and Conflict*, 179-181; Amlund, *Federalism in the Southern Confederacy*, 90.

[161] 60 N.C. 205, 226.

heard, the *Greensboro Patriot* indicated the importance of the trial in providing a definitive answer to a divisive issue and their expectations for "able and elaborate arguments, to be followed with a final decision, now highest known to the law, from a full Bench; which we trust may be cheerfully submitted to and acquiesced in, by all upon this at present much vexed question."[162] Battle, though, did not disappoint his fellow North Carolinians. The *Carolina Watchman* applauded the opinion by Justice Battle in *Gatlin v. Walton* stating that the decision "embraces the broad and comprehensive argument of the power, as an attribute of sovereignty. It enforces the just conception of a government in its strength and majesty."[163]

In *Gatlin*, Walton argued that the act of April 16, 1862, which authorized him to exempt himself from conscription by hiring a substitute, had resulted in his entering into a binding contract with the government that the Confederate Congress could not impair under the Confederate Contracts Clause. Battle stated that, when the necessities of the country required it, the government did have the power to repudiate such an agreement and, when necessary for a common good, to impair such contracts, dismissing any characterization of the nature of Walton's interest in exemption as a property interest under the Constitution. The exemption was characterized simply as a "personal privilege" and Walton was liable to the national government since "the necessities of a nation, as of an individual, have laws of their own" and the interest of the nation and preserving the

[162] Salisbury *Carolina Watchman*, February 15, 1864.

[163] *Ibid*., July 18, 1864.

common good were of a higher priority than the individual's interest [164]

Battle maintained that the superior duty lay in the central government's duty to protect the population and that the war power wielded by the central government was significant as an "absolute power to control the citizens for military duty." Here, Battle refused to accept the argument that Walton could contract himself out of his duty to the nation and at the injury to a national common interest, stating, "A service was thus demanded of him, which he owed, and from which he had no escape as a matter of right. Why should the Government make any contract with him dispensing him irrevocably from duty, and weakening and fettering its military power?"[165] Underscoring the interest in resolving this issue and the extent of constitutional development in other state supreme courts across the South, Associate Justice Manly referred in his concurring opinion to other decisions in Georgia,[166] Virginia,[167] and Alabama.[168] He said, "We have been assisted in our consideration of the subject before us by cases of a like nature …which seem to have been well considered. These cases decide the acts of April and September, 1862, and also the act of January, 1864, to be constitutional and valid." He added "They are entitled, I think, to much weight, and serve to confirm and strengthen the conclusion to which this Court has come."[169]

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[164] 60 N.C. 205, 213; see also Hamilton, "The State Courts and the Confederate Constitution," 399.

[165] 60 N.C. 205, 219.

[166] *Daly and Fitzgerald v. Harris and Harwell v. Cohen*, 33 Ga. 38 (1864) .

[167] *Burroughs v. Peyton & Abrahams v. Peyton*, 16 Gratt. 470 (1864).

[168] *In Re Tate*, 39 Ala. 254 (1864).

[169] 60 N.C. 205, 221.

Beginning in 1864, several jurisdictions handed down decisions that articulated more clearly the nature of the Confederate Contracts Clause. These cases reveal a commitment to the social contract that lay at the core of the Confederate constitutional order. Evident in the courts' analyses was the paramount importance of substantive constitutional principles, such as the primacy of the commonwealth and the duties of individual citizens owed to other citizens within the political community. State supreme courts concluded that there were substantive principles embedded within the social contract of the Confederate Constitution that could not be removed from it through legislation.

In the Virginia case of *Burroughs v. Peyton*, the court took up the question of whether the January 5, 1864 act to revoke all exemptions due to substitution was unconstitutional because the authority to do so was not provided under the Confederate Constitution and whether it was specifically prohibited under the prohibition against impairing the obligation of contracts.[170] In *Burroughs*, the court decided two cases simultaneously, with both appellants claiming that they were held illegally as conscripts by Major T.J. Peyton, commandant of Camp Lee, near Richmond, and that both had hired substitutes who were still in service. Burroughs' substitute was an unnaturalized foreigner and Abrahams' substitute was a fifty-seven-year-old.

The appellants had challenged the conscription acts under the argument that Congress possessed no power to compel "citizens of a state" into the Confederate Army, "[t]hat a power so to do, would be despotic in its nature, and far greater and more dangerous than any possessed by the government; subjecting as it does the personal

[170] *Burroughs v. Peyton* 16 Va. (Gratt.) 470 (1864).

freedom of every citizen to arbitrary discretion.[171] Associate Justice Robertson made clear that any limitation stemming from the Constitution's Article I, Section 10, clause 1 prohibition from impairing the obligation of contracts applied only to the states, that the national charter "does not impose any restriction upon the power of Congress in this respect."[172] Robertson distinguished the language of the Constitution by pointing out that "the term 'contracts' in that clause is not meant to include rights and interests growing out of measures of public policy. Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired under them, those rights and interests cannot be considered as violated by subsequent legislative changes which may destroy them."[173]

The issue of whether the national government could contract away its obligations to preserve the common good and safeguard the public interest materialized in Virginia in *Burroughs v. Peyton*, with the Virginia court affirming the North Carolina court's decision in *Gatlin v. Walton*. Here, Robertson raised the issue of national purpose as a bar against any argument that the Confederate government could contract away its constitutional duties and obligations to the people of the nation. Once the government had been given the authority for preserving the national good and conferred with the war powers to protect the nation, these constitutional powers were to be used and "[n]o government can have the right to endanger the life of the nation it represents, by

[171] *Ibid*., 473.

[172] *Ibid*., 485-486.

[173] *Ibid*., 490.

contracting that it will not exercise the powers confided to it."[174] The preservation of the nation took on a real importance in *Burroughs* and, against the claims for individual liberties being abrogated, Robertson stated that "[t]he power of coercing the citizen to render military service" while "inconsistent with liberty, it is essential to its preservation."[175]

Robertson made clear that substitution was a temporary grant against which the national government and the safety of the nation could make demands as a matter of duty since "the obligation of the citizen to render military service is a paramount social and political duty. It is a matter in which the whole body politic is interested."[176] In his opinion, he reasoned that substitution "was originally permitted as a privilege to individuals, and not from any benefit the government expected to derive from it; and it did not cease to be a privilege because of the terms imposed as a condition of granting it."

This was a significant step for he next drew upon the U.S. Supreme Court's decision in *Charles River Bridge v. Warren Bridge*, stating that the public interest was to be protected as a general rule of construction since "all grants of privileges and exemptions from general burdens are to be constructed liberally in favor of the public and strictly against as against the grantee. Whatever is not plainly expressed and unequivocally granted is to be taken to have been withheld." The plain language of the applicable section 9 of the April 16, 1862 act was "'That persons not liable for duty

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[174] *Ibid*., 489.

[175] *Ibid*., 473.

[176] *Ibid*., 487.

may be received as substitutes for those who are, under such regulations as may be prescribed by the Secretary of War'" and Robertson concluded that "This is the whole provision on the subject. There is not one word to show that it was intended to extend the exemption from liability, by reason of having furnished substitutes."[177] Robertson also rejected the assertion that no authority to conscript (a specific mode of raising armies) existed under the general grant of power to raise armies, that conscription was "repugnant to the spirit of free institutions, the principles on which our constitution rests, and the rights secured by it." Robertson identified the separation of powers issue and stated that it was the constitutional responsibility of Congress, not the courts to determine the nature of the necessity to provide for the public defense by ending all exemptions by substitution. But, since Congress had exercised its constitutional duty in identifying the necessity, the courts were bound to enunciate these clearly using appropriate rules of construction and following the provisions of the Confederate Constitution.[178]

In *Burroughs*, it became more evident that the national and not the state governments became the principal guarantor of the peoples' general welfare, undermining an important idea in the states' rights ideology. The duty of the national government to protect *all* Confederate citizens was a permanent and highly important constitutional duty and could not be abrogated by individual claims. In Virginia, the court held that "[n]o right has been conferred on the government to divest itself, by contract or otherwise, of the power of employing, whenever and as the exigencies of the

[177] *Ibid*., 493-494.

[178] *Ibid*., 473.

country may demand, the whole military strength that has been placed at its disposal."[179] Robertson made clear that substitution was a temporary grant against which the national government and the safety of the nation could make demands: "[t]he arrangement of substitution cannot be made to extend further than to discharge the person putting in the substitute from the liability to which he is then subject under the existing law," and any interpretation of the Contracts Clause that would impact the national obligation for national defense had to take into account the national social contract.[180] Robertson made clear that "[t]he obligation of the citizen to render military service is a paramount social and political duty. It is a matter in which the whole body politic is interested."[181] Here, the court articulated the republican idea of a national common good that was to be protected. The national government, in the exercise of its constitutional powers and authority and in furtherance of meeting its constitutional obligations to protect and preserve the common good of the nation, could operate directly upon individuals in the states who owed duties and obligations as Confederate citizens to their national community, the Confederate States of America.

In the 1864 case of *Daly & Fitzgerald v. Harris and Harwell v. Cohen*, a jointly-decided case, Daly, Fitzgerald, and Cohen hired substitutes for Confederate service, all of whom were accepted and mustered into Confederate service.[182] Following the passage of the January 5, 1864 act, which prohibited exemptions on the basis of previously having

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[179] *Ibid*., 488.

[180] *Ibid*., 493-494.

[181] *Ibid*., 487.

[182] *Daly & Fitzgerald v. Harris and Harwell v. Cohen*, 33 Ga. 38 (1864).

supplied a substitute, Conscript Bureau officers summoned all three for Confederate service. The Georgia court considered whether the January 5th, 1864 act was unconstitutional because it denied these three the "right of exemption from military service vested in them by a contract between the Confederate Government and themselves" and thus resulted in the impairment of the obligation from a valid contract.[183] Associate Justice Jenkins developed the court's opinion that exemption was only a privilege by pointing out that the extension of the privilege and the withdrawal of it had been done by the same Congress comprised of the same elected individuals who in no way ever intended to bind themselves or successive Congresses to any course of action which might in the future be detrimental to the nation: "It is the Congress withdrawing an exemption previously granted by itself, alleging as its reason, that the altered circumstances of the country forbid its longer enjoyment" and Jenkins called any judicial interpretation to the contrary a "novelty in jurisprudence."[184]

Jenkins' interest in providing consistency with other decisions became evident in his analysis of how statutory exemptions were handled by other state courts. Jenkins pointed out that statutory exemptions were provided for mechanics and those with special trades. However, exemptions were based upon a contingency that the exemptee would provide the nation with a service more valuable than military service and the government always retained the right to revoke such a statutory exemption without allegation that it had breached a contract. Likewise, here, the government could revoke the exemption provided to principals when a greater service to the nation could be had

[183] 33 Ga. 38, 41.

[184] *Ibid*., 47-48.

through their military service. Without the intent to be bound irrevocably, an essential consideration in determining whether a contract existed, Jenkins held that no contract had been created.[185]

His textual analysis of the legislation and the Confederate Constitution concluded that "the government had no intention to contract, and hence the element of mutual assent of minds and wills was wanting."[186] The other reason that Jenkins refused to characterize exemption as a contract was because of the civic responsibilities which he identified as part of the Confederate social compact and implicit in the Confederate Constitution: "Writers upon the social compact and political law, affirm the proposition inwrought with the foundation of all society, that each member owes *to all other members* [in original] (not to government), the duty of defending the State, as far as he is capable, and that governments instituted simply to administer the public affairs of organized society, are powerless to release him from this obligation…it is not true of all governments invested with legislative power for the common weal, that no Legislature can, by contract, divest either itself or its successors of any power necessary to the well-being of the State.[187] Jenkins also went on to state that to assume that the Confederate government could contract itself out of its responsibilities was violative of the fundamental principles inherent in any government and especially in the Confederate charter: "that an agency

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[185] *Ibid*., 49.

[186] *Ibid*., 50.

[187] Jenkins cited to numerous treatises and U.S. Supreme Court cases, including *The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) ; *Goszler vs. Georgetown*, 19 U.S. (6 Wheat.) 593 (1821); and *Ohio Loan, Insurance and Trust Company vs. Debolt*, 57 U.S. (16 How.) 416 (1854). *Ibid*., 50.

established by society for certain specified ends, may, in its discretion, defeat those very ends…would be contrary to first principles, and subversive of all government…We need not go to remote antiquity nor inquire into first principles, upon which the social compact is founded…The solution is the question is found in a document, accessible to all, recognized as fundamental as supreme law, ordained but three years since, whereto we all were consenting."[188] As Jenkins pointed out, "the Constitution contains no express grant of the power in question" namely, to enter into contracts exempting individuals out of military service to the nation, in derogation to individual civic duty and specific purposes and responsibilities articulated in the constitutive document.[189]

Yet, the national government was not alone in possessing constitutional duties; there were also significant individual duties which the national government had to enforce if the common good was to be served, "that the well-being of society, and the daily operations of the Government, impose upon the citizen certain public duties, which, if not performed upon requisition, must be enforced," such as the public duty of the juror, which if not maintained, had to be enforced.[190] However, "the obligation of public duty" owed to preserve the nation and the common good through military service was essential to the very fabric of society and public order. Jenkins stated that "each one owes to all of his associates the duty of defending them against external dangers. Without this, there can be neither government nor society." This was not a specific provision but an obligation older than any written constitution. Those clauses of the

[188] *Ibid*., 51-52.

[189] *Ibid*., 53.

[190] *Ibid*., 32-33.

Confederate constitution which authorize the raising of armies and calling forth of the militia do not create: [sic] they but recognize the obligation and provide for its enforcement." Allowing easy access to exemptions would violate these social principles and permit recusant conscripts "to throw off the burthen [sic] of a public duty?" [191]

Republicanism formed the basic "vision" of the Confederate framers and shaped the national charter as a reform document to reflect the values and constitutional ideas shared by southerners generally. Confederate framers were committed to conserving republicanism as a founding principle, with its emphasis upon disinterested and virtuous government, virtue, and common good.[192] These principles shaped southern expectations and, by 1860, many southerners had become vehemently opposed to partisan politics, specifically Republican Party politics, because of political corruption and abuse.[193] The conservative commitments of the Confederate framers and the

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[191] *Ibid*., 33. Similar conclusions were also reached by the courts in Texas and Alabama, as in *Ex Parte Abraham Mayer*, 27 Tex. 715 (1864) and *The State, ex rel. Graham, in re Pille*, 39 Ala. 459 (1864).

[192] The Confederate Constitution "embodies the distinctive principles of republican government to which the South was committed." DeRosa rejects the argument made by Jesse Carpenter that the U.S. Constitution and the Confederate Constitution were very similar with only "slight" modifications in wording used in the respective documents. DeRosa, *The Confederate Constitution of 1861*, 17.

[193] Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 204-205. As Ericson pointed out, "The existence of a common interest binding together the whole nation is one of Webster's political truisms." David F. Ericson, "The Nullification Crisis, American Republicanism, and the Force Bill Debate," *The Journal of Southern History*, vol. 61, No. 2 (May, 1995):249-270, 264; Daniel Webster, *Writings and Speeches*, vol. VI (Boston, MA: Little, Brown, 1903), 222; Robert F. Dalzell, *Daniel Webster and the Trial of American Nationalism* (Boston, MA: Houghton Mifflin, 1973), 33-34; Daniel Walker Howe, *Political Culture of the American Whigs* (Chicago, IL: University of Chicago Press, 1979), 217.

innovations they would employ in their new constitutive document were heavily influenced by this republican ideology. They became an important component in Confederate constitutionalism that provided the perspective and language that "deeply influenced the Confederate framers' approach to constitutional reform, especially the significant changes they made in the presidency."[194] They would also shape the jurisprudence of the state supreme court justices who sought to enunciate its principles accurately and in conformity to the intent of the founders and the nation they had represented.

Confederate Commitment to Limited Government

The Confederate Constitution and the constitutionalism that emerged during the war reflected a commitment to limiting national government, a commitment made even more significant in the Confederacy because of the many war-related demands that pulled the national government towards consolidation and a greater exercise of power and authority.[195] In 1861 and 1862 Confederate framers were committed to preserving limitations upon national government based upon their understanding of the Constitution of 1787 and their antebellum experiences. To this end they drafted a national charter with more specific limitations in Article I, Article II, and Article V than

[194] Discussed in Chapter Three.

[195] The centralization caused by the war was of critical concern. DeRosa argued that the Confederate framers' commitment to limited national government was a major political and constitutional objective because "the primary concern of the Confederate framers was the centralization of political power at the national level to the detriment of the states." DeRosa, *Confederate Constitution of 1861,* 5.

contained in the U.S. Constitution of 1787.[196]

In Article I, Section 1, the Confederate framers' commitment to limited government included significant and numerous alterations to the legislative powers exercised by the Confederate Congress. Their restrictions were substantial and more than fifty percent of all changes in the draft of the Permanent Confederate Constitution were made in this first article.[197] One of the most significant revisions was changing the conveyance of national legislative powers so that these powers were *delegated* to the Confederate Congress instead of being *granted*, as they were in the Constitution of 1787.[198] This reflected the belief that the Congress acted as the representative of the people and this delegation of sovereignty was not a permanent one. J.L.M. Curry characterized this as an expression of states' rights thinking, though it reflected limited government restrained within republican guidelines since "'[t]he permanent Constitution was framed on the States rights theory, to take from a majority in Congress unlimited control, and to give effective assurances of purity and economy in all national legislation.'"[199] This delegation was a temporary trust of the sovereignty of the people. Although this provision has been interpreted as providing that Congress was to be the

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[196] Donald Lutz argued that limiting governmental power was a purpose by which a constitution was to be measured. Lutz, *Origins of American Constitutionalism*, 16. Limitations upon the President in Article II and the Amendment process in Article V are both discussed in Chapter Three.

[197] Lee, *The Confederate Constitutions*, 89.

[198] The full text from Article I, Section 1 is "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" [italics added].

[199] J.L.M. Curry, *Civil History of the Confederate Government, With Some Personal Reminiscences* (Richmond, VA: B.F. Johnson Publishing Company, 1901), 69.

"agent of the individual states" and that "the states could withdraw the power they had given Congress whenever the need arose," such a principle was specifically rejected during the war bythe state courts .[200] This emphasis upon a sovereignty emanating from the people and the national government's responsibility for facilitating the will of the people was also brought to bear upon the procedures for electing Confederate Senators. In Article I, Section 3, clause 1 of the Confederate Constitution, Confederate Senators were to be "chosen for six years by the Legislature thereof, at the regular session next immediately preceding the commencement of the term of service." The end result of this revision would be the election of national senators by state legislators who were themselves recently elected to office. Free from the corruption of their own extended incumbencies, the state legislators would make choices in accord with the will of the people with whom they would have had recent affiliation prior to being elected.[201]

One of the most profound examples of the commitment to limited government in the Confederate Constitution, however, is the provision by which state legislatures could impeach Confederate federal officials. The language contained in Article I, section 2, paragraph 5, afforded that "any judicial or other Federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of

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[200] Hardaway, "The Confederate Constitution," 23. In *Ex Parte Abraham Mayer*, 26 Tex. 715 (1864), the court specifically rejected any belief that the Confederacy was the creation of the states. Associate Justice Reeves held that the Confederate government was the creation of the people of the Confederacy, that "the government of the Confederate States, like the government of a state, is derived from the same source, the people, and founded on their authority; that the constitution and laws of the Confederate States are the supreme law of the land, and not in any sense dependent on the constitution of a state for their authority," 26 Tex. 715.

[201] Hardaway, "The Confederate Constitution," 27. This provision was intended to make Confederate Senators "more beholden to their state legislature's directives." DeRosa, *The Confederate Constitution of 1861*, 42.

both branches of the Legislature thereof."[202] Under this paragraph, Confederate officials, including federal judges, were subject to the biases and influence of the local state constituencies, rather than owing their complete allegiances to the central government, reinforcing the belief that the people were the source of sovereignty and to ensure that national government policies reflected the will of the people.[203] In Alabama, Associate Justice Stone added that the national government was intended to be limited under the Constitution in the exercise of governmental powers and vigilance was necessary "to prevent it from enlarging its powers by construction."[204] Under the threat of impeachment, no Confederate official could act with impunity to expand the powers of the national government and in defiance of the principles of limited government.

The ability of Congress to expand its powers by construction had been a serious threat to southerners and in the Constitution, the Confederate framers attempted to prevent this from occurring by making significant revisions to congressional powers under Article I, Section 8. Congressional taxing power was constrained in order to prevent abuse and Congress was provided with only enough power to lay and collect taxes to pay government debts, provide for the common defense, or pay for the business

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[202] *Journal of the Congress of the Confederate States of America*, 1:909-923; Lee, *Confederate Constitutions*, 173.

[203] On March 2, 1861, T.R.R. Cobb introduced the provision for impeachment of federal officers. Lee argued that this was "a significant embodiment of the theory of state rights." Lee, *The Confederate Constitutions*, 92.

[204] *Ex Parte Hill, In Re Willis, et al.* 38 Ala. 429, 454-456 (1863).

of the government.[205] The restriction of congressional powers under Article I, Section 8 was also achieved with the inclusion of language and powers that were more specific and less ambiguous than the language used in the U.S. Constitution. During the antebellum period, the phrase "post-roads" had been interpreted broadly in order to facilitate ambitious federal road projects. Confederate framers' commitment to limited government led them to substitute the earlier language from the U.S. Constitution for the phrase "post-routes."[206]

Fiscal irresponsibility had been a common allegation leveled against the U.S. Congress, especially due to the extravagances with pork barrel legislation and the waste of national funds. Undeterred in their commitment to limited government, Confederate framers revised their national constitutive document to require specificity in bills of appropriation as to the specific amount of funds requested and the purpose of the appropriation. Article I, section 9, clause 20 required that every bill be related to only one subject, which was also to be expressed in the title of the bill, a development which was designed to prevent the antebellum abuse of attaching riders to bills.[207] Under

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[205] Article I, Section 8, clause 1. This section reads, "To 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; but no bounties shall be granted from the Treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises shall be uniform throughout the Confederate States." See also White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 12.

[206] Article I, Section 8, clause 7. White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 14-15.

[207] Each bill was limited to one subject, explicitly stated in the title, see Article I, Section 9, clause 20. White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 14.

Article I, Section 9, clause 10, Congress was prohibited from paying any additional compensation to any persons after contract terms and prices were established.[208]

More broadly, the elimination of the General Welfare clause was a substantive and procedural constitutional innovation meant by the Confederate framers to strengthen constitutional limitations for the sake of effective government and to restrict all government authority to those powers and duties specified in the Constitution.[209] In the 1864 case of *Ex Parte Abraham Mayer*, Associate Justice Reeves, writing for the Texas high court, held that the primary responsibility of the Confederate government was to fulfill the purposes for which it had been created, namely "to protect the states against invasion and domestic violence" and any attempt to interfere with this "obligation" of the national government would violate one of the national purposes contained within the Confederate Constitution."[210]

In determining the scope of national government power to raise armies and accomplish this, however, Reeves stated that any expansion of the national power, especially under the notion that wartime demands required it, would be

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[208] *Ibid*.

[209] Anastaplo argued that the elimination of the general welfare phrase in the Confederate provisional Constitution, in reaction to the potency of the same clause in the Constitution of 1787, should be evaluated by original intent interpreters as providing for "a weaker national government." Anastaplo, *The Amendments to the Constitution: A Commentary*, 133. Anastaplo pointed out that despite antebellum criticisms of the national government's broad interpretation of implied powers, the Confederate framers did not do away with implied powers nor did they limit the national government to only those powers expressly delegated to it; rather they attempted to forestall abuses of such powers by specifying which express powers were to be delegated to the national government while refusing to handicap the national government from facilitating its responsibilities in the national sphere. *Ibid*., 127.

[210] *Ex Parte Abraham Mayer*, 26 Tex. 715 (1864).

unconstitutional: “the power to raise armies must not be so construed as that its use, if exercised, might result in the destruction of the state governments [a violation of the doctrine of federalism], or that would impair any right over which congress has no power to legislate [a violation of the separation of powers doctrine], or that would render the Confederate States unable to give that protection to the states to which they are entitled, and may demand, under the guaranties [sic] of the constitution [a violation of the guarantee to republican government].” For Reeves, this stretching of constitutional powers beyond the authority provided in the Constitution “would be to pervert the power which was intended for the protection and common defense of all the states into an engine of self-destruction.”[211]

The commitment to limited government was not just directed against the national government; there were also significant limitations placed upon the state governments to maintain the delicate balance of powers between the two entities and to prevent state government, chiefly the state legislatures, from usurping national governmental powers. Congress still held power to legislate bills for appropriating funds to aid in coastal navigation, harbor improvements, the removal of river obstacles, and to tax transportation which benefited from such improvements.[212] Under Article I, Section 10, clause 3, states were required to coordinate with the Confederate Congress before imposing duties for the improvement of rivers and harbors. However, in the exercise of this power, the state governments were limited to imposing only such duties that did not violate any Confederate treaty obligations and as they were necessary.

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[211] *Ibid*.

[212] White, “The Constitution of the Confederate States of America: Innovation or Duplication?,”13.

States were prohibited from using duties as a means of raising revenue for other means and any surplus revenue generated by such duties had to be paid into the Confederate coffers.[213]

The war unleashed tremendous pressures on the national government to mobilize and outfit large modern field armies, but, while state supreme courts held many exercises of government power as constitutional, there were limitations to the extent of national government power, particularly with regards to the impressment of foodstuffs and war materiel and the requirement to provide just compensation.[214] In Georgia, Alabama, and Florida cases, the state supreme courts applied "strict constitutional tests" to protect the right to property, what William Yancey had described as "one of the most sacred known to the Constitution."[215] In doing so, state courts revealed a commitment to prevent the national government from overstepping its constitutional bounds, manifesting a commitment to uphold the principles of limited government regardless of the demands of war.[216]

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[213] The language of this clause is "No State shall, without the consent of Congress, lay any duty on tonnage, except on seagoing vessels, for the improvement of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States with foreign nations; and any surplus revenue thus derived shall, after making such improvement, be paid into the common treasury." *Ibid.*

[214] The Confederate Constitution provided for eminent domain in Article I, section 9, clause 16: "nor shall private property be taken for public use without compensation." Brummer, "Judicial Interpretation of the Confederate Constitution," 126-127.

[215] DeRosa, *The Confederate Constitution of 1861*, 115.

[216] The importance of adhering to substantive constitutional principles, even during war, was evident in J.L.M. Curry's post-war recollections about the reluctance of the Confederate Congress to issue Treasury bills as legal tender in the Confederacy:

While the Confederate power to impress was never questioned, the courts did question the manner by which the Confederate government ascertained "just compensation." In *Cox & Hill v. James F. Cummings*,[217] Georgia's Chief Justice Lumpkin did not question the ability of the Confederate government to impress because this power—the power of eminent domain—was provided for under the Confederate Constitution. According to Chief Justice Joseph Lumpkin, this power was exercised by Congress when it promulgated the impressment legislation. However, possessing constitutional authority was not enough; the Confederate government had also to observe constitutional forms and limitations in the proper exercise of its powers, chiefly that private property should not "'be taken for public use without just compensation.'"[218] The issue in *Cox & Hill* was whether the Superior Court erred in its determination of what was just compensation for the impressments of sugar, how was just compensation to be determined, and how, when, and in what paid?

In this case, William B. Jones & Co. of Richmond purchased from A. C. Wyley & Co. of Atlanta, 33, 942 pounds of brown sugar in 135 barrels, stored in warehouses of Cox & Hill in Atlanta. The sugar was "choice" sugar, with a market price of $1.10 per pound and barrels worth $3.75 each. Major James F. Cummings was commissary of

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"such a compulsory method of imparting an artificial value to money or government credit had universally proved a failure; that it was an impairment of contracts; that the injection into the Constitution of a power not specifically granted, but intentionally omitted, was an utter departure from the fundamental principles of a government which was intended to guard against the assumption of powers not granted." J.L.M. Curry, "The Struggle of the Confederacy: a Review," *Publications of the Southern History Association,* volume 5, 1901: 504-511, 508.

[217] 33 Ga. 549 (1863).

[218] *Ibid*., 554-555.

subsistence and gave notice to Jones & Co. that he was going to impress the sugar for the Confederate States and that he would pay 75 cents per pound, the price set by price commissioners appointed by the Confederate States and the State of Georgia. The agent for Jones & Co. refused to accept the sum from Major Cummings on the basis that it was not just compensation and, in the alternative, proposed that Cummings pay either the market price or its value in Atlanta at that time. Cummings declined this proposal, stating that the sugar was worth 85 cents per pound rather then the price fixed by the commissioners and he believed that he was not empowered to pay more than the fixed price. Jones & Co.'s agent refused to hold the sugar for Cummings, whereupon, on June 16, 1863, Cummings seized the sugar (worth at that time $1.25 per pound) by force and removed it without permission from Jones & Co. Before the Justices of the Peace, Cummings asserted that the seizure was justified under the Impressment Act of April 1863 and the War Department's General Orders No. 37 of April 6, 1863.

Lumpkin, a vigorous supporter of states' rights, looked to the impressment legislation and took seriously its market-value orientation and provision that compensation "should be determined in the case of producers by two or three impartial loyal citizens of the vicinage, and in the case of non-producers, by two commissioners in each State, one appointed by the President, the other by the Governor."[219] However, Lumpkin also noted that shortly after the passage of the impressment act, a case in Virginia had resulted in the impressment of hay and an extreme appraisal of its value. The result of this was that Congress passed supplemental legislation so that if the impressment officer refused the appraised price, State commissioners would determine

[219] *Ibid*., 555.

price, denying the producer any further role in determining value or price. Accordingly, the War Department issued regulations to impressment officers denying them any authority to accept prices in excess of the scheduled prices fixed by commissioners for the state. The supplemental legislation was a rejection of the earlier position by Congress to allow local citizens a role in determining price.[220]

Since the provisions impressed in this case were not of "pressing necessity" to the Army, Lumpkin held that for the taking to be constitutional and to assure "just compensation" under the Constitution, it could be accomplished in one of three possible manners: either by the agreement of the parties, by the intervention of a jury, or by commissioners selected by mutual agreement of the parties. Lumpkin refused to provide Congress any special consideration because of wartime exigencies and he stated that "Congress is but the creature of the Constitution." He was adamant about Congress satisfying the test for a constitutional takings and he rejected any claim that Congress could promulgate legislation depriving owners of their property "even for public use, unless adequate compensation is secured by the law."[221]

Lumpkin evaluated the propriety of the schedule of prices and whether this schedule provided the just compensation required under the Constitution. He concluded that the schedule, as established, had "no reference to demand and supply at the time and place the article is seized than which nothing is more fluctuating at this eventful

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[220] *Ibid.*

[221] *Ibid*., 556. Lumpkin looked to the U.S. Supreme Court case of *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795) in which Justice Patterson emphasized the importance of establishing fair and just compensation to preserve the rights of the private property owner, "'except in cases of absolute necessity or great public utility.'" 33 Ga. 549, 557.

period" and that the schedule did not anticipate changes in prices over long periods of time. Rather, according to Lumpkin, the owner of private property "is entitled to the value of the property taken, and *at the time it is taken* [italics in original]—the amount to be assessed by a proper tribunal and paid in money. It is a debt against the public, who takes the property, and must be paid like all other debts."[222] Lumpkin observed that here there was no schedule of prices for the sugar impressed by Cummings, that the price of 75 cents per pound was established for "good sugar" and not "choice sugar" while the sugar taken by Cummings was "choice," a higher grade of sugar, "and consequently this sugar did not come within the schedule of prices fixed by the commissioners."[223] Lumpkin held that "no schedule of prices, including this particular grade of sugar, ever was fixed by the board of commissioners, either at the time it was taken or before; that its true value never has been ascertained by any legal or constitutional tribunal; and that the same was seized by the agent of the Government against the consent of the holders, without making or tendering therefor [sic] just compensation."[224] Lumpkin also held that, unless the parties could decide upon a price for the sugar, the question of just compensation should be referred on to a special jury in the Superior Court of Fulton County at its next term.[225]

The court in Georgia did not have to wait long for its next impressment case, with the court explaining how the March 26, 1863 impressment legislation was to be

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[222] *Ibid*., 558-559.

[223] *Ibid*., 559.

[224] *Ibid*., 560.

[225] *Ibid*.

reconciled to the Confederate Constitution's Article I, Section 9 provisions for constitutional takings in *Hardie C. Cunningham v. David L. Campbell* [226] Here, the court enunciated the specific parameters of and specific procures for government power to be exercised, considering congressional legislation, War Department regulations, and principles of equity. Cunningham, a Confederate Assistant Commissary for Georgia, had seized a quantity of sugar from three different businesses, one of which was David Campbell's. Cunningham had claimed authority to do so under the March 26, 1863 legislation ("An Act to Regulate Impressments") and had offered to pay these owners seventy-five cents per pound for the sugar, according to the schedule that was established by the appraisers appointed for the State of Georgia. The owners claimed and proved that they had purchased the sugar for $1.00 per pound and they offered to sell the sugar to the government at a "market price," which, at the time of its seizure, was approximately $1.20 to $1.25 per pound. The plaintiffs claimed that the process for assessing compensation was at odds with the Takings Clause in Article I, Section 9, Paragraph 16 of the Confederate Constitution.[227]

Associate Justice Jenkins, writing for the court, rejected the proposition that constitutional limitations could be dispensed with due to wartime exigencies and provided a narrow definition of "necessity" and specifying the proper conditions under which "necessity" could provide a rationale for dispensing with constitutional provisions. "Necessity" was the result of drastic circumstances, "it looms up and asserts itself in the inevitable now," and "it discloses present evil menacing the body

[226] 33 Ga. 625 (1863).

[227] *Ibid*., 625-626.

politic, and demands a present and sure remedy" in order to safeguard the safety of the people.[228] Jenkins noted that the "necessity" standard was not included within the Article I, Section 9, paragraph 16 language that conveyed the impressment power upon the Confederate government. He noted that the language was "'nor shall private property be taken for public use, without just compensation'" and was not "'nor shall private property be taken to meet a public necessity, but for public use.'" Impressment was compared to the taking of private property for the "promotion of public gain" such as "the construction of public highways, railroads and bridges, and the opening of streets." These purposes were very different from matters of "great public necessity" in which the purpose was "to prevent public loss" and "avert calamity" such as "the repulsion of an invading army, the stay of pestilence, or the arrest of conflagration."[229]

The court held that when the Confederate Congress authorized the seizure of property with the Impressment Act, it did so with the understanding that impressment would proceed under the Article I, Section 9 provisions requiring "just compensation," adding "whatever may be said of the existence of the power to seize, independently of this clause, there can be no question as to the limitation thus placed upon its exercise" and "the terms in which this clause is expressed, are adapted rather to limiting an inherent or preexisting power, than to an original grant of it."[230] If an impressment officer was to claim authority under the Impressment Act for the seizure of property, the validity of his actions would also be measured by the act and constitutional limitations

[228] *Ibid*, 627.

[229] *Ibid*, 627-628.

[230] *Ibid*, 627-628.

under which he claimed authority. There were procedures established for resolving disagreements between impressment officers and producers over the value of the goods being seized and a determination of "just compensation."[231]

The court enunciated, as a matter of constitutional doctrine, that the constitutional limitations and statutory procedures were to be followed by all parties and it refused to revise any understanding of the statutory or constitutional limitations upon national government power here in the name of military necessity.[232] While acknowledging the condition of the Confederate nation, the court also held that "not even war, with its attendant horrors, may rightfully impel the judiciary. Positive conviction of constitutional obligation may not be yielded under any circumstances." Jenkins stated that there could be "fatal consequences likely to result from judicial interference with the war measures of the Government; but let it be remembered that by a provision of the instrument itself, Judges, as well as legislators, are sworn 'to support the Constitution;' and this they are to do in war, as well as peace."[233]

The rationale for the constitutionality of impressment became clearer in 1864 when the Alabama court adjudicated the case of *Alabama and Florida Railroad Co. v.*

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[231] *Ibid*, 631-633.

[232] For Belz, constitutionalism "is the theory and practice of conducting politics in accordance with a constitution" and essential components of constitutionalism include legalism—"the belief that right conduct consists in following rules," especially the supremacy of the constitution, and "purposive political action" to avoid the rigid formalism that could result from legalism. Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th edition, vol. 1, xx.

[233] *Ibid*, 633-634.

Kenney.[234] The railroad had petitioned for and received an injunction to prevent impressment officers from impressing rolling stock and other property belonging to the railroad. The impressment agents filed a response, claiming that their acts were carried out under the authority of the Secretary of War. When the chancellor dissolved the injunction and dismissed the case, an appeal was made claiming that the taking of private mortgaged property by the government impairs the obligation of contract and, in this case, impressment of property by the Confederate government resulted in the "destruction of a franchise granted by the state, making the act invalid and unconstitutional. The case compelled Chief Justice Walker and the Alabama court to address the constitutionality of the impressment legislation by considering the specific circumstances that would permit the national government to impress and the issue of just compensation.[235]

Under the Confederate Constitution, the standard applied was the national majoritarian common good, for this common good was what the national government was charged to preserve. This linked republicanism and constitutional limitations in a way that provided a doctrinal structure for deciding impressment cases. Walker stated that "there is a power, alike in the general government and in the states, to take private property for established governments, it is a recognized principle, that all property is held subject to an inherent right in the government to appropriate it to the public use, when the public good may require it to be done." Walker's emphasis upon safeguarding the common good was evident in his explanation as to the source of this

[234] 39 Ala. 307 (1864).

[235] *Ibid*., 307-308.

principle, that it might have originated from "'the mutual necessities of the individuals about to constitute a political community.'"[236]

But, there were also constitutional limitations to this taking, namely that just compensation was to be provided to those from whom goods or services were impressed, even during wartime and here, the court limited the influence of wartime exigencies to influence constitutional decision making and remove constitutional protections for individual producers. Walker made clear that under the Confederate Constitution, impressing private property for the public good did not impair the obligation of contract but rather "it transfers to the government the rights of property given by the contract; and compensation for the benefits of the contract is required to be made." Here, Walker and his brother justices held that the Confederate government had not "taken the franchise, nor property indispensable to the existence of the franchise, or the exercise of the privileges bestowed by the act of incorporation."[237]

During the war, state supreme courts became charged with enunciating constitutional limitations in the Confederacy. As they examined the provisions of the written Confederate Constitution, especially the limitations placed on government authority and power, the courts also enunciated the Confederate unwritten Constitution and constitutional order, particularly republican values which the framers believed inherited from the Revolution and the early Republic. The importance of written provisions and unwritten but shared values, both of which were enunciated by the state supreme courts, suggests that the Confederate constitutional order was about more than just the

[236] *Ibid*., 309.

[237] *Ibid*., 309-310, 312.

"juxtapositions of power" within the Confederate political order and placing restrictions on national government.

Although the powers in the Confederate Constitution were enumerated powers, this did not mean that the national government was to remain powerless to fulfill its constitutional functions and responsibilities. Confederate constitutionalism comprised principles of limited government, but the nature of Confederate constitutionalism was not so doctrinaire as to reduce principles and constitutional provisions to meaningless formalities. Historian Don Fehrenbacher argued that "the constitutional-makers at Montgomery seem to have regarded themselves as both conservators and innovators—that is, as defenders of traditional rights who had been forced to become revolutionaries and builders of a new political order."[238] The new political order and the Confederate Constitution that the Confederate framers created were both conservative and innovative. It was this dual nature of the Confederate Constitution that made it such a distinctive document, shaped a constitutional reform effort, and was enunciated in the constitutional decisions issued by state supreme courts interpreting its provisions.

[238] Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 66.

Chapter Three

The Commitment to Purposeful Innovations

In February and March of 1861, Confederate framers prided themselves on their ability to conserve the original constitutional ideas of the American founding and to improve upon its constitutional forms. They believed that they had corrected the "'defects'" of the Constitution and ushered in the "best form of government" possible.[239] In March, Howell Cobb, President of the Confederate Provisional Congress and a member of the Constitutional Convention, evaluated publicly the provisional constitution of the new southern nation and the ideas that had shaped it. Focusing on the document's adherence to constitutional principles *and more modern, innovative forms,* he concluded that, as a constitutive document, it would become very popular and much admired: "What ever [sic] may be the criticism of the hour upon the Constitution we have formed, I feel confident that the judgment of our people, and indeed of the world, will in the end, pronounce it the ablest instrument ever prepared for the government of a free people."[240]

The Provisional Constitution received attention and praise from politicians and newspapers in the North as well as South, who believed that Confederate revisions of the Constitution of 1787 would address successfully the political and constitutional ills

[239] J.L.M. Curry, *Civil History of the Government of the Confederate States*, as cited in Amlund, *Federalism in the Southern Confederacy,* 63; Carpenter, *The South as a Conscious Minority,* 222; Hardaway, "The Confederate Constitution: A Legal and Historical Examination," 22-23.

[240] *The Weekly Mail*, March 22, 1861.

of the United States, perhaps even providing the basis for reunion.[241] T.R.R. Cobb explained the importance of this reform effort, telling his listeners that "To provide against these [abuses], has been the chief labor in forming your Constitution." [242] Alabamian Robert Hardy Smith, a member of the Confederate Constitutional Convention, candidly told his listeners in March, 1861, "We come to-night to indulge in no Utopian idea, that we have attained perfection in Government, or that we have, by the clearness of language, left no room for evasion or perversion or usurpation of power." Yet, he went on to share with them his optimism and pride about the document, confessing "we may, I think, congratulate ourselves that grave errors have been corrected, and additional hopes given for the preservation of American liberty."[243] In an editorial, the *New York Herald* praised the new constitution for its innovations and proclaimed that "The new Constitution is the Constitution of the United States with various modifications and some very important and most desirable improvements. We are free to say that the invaluable reforms enumerated should be adopted by the United

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[241] Southern newspapers recorded general satisfaction with the new national charter. In Atlanta, *The Intelligencer* stated on February 16, 1862 "We are now seeking to create a government that will be nearer perfection than the one we have left" and three days later it warned that "Our public servants, who are now in Montgomery, organizing a Government, should not lose sight of the great principle lying at the foundation of our Republican system, that the people are the source of all power." On February 25, 1862, the *New Orleans Daily Picayune* stated that the Confederate Constitution was "a clear, calm, stately manifesto of the cause which impelled eight millions of free people to withdraw from a Government, which had, by a long train of abuses and usurpations...evinced a design to reduce them under absolute despotism."

[242] "Substance of An Address of T.R.R. Cobb, To His Constituents of Clark County, April 6th, 1861, 2-3.

[243] *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America* by the Hon. Robert H. Smith, (Mobile, AL: Mobile Daily Register Print, 1861), 12.

States, with or without a reunion of the seceded States, and as soon as possible."[244] So appropriate and timely were the alterations made in this Confederate Constitution that an editorial in *Harper's Weekly* predicted, "Most of them would receive the hearty support of the people of the North."[245]

Yet, this understanding of the Confederate Constitution as something innovative, inventive, or modern, and transforming the American constitutional tradition into something new, more energetic, and efficacious seems to contradict statements made by Howell Cobb, Jefferson Davis, and T.R.R. Cobb in 1861 that the Confederacy was founded upon conservative constitutional tenets from the past.[246] These different assessments raise significant questions about the nature and tendency of the southern constitutional order.[247] If the constitutive principles, purposes, and ideas of the Confederate constitutional order were committed to the preservation of eighteenth

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[244] *The New York Herald*, March 19, 1861.

[245] *Harper's Weekly*, March 30, 1861, 194:3.

[246] In February of 1862, as he adjourned the Provisional Congress, Howell Cobb, president of the Confederate Congress, declared that the Confederate *constitutional order* and political revolution were founded upon *conservative* tenets and ideas: "ours is the first revolution which history records, wherein the tendency has been to conservatism and stability." "Adjournment of the Provisional Congress," Richmond *Daily Dispatch*, February 16, 1862. Jefferson Davis, in his inaugural address as the First President of the Confederacy, likewise asserted conservative constitutional tenets, proclaiming that the framers of the permanent Confederate government were committed "to perpetuate the principles of our Revolutionary fathers." Davis, *Rise and Fall of the Confederate Government*, 2:232-236.

[247] Mark Neely has argued that a traditional understanding of the Confederacy and Confederate leaders as protective of individual and constitutional rights is incorrect and that Confederate constitutional history has "remained frozen in the assumptions of the Lost Cause past." Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*, 1-10, 168-173.

century ideas and principles such as limited government, and consistent with the Constitution of 1787,[248] should Confederate revisions designed to establish energetic and efficient government be considered as innovative, enlightened, modern, or establishing something new in American constitutionalism? Could the national charter be premised upon the preservation of principles from the past and limiting government authority and power while also providing for constitutional forms focused on transformation, change, and more efficacious national government? Were these ideas irreconcilable in Southern political and constitutional thought? This chapter will examine these questions and will conclude that the Confederate Constitution, while conservative in principles and origins, provided for constitutional innovations and new forms in order to make national government more energized, efficacious, and responsive to a national constituency. Moreover, these aspects of the Confederate constitutional order were complementary.

The Confederate Constitution was the cornerstone of Confederate nation-building and it possessed a character that was *both conservative and innovative* in its spirit, provisions, and purposes.[249] As noted in Chapters One and Two, without a national court it was left to the state supreme courts to enunciate not only its specific provisions but also this hybrid character. State wartime litigation did not always raise direct questions about the conservative or innovative nature of the document, but it did

[248] DeRosa argued that Confederate constitutionalism looked to the past and was strongly influenced by eighteenth century political ideas, republicanism, and the Antifederalist tradition. DeRosa, *The Confederate Constitution of 1861*.

[249] The Confederacy is termed "innovative" here because of the nature of its reform measures, the implementation of new constitutional forms and relationships, and the establishment of a new nation with a new or modified political philosophy.

require addressing specific constitutional issues and the doctrinal development of key constitutional concepts that were shaped (quite appropriately) by this character of the document. It was this dual character of the Confederate Constitution, both conservative and progressive, that made it such a distinctive document for the Confederacy and, as the source and embodiment of a constitutional reform effort, shaped the nature and substance of the constitutional decisions issued by state supreme courts interpreting its provisions.[250]

As with the conservative principles enunciated by the state supreme courts (limited national government and the preservation of national common good and virtue in politics), wartime cases reveal the significant and substantive reform-minded concepts of Confederate constitutionalism. In their wartime decisions, state supreme court justices explained its principles and innovative forms and purposeful objectives which were to usher in new era of specificity and efficiency in American constitutional government, chiefly by: 1) creating a more effective and managerial chief executive; 2) forming a more purposeful and effective national government focused on its constitutional duties; and 3) establishing a permanent fundamental law framework for a *national* political community that diminished the importance of the states' rights

[250] Fehrenbacher stated that "the Confederate reconstruction of the American presidency was nostalgic as well as progressive" and that "constitution-makers at Montgomery seem to have regarded themselves as both conservators ands innovators—that is, as defenders of traditional rights who had been forced to become revolutionaries and builders of a new political order." The unique mixture of "reverent imitation and bold invention in the Confederate Constitution suggests an ambivalent desire to be quintessentially American and at the same time distinctively, independently southern." Fehrenbacher, *Constitutions and Constitutionalism*, 66.

constitutionalism that had facilitated secession.[251] In the Confederate experience, it was uncertain following secession whether the new Confederate constitutional order would be built upon a states' rights political philosophy. State court decisions affirmed the commitment to view the constitution as fundamental law and, surprisingly, Confederate fundamental law possessed a distinct national character.

Innovative Constitutionalism

The historiography on Confederate constitutionalism has been limited, largely discounting or ignoring the state supreme court decisions that provide the definitive judicial interpretation of the Confederate Constitution. Consequently, historians have found it difficult to understand the Confederate constitutional order as shaped by anything other than the states' rights ideology.[252] Several historians of Confederate law and politics have acknowledged the significant effort by the Confederate framers to re-structure and reform American constitutional government.[253] William Robinson, author of *Justice in Grey*, the comprehensive work on the Confederate legal system, declared

[251] In the American tradition, a constitution possesses an extra-statutory quality and is regarded as fundamental law, with the fundamental law comprised of "immemorial custom and the principles of reason, justice, and equity that constituted natural law." Belz, *A Living Constitution or Fundamental Law?*, 2.

[252] McDonald, *States' Rights and The Union*, 4-5; Ford, "Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought," 20, 21, 35, 49, 52; Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860"; Finkelman, "States' Rights North and South in Antebellum America," 126; Thomas, *The Confederate Nation*, 64-66.

[253] Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 201-224; Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 58-62; Robinson, Jr., "A New Deal in Constitutions," 454.

that "the Constitution of the Confederate States marked a high point in American constitution-making" due to the attempt by its drafters to improve upon the American governmental machine and to "set at rest moot questions," which had plagued the United States in prior decades and to correct the "defects" in the Constitution of 1787.[254] Charles Lee, author of a major work on the creation and development of the Confederate Constitutions, studied the political developments during the Constitutional Convention and concluded that "the reforms in the Confederate Constitutions represent a significant constitutional legacy," that "they mark a milestone in the constitutional development of the United States," and became an influence upon subsequent reforms in U.S. constitutional government.[255] However, historians, have never agreed on the character of the Confederate Constitution or whether it represented a new direction in American constitutionalism or constitutional government. There has never been consensus on whether the spirit and provisions of the document represented something substantively different from the U.S. Constitution of 1787.

This idea that the Confederate Constitution was simply a direct copy of the Constitution of 1787 or was an incomplete and inconclusive instrument of reform has resulted from its close resemblance to the U.S. Constitution and the failure of historians' to understand constitutional legal decisions and constitutional doctrinal development by the

[254] The Confederate Constitution was designed to overcome the shortcomings of the old political system, to improve government, and remove the sources of dissension. Robinson, *Justice in Grey*, 623 and Robinson, "A New Deal in Constitutions," 454.

[255] Lee, *The Confederate Constitutions*, 150.

courts as explicative of more pervasive political and constitutional principles.[256] Richard E. Beringer, Herman Hattaway, Archer Jones, and William N. Still, Jr., drawing upon the earlier argument of Rollin Osterweis, acknowledged that the Confederate Constitution "had the potential for creating a stronger government than that of the Union in 1861" but they disregarded the conceptual and textual differences in the document, concluding that the Confederate Constitution was little more than "a word-for-word copy of the Federal Constitution" and that this charter therefore lacked nationalism.[257] Beringer and his colleagues preferred to look to political developments and popular interpretation for their insight and bothered little with judicial interpretations. Lee concluded that the Confederate Constitutions were "significant" because "they make a valuable contribution through the legacy of governmental reform" but, looking to political statements and behavior rather than court decisions and constitutional doctrinal development, he maintained that these reforms were based upon a states' rights ideology.[258] Sidney Brummer acknowledged that there was a "development" of Confederate constitutional law during the war but failed to identify or explain which

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[256] Alan Barker, *The Civil War in America* (Garden City, NY: Doubleday, 1961); David Donald & J.G. Randall, *The Civil War and Reconstruction* (Boston, MA: Little and Brown, 1969); Henry S. Commager, William E. Leuchtenberg, & Samuel E. Morison, *The Growth of the American Republic* (New York, NY: Oxford University Press, 1980); Peter J. Parish, *The American Civil War* (New York, NY: Holmes & Meier Publishers, 1975).

[257] Richard E. Beringer, Herman Hattaway, Archer Jones, and William N. Still, Jr., *Why The South Lost The Civil War* (Athens, GA: University of Georgia Press, 1986), 65, 76.

[258] Lee, *The Confederate Constitutions*, 150. Lee believed that this reform served the states' rights ideology and that the Confederate Constitution represented "the ultimate constitutional expression of the state rights philosophy and the state sovereignty concept in nineteenth century America."

doctrines had been developed. There was little basis upon which to initiate change because the Confederacy's Permanent Constitution "was so closely modeled after that of the United States" and little incentive to promote change because so many questions of constitutional law had already been settled during the antebellum, both of which led Brummer to conclude that during the war, "there naturally were not many constitutional points raised in the southern courts in such troublous times."[259]

However, there were distinctive philosophical and operational differences between the Confederate Constitution and the U.S. Constitution of 1787. George Anastaplo stated that Confederate Constitution reflects "a *radically different* [italics added] approach to the governance of a country from that found in the 1787 Constitution."[260] The Confederate Constitution was more than "mere imitation" of the U.S. document and individual articles in the Confederate charter were "more than mirror images of their federal counterparts."[261] While it was true that many articles from the U.S. Constitution were retained in the Confederate Constitution, this was done, in part, out of framers' reverence for the original document, and also because of their political objective to provide for "a smoother transition for the Southern people from the Union to the Confederacy"[262] The Confederate Constitution was "a living and

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[259] Brummer, "The Judicial Interpretation of the Confederate Constitution," 131.

[260] Anastaplo, *The Amendments to the Constitution: A Commentary*.

[261] White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 6, 21.

[262] *Ibid*., 6. White argued that the similarities were due to the need to create a nation quickly before the seceded states were brought back into the Union, to appease Southern Unionists who opposed secession and who rejected any constitutional rights to destroy the Constitution and to "emphasize the tranquility of the Southern movement"

workable document that had the capacity to establish a form of government, which, because of its innovative forms, would have halted political wastefulness, stimulated an economical government, and restrained each governmental branch to its designated field of authority." "Far from being a hasty, improvident duplication of the United States Constitution, the Constitution of the Confederate States of America was a thoughtful and farsighted innovation."[263]

The innovative provisions of the new national charter "reflected Southern discomfort with the workings of the United States Government during the years preceding the outbreak of the Civil War."[264] As a result, Confederate framers initiated a constitutional reorganization in which reform "dictated innovation" so that "'[t]he new document departed from the United States Constitution…where necessary to guard against what were considered the dangers and evils 'which led to the dissolution of the late Union.'"[265] To facilitate this constitutional reform, the Confederate charter included a number of innovations that were designed to rectify what southerners perceived of as the corruption of the old constitutional system of governing the United

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and establish its legitimacy. *Ibid*., 8-9. Alexander Stephens recounted "'The Southern people were actuated by no disloyalty to the [United States] Constitution, to the principles it contained, or to the form of government thereby established." Stephens, *Recollections of Alexander H. Stephens* (New York, NY: Doubleday, Page & Company, 1910), 171, op cit. *Ibid*., 9; *Journal of the Confederate Congress*, 1:19; White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 9.

[263] *Ibid*., 6.

[264] *Ibid*., 21.

[265] Horace Montgomery, *Howell Cobb's Confederate Career* (Tuscaloosa, AL: Confederate Publishing Co., 1959), 26; White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 10.

States.[266] This corruption included partisan politics, executive privilege and patronage, the dominance of a spoils system that had resulted in an inefficient and ever-growing national government in Washington, D.C., and the cessation of a national government serving distinctly national interests.[267] In place of what they perceived as an extremely partisan and easily corrupted Chief Executive, the Confederate framers sought to create a more effective and managerial national government.

More Effective and Managerial National Government

Constitutional government in the Confederacy, though firmly rooted in conservative principles of limited government, was not designed to be weak or ineffective; Confederate constitutionalism possessed a innovative reform quality (in addition to its conservative quality) with the objective of transforming the Confederate government into an effective, efficient, energetic, and purposeful entity aimed at fulfilling *national* goals and objectives.[268] Notwithstanding restrictions or the patronage

[266] Curry conceded that the 1861 Constitution was copied with "almost literal fidelity." His contention was that specific alterations were made to remedy the "evils" which had provoked secession; these changes were supposed to expurgate the "vicious interpretations of selfish majorities," and to accomplish the "true ends of the Confederacy." Robert McElroy, *Jefferson Davis: The Unreal and the Real*, vol. 2 (New York, NY: London, Harper & Brothers, 1937), 263, op cit. Amlund, *Federalism in the Southern Confederacy*, 17.

[267] It was the failure to preserve the national constitutional system under the U.S. Constitution, especially slavery and comity, that had prompted Southern withdrawal: "why attempt longer to hold together hostile States under the stipulations of a violated Constitution?…The Northern States and their citizens have proved recreant to their obligations under the Federal Constitution." *Official Records of the War of the Rebellion*, series IV, volume I, 9-10.

[268] The Confederate framers "created a document that included provisions for a more streamlined government." White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 21.

powers and partisanship of the president, the Confederate framers did not aim to emasculate the office of the chief executive. Reforms implemented by Confederate framers were designed to strengthen and make more efficient the national government. In furtherance of this goal, the Confederate framers created a more powerful chief executive under Article II, implemented significant changes in the appropriations process, and provided for cabinet participation in congressional debate.

Confederate framers believed that the most pernicious threat to the American constitutional order was the extreme partisanship of the two-party system. Partisanship, a concern of the framers in 1787, had, during the antebellum period, overturned the distinctly national character of governance in Washington that they believed consisted of a national perspective in politics, a concern for the welfare of a national population, and the safeguarding of the national government.[269] In the election of 1860, southerners considered the election of Lincoln, a sectional candidate, as a sign that they could no longer rely upon a national elected official to uphold a national perspective and pursue a nation-oriented platform and to disregard sectional interests.[270] Robert Hardy Smith

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[269] They saw it not as an extension of, but as "a threat to, a constitutional republic," see Keller, "Power and Rights: Two Centuries of American Constitutionalism," 679. Richard Hofstadter, *Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley, CA: University of California Press, 1969), 40-73, and Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. 1, 212-271.

[270] In Georgia, Lincoln's election and a belief that Northern states would continue to violate their obligations under the Constitution, led 60% of the population to support secession while only 7.5% opposed it. Allen Chandler, ed. *The Confederate Records of the State of Georgia* (New York, NY: AMS Press, Inc., 1972), 162. *Official Records of the War of the Rebellion*, series IV, volume I, 6-8. Nieman argued that "By 1860 southerners were perhaps more receptive to antiparty ideas than other Americans. The meteoric rise of the Republicans impressed upon southerners the evils of party: in their eyes the Republican party was bent upon using government to promote the interests

described to his constituents in 1861 how the U.S. President "'had come to be the appointee of a mere self-constituted and irresponsible convention" and how "as a consequence, each four years heralded the advent of a politician thrown upon the surface by accidental causes and reflecting the latest heretical dogma of a section, rather than addressing himself to the good of the whole country."[271]

In their new national charter, Confederate framers sought to raise the Chief Executive above the corrupting influence of partisan politics by creating a single six-year term of office.[272] A President ineligible for re-election would be more interested in concentrating on the tasks of leading the nation rather than political self-interest.[273] The single six-year term was widely approved, even in the North, where *Harper's Weekly* commented, "These innovations [six year term and ineligibility for reelection] will commend themselves to the approval of all who have watched the mischiefs [sic] produced by the too speedy recurrence of elections, and by the maneuvers of acting presidents for reelection…They would gladly be adopted by the people throughout the

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of the North by riding roughshod over the rights of the South. As such, it was a chilling reminder of the dangers posed by political parties." Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 207.

[271] Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America*, 13.

[272] Article II, Section 1 of the Confederate Constitution provided that "The executive power shall be vested in a President of the Confederate States of America. He and the Vice President shall hold their offices for the term of six years; but the President shall not be reeligible."

[273] Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 215.

Union."[274] J.L.M. Curry favored the single six-year term because of its potential for re-focusing national political leadership upon national affairs and interests rather than sectional interests. He stated that "A President ineligible is freed from the temptation of using his official influence to secure reelection. He is the executive of the whole people and not merely the head of a party."[275] Consequently, there was little debate over on Robert Barnwell Rhett's idea that the presidential term be limited to a single six-year term, the framers believing "that they were lifting the president above party politics and freeing him to pursue the national interest."[276]

Once freed from the evils of party politics, the national chief executive was to become an efficient and powerful national manager in order to lead a lean national bureaucracy, to restrict the excesses of legislative politics, and to balance out the particular energies and efforts of the state governments.[277] Confederate framers provided the president with the line item veto, a significant innovation with the specific purpose of arresting "legislative abuses" and facilitating a more efficient legislative fiscal

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[274] From "The Two Constitutions" in *Harper's Weekly*, March 30, 1861, 194; Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 209.

[275] Curry, "The Confederate States and Their Constitution" in *Galaxy* 17 (1874): 402; Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America by the Hon. Robert H. Smith*, 13-14; Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 207.

[276] Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America by the Hon. Robert H. Smith*, 13-14 and Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 207.

[277] Fitts, "The Confederate Convention: The Constitutional Debate," 194.

process to be conducted *in consultation with* the president.[278] It proved to be far superior to the simple veto provided in the Constitution of 1787 as it "would expand the rationality of the process beyond the simple veto because, at the discretion of the president, portions of legislation could be selectively returned to the Congress for further deliberations and subject to two-thirds approval." Regardless of whether the president would actually utilize the line-item veto, the mere opportunity to do so "would modify the legislative behavior regarding pork-barrel bills, as the legislators would be obliged to consult with the executive branch in advance, thereby facilitating dialogue between the two branches."[279]

The primary objective here was to empower the presidency to the extent required for him to fulfill his *constitutional* duties and responsibilities *to the nation*, particularly with respect to national appropriations under Article I, Section 7.[280] According to Robert

[278] Article I, Section 7, clause 2 provides, "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; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President." *Federalist No. 73* in Jacob E. Cooke, ed., *The Federalist* (Middletown, CT: Wesleyan University Press, 1961), 495. The most serious abuses of the general welfare clause had to do with fiscal policies, so Confederate framers created strict prohibitions, especially on protectionist tariffs and internal improvements, in order to facilitate "a national political economy of minimal interference with market forces." DeRosa, *The Confederate Constitution of 1861*, 91-92.

[279] *Ibid*., 84.

[280] Article I, Section 7, clause 2 provides that "Every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the Confederate States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it…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; and shall return a copy of such appropriations, with his objections, to the House in which

Hardy Smith, it was the Chief Executive who was to occupy the primary role in national governance as the people's representative, the efficient manager, and the leader towards the accomplishment of national constitutive purposes and goals. The President, as a representative of the entire nation, could initiate appropriations bills and these could be passed in Congress with only a simple majority under the rationale that the President (unlike congressmen) responded to a national constituency and therefore was best able to initiate appropriations in the national interest. Smith believed these restrictions necessary, based "upon the idea that the chief Executive as the head of the country and his cabinet should understand the pecuniary needs of the Confederacy, and should be answerable for an economical administration of public affairs, and at the same time should be enabled and required to call for whatever sums may be necessary to accomplish the purposes of Government."[281] Meanwhile, congressionally-initiated bills, which could be tainted by political squabbles and favoritism, required a two-thirds vote for passage. The Constitution's Article I, Section 9 restrictions on appropriation bills were drafted in opposition to the localized pork barrel legislation that had characterized congressional appropriations during the antebellum period.[282] The executive budget and line item veto were examples of an emphasis on efficient and managerial leadership

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the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President."

[281] Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America by the Hon. Robert H. Smith*, 7-8.

[282] Article I, Section 9, clause 9 stated "Congress shall appropriate no money from the Treasury except by a vote of two-thirds of both Houses…unless it be asked and estimated for by some one of the heads of departments and submitted to Congress by the President; or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States." Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 204.

and responsibility in fiscal matters. These were additional mechanisms for the eradication of corruption, special interests, patronage, and irresponsible national spending that southerners believed rampant, especially during the Buchanan administration.[283]

This concept of managerial efficiency also included the specific objective of making the president more independent by empowering him with unequivocal constitutional removal powers. In Article II, Section 2, clause 3 of the Confederate Constitution, diplomats and heads of Executive Branch departments could be removed from office "at the pleasure of the President" while "all other civil officers of the Executive Departments may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty."[284] This innovation, more representative of the "presidential system" of government, gave the Confederate president increased independence from interference by the Confederate Congress or other non-governmental interests and provided the Chief Executive with greater freedom to direct the affairs of the nation without having to contend with political intrigue, partisanship,

[283] White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 13.

[284] Article II, Section 2, clause 3 provides that "The principal officer in each of the Executive Departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the Executive Departments may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor [sic]."

or the influence of special interests.[285]

This innovative strengthening of the executive at the expense of the legislature was designed "to keep the body politic in a healthy condition." It reflected the more general concern for a common good and public honesty that characterized the reform of state constitutions against corruption and patronage.[286] Yet, the framers also understood the importance of the executive and legislative branches working together effectively and they sought to institutionalize greater communication and cooperation between the two branches. Unlike the U.S. Constitution, Confederate framers created a constitutional provision that provided for representation of Cabinet portfolios on the floor of Congress and here the framers borrowed only that much from the "Cabinet System" as was necessary for efficient and effective national government.[287] The experiences of the past had suggested to the Confederate framers that "our Fathers, by refusing the

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[285] DeRosa, *The Confederate Constitution of 1861*, 81-82. According to Walter Bagehot, the "presidential system" of government occurs when "the President is elected from the people by one process, and the House of Representatives by another. The independence of the legislative and executive powers is the specific quality of Presidential Government." The "Cabinet System" differs from the "Presidential System" because of the "fusion and combination" of the legislative and executive branches. Walter Bagehot, *The English Constitution and Other Political Essays* (New York, NY: D. Appleton & Company, 1877), 47, 82, 84.

[286] *Milledgeville Southern Recorder*, February 19, 1861. The Confederate Constitution's restriction on legislative initiative for appropriations was reflective of the same spirit and intent as the state constitutions created after the late 1830s when legislative powers over finances was strictly curtailed following the speculation and state-funded debt that spelled disaster in 1837 and the emergence of executive powers over the purse. Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 211-213; Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 64-65.

[287] Article I, Section 6, clause 2 provides "Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department."

executive the right to be heard through his constitutional advisers on the floor of the Legislature, had interposed barriers to that free intercourse between the two departments which was essential to the wise and healthy action of each."[288] J.L.M. Curry remembered that "the restricted privilege worked well while it lasted, and the occasionally appearance of cabinet officers on the floor of Congress and participation in debates worked beneficially and showed the importance of enlarging the privilege."[289]

Robert Hardy Smith would look upon these innovations with a great deal of satisfaction, stating that "we have, I trust, greatly purified our Government, and, at the same time, placed its different parts in nearer and more harmonious relations." He enumerated the innovations, "refusing to a mere majority of Congress unlimited control over the treasury," requiring a roll call vote for all appropriation bills initiated in the Congress, by prohibiting the Congress from deciding on claims against the government,[290] providing for Executive representation in debate on the floor of the Congress,[291] "placing upon the administration the duty and responsibility of calling for appropriations,"[292] and "giving the President the power to veto objectionable items in

[288] Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America by the Hon. Robert H. Smith*, 9.

[289] No enabling legislation was passed for these provisions in the Permanent Confederate Constitution, though J.L.M. Curry's favorable recollections of it suggest that it was a positive development under the Provisional Confederate Constitution. Curry, *Civil History of the Confederate Government*, 83; White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 15.

[290] Article I, Section 9, clause 9 of the Confederate Constitution.

[291] Article I, Section 6, clause 2 of the Confederate Constitution.

[292] Article I, Section 9, clause 9 of the Confederate Constitution.

appropriation bills."[293] These significant reforms were premised upon an understanding that the provisions were to be adhered to if the reform was to be successful. It would fall to the state supreme courts to ensure that constitutional provisions were preserved and applied consistently in wartime decisions.

Purposeful Government and Constitutional Duties

In his Inaugural Address as Provisional President, Jefferson Davis urged adherence to constitutional provisions, articulated by the courts, as the guide for all public office holders to follow (including himself), in order to preserve limited government for the benefit of the people of the Confederacy.[294] However, according to state supreme courts that interpreted the provisions and principles of the Confederate Constitution, the intent of the Confederate framers was to make national government limited *but not powerless*, in order to facilitate the principles, goals, and purposes for which their nation and constitutive documents had been created. The framers institutionalized their intent by eliminating the Article I, section 8 General Welfare clause and, thereby restricting the national government from expanding its own authority, in derogation of the manifested will of the people. The elimination of the General Welfare clause was a major innovation in Confederate constitutional government, one designed

[293] Article I, Section 7, clause 2 of the Confederate Constitution. Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America by the Hon. Robert H. Smith*, 11.

[294] Davis said, "Thus instructed as to the just interpretation of the instrument, and ever remembering that all offices are but trusts held for the people, and that delegated powers are to be strictly construed." *Official Records of the War of the Rebellion*, series IV, volume I, 106.

to promote greater "economy" as compared to the "extravagance and corruption of the old Government."[295]

Davis made clear, however, that while the national government was to be *limited in the scope of its authority* to specific constitutional duties and responsibilities, it was also *vested with broad powers* to fulfill those duties and responsibilities. *Authority* refers to the sphere and scope of responsibility for governmentalduties and responsibilities while *power* refers to the range of action that a governmental entity may take in order to realize the duties and responsibilities with which it has been charged. When Confederate framers eliminated the General Welfare clause, they limited the authority of the national government to specific duties and responsibilities. Yet, they retained the Necessary and Proper clause in Article I, Section 8, so that national government, now limited to specific concerns, duties, and responsibilities, might be more fully effective with these specific charges, provided with a full range of powers deemed as "necessary and proper" for the government to fulfill its duties and responsibilities under the Constitution.[296]

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[295] *Substance of An Address of T.R.R. Cobb, To His Constituents of Clark County, April 6th, 1861*, 4. Curry recounted how the Confederate Congress was reluctant to issue Treasury bills as legal tender in the Confederacy because of their adherence to constitutional principles and their refusal to expand constitutional authority of the national government. States restricted creditors by passing stay laws and relaxing the collection laws as "remedial legislation and to help debtors in their distress." "The Struggle of the Confederacy: A Review," 508. George Anastaplo argued that the elimination of the general welfare phrase provided for "a weaker national government." Anastaplo, *The Amendments to the Constitution: A Commentary*, 133.

[296] White argued that the General Welfare clause was omitted in deference to states' rights, drawing from Curry that the clause was vague and had been interpreted during the antebellum period in pursuit of "'powers for personal and party and sectional advantage.'" Curry, *Civil History of the Confederate Government*, 83; Yearns, *The Confederate Congress*, 24; White, "The Constitution of the Confederate States of

During the war, desperate military situations and exigencies were likely to compel the justices to interpret the Constitution as providing for broad grants of authority to a highly centralized Confederate government as well as broad powers. Southern state supreme courts resolved this dilemma early in the war by enunciating a constitutional doctrine of limited national government restricted in its *political authority* but provided with complete *political powers* to facilitate this authority. The result was the creation of a philosophical framework that encouraged and supported a more fully capable and effective national government to fulfill its duties and responsibilities within express constitutional limits. During the war, state court litigants who attempted to avoid Confederate military service asserted a states' rights conceptualization of Confederate limited government by claiming in their pleadings that conscription was unconstitutional as a breach of these express limitations upon national government authority.

State supreme courts were faced with a very interesting constitutional problem of interpreting the Necessary and Proper clause so that the national government would be

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America: Innovation or Duplication?," 11. James Jason Kilpatrick argued that within the U.S. Constitution, there was a pervasive "self-evident desire to restrain all government." He added, "ours was to be a limited government…And what a mockery it is of their prudent labors to see men contend for the absurd notion that the power to lay taxes 'to provide for the general welfare' vests the Congress with the power to do whatever Congress pleases!" James Jason Kilpatrick, "The Case for States' Rights," in Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System*, 3rd printing, (Chicago, IL: Rand McNally & Company, 1965), 95. Yet, limited government did not mean that the national government was to be ineffective, weak, or was not to receive the allegiance of the people: "The plan of our fathers; and it was a good plan, was simply to assure the people the best of both worlds—a central government strong enough to act boldly and powerfully in the preservation of national security and in the promotion of truly national interests, yet not so strong that it would swallow up the administration of those local and domestic responsibilities which the people wanted kept close at hand." Kilpatrick, "The Case for "States' Rights," 97.

both limited and fully effective.[297] In Georgia, in November 1862, Asa Jeffers claimed that the conscription acts of April 16 and September 27, 1862 were unconstitutional and therefore the enrolling officer, John Fair, had no authority to hold him. Jeffers claimed that the power claimed by the Confederate government violated the Confederate Constitution because it was "incompatible with State sovereignty and subversive of the State Governments." In *Jeffers v. Fair*,[298] the Georgia Supreme Court was called upon to decide whether the conscription act of April 16, 1862 and the amendatory act of September 27, 1862 were constitutional under the war powers conferred upon the national government in Article I of the Confederate Constitution. In order to adjudicate this claim, the court first had to consider "the extent and proper construction of the grant of '*power to raise armies'* contained in the 12th clause" of Article I and "distinguish between it and the grant of '*power to call forth, the militia*,' etc., contained in the 15th clause." The court held that the Confederate Constitution outlined the intent of the framers for the national government and its purposes, stating that the national government's power over individuals and its ability to conscript them resulted from the act of forming and constituting the Confederate States of America. The court, "impressed with the importance of the question, and the responsibility involved in its decision" gave the issue in this case "careful and anxious consideration" and rejected Jeffers' argument.[299]

In construing the power to raise armies, Georgia's Associate Justice Jenkins

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[297] Article II, Section 8, clause 18 of the Confederate Constitution.

[298] *Jeffers v. Fair*, 32 Ga. 347 (1862).

[299] *Ibid*., 348.

declared that the Necessary and Proper clause in Article I, Section 8 of the Constitution was "very general in its terms—neither specifying nor prohibiting any means" and that this language "could not express a broader, more general grant of a specific power" intended by the Confederate framers: "we hold that the clause, *ex vi termini*, express a grant of *power*—of power commensurate with the object—of power over the populations of the several States, entering into and becoming component parts of the Confederate States of America." Jenkins reasoned that to assume that the Confederate government did not enjoy this broad grant of power would mean that the national government, which had been entrusted with the broad authority to raise armies for the nation's defense, would be prohibited from exercising the power to raise these armies even though the states could utilize compulsory enlistment but were denied the authority to declare war and raise armies. Jenkins held that "compulsory enrollment is a proper incident of the power to raise armies" for which the Confederate Congress had and the States did not have the power.[300] Jenkins reasoned that even if Article I, Section 12 did not grant the power for compulsory enrollments, the Article I, Section 8, clause 18 eighteenth clause [the "Necessary and Proper clause"] of the Constitution did provide such power since "it confers 'power to make all laws which shall be necessary and proper for carrying into effect the foregoing powers,' etc."[301] Jenkins concluded that "the people of the Confederate States adopted…these powers, the same Constitution. Our conclusion is, that the power of raising armies by compulsory enrollment, was necessary to the attainment of the end, that

[300] *Ibid*., 351.

[301] *Ibid*., 351.

it was seen by them to be so."[302]

In *Jeffers*, the Georgia high court established the constitutional principle of limited but fully effective national government. It rejected states' rights on the ground that it might render the national government powerless in its respective responsibilities. Associate Justice Jenkins refuted any state sovereignty claim, choosing to look to the Confederate Constitution and a determination of whether the government's actions were the exercise of delegated powers or the usurpation of a reserved power. Jenkins made very clear that while the Confederate government was limited, it was limited from usurping general or reserved powers. In the exercise of its delegated responsibilities, which included raising and supporting an army under Article II, Section 8, it was to enjoy the full powers to fulfill these responsibilities and the provisions and principles of the Confederate Constitution precluded interference by the states: "If the true construction of the Constitution be, that in deference to State sovereignty the Confederate Government must depend upon the separate, unconcerted action of the several States for the exercise of powers granted to it in general comprehensive terms, it is but the shadow of a government, the experiment of Confederate Republics must inevitably fail, and the sooner it is abandoned the better."[303]

Jenkins articulated that there was another political philosophy served by Confederate limited government beyond states' rights and that government was to be limited under the constitutive principles of the Confederacy so as to facilitate *general* and *national* goals. To underscore this statement, Jenkins stated that it was preferable to have *no government at all* rather than ineffective government, a rather strong and passionate

[302] *Ibid*., 364.
[303] *Ibid*., 364-365.

political statement to include in a decision enunciating constitutional principles.[304]

In his opinion, Jenkins identified very clearly the distinction between *authority* granted to government under the Constitution and the *power* that government could exercise in furtherance of this authority and to realize the national goals and purposes, a statement that mirrored the elimination of the General Welfare clause and the retention of the Necessary and Proper clause. Jenkins stated that although the national government's power to raise armies was "unlimited *as to the use of means*" is was not unlimited in its authority, "*as to the subjects upon whom it may operate*" and state government officials who were necessary to the operation of state governance would not be subjected to conscription. Jenkins was unequivocal in asserting the court's commitment to the enforcement of constitutional principles and limitations, stating that "civil power, even in despotic governments, is held in and restrained within limits by great first principles, or by limitations inherent in each peculiar system."[305]

The Georgia high court's pronouncement of limited but purposeful government was followed in Alabama in January, 1863 in the jointly-decided case of *Ex Parte Hill, In Re Armistead v. Confederate States & Ex Parte Dudley*. Associate Justice Walker made clear that the power conferred under the Constitution included a full grant of power to fulfill the responsibilities of the respective government, within its scope of authority.[306] In his reasoning, Walker underscored the importance of the Necessary and Proper clause as a complete grant of power to the Confederate government, but limited to only

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[304] *Ibid*.
[305] *Ibid*., 365-367.

[306] 38 Ala. 458 (1863).

that authority afforded the national government in the Confederate Constitution. "The constitutional power of executing the laws of congress, whether they touch the person or the property of the citizen, can not [sic] be subordinated to the authority of a State tribunal…[t]his is the inevitable deduction from the proposition that the general government is, within the sphere of its delegated powers, coordinate with the respective States."[307] By limiting the scope of general authority but expanding the power of the national government within the limited scope of its authority, the Confederate framers had hoped to correct the abuses of the national government without impairing its ability to meet its constitutional obligations and duties to the nation. Southern justices enunciated this principle as a matter of constitutional doctrine.

The enunciation of limited authority with the full range of powers necessary and proper for their fulfillment was addressed by the Alabama court again in 1863. Associate Justice Stone, in a concurring opinion in another January 1863 case, *Ex Parte Hill & Willis, Johnson and Reynolds v. Confederate States*, held that the conscription statutes were constitutional under Article I, section 8, clauses 11, 12, 13, and 14 as "specific grants of power, in language free from ambiguity."[308] Here, drawing upon *Federalist No. 33*, Stone was very clear in identifying that Congress was empowered to the extent necessary but only for those "specific grants" provided for in the Confederate

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[307] *Ibid*., 479-480.

[308] 38 Ala. 429, 445 (1863). Willis, Johnson, and Reynolds were captured, held by L.H. Hill, an enrollment officer, and severally petitioned the Montgomery County probate judge for writs of habeas corpus, praying for discharge and exemption because of physical disability. The probate judge issued the writs and Hill filed an application for writs of prohibition against the probate court of Montgomery County, to enjoin that court from any further action in the cases of the three petitioners.

Constitution since "there should be no incidents to incidental powers.[309] Stone analyzed the Necessary and Proper clause to determine whether the jurisdiction and powers over conscription were rightly held by the Confederate government and he concluded that since "congress is clothed with power to raise armies by direct means, without calling to its aid State authority…with the well known limitation, that the means employed shall be both necessary and proper for carrying into execution the granted power."

Stone interpreted the phrase "necessary and proper" to mean "that both qualifying words shall have operation and effect; necessary to the full employment of the right; and proper—homogeneous and harmonious with our compound system of government." Stone made clear that the Constitution also dictated the extent of what was to be considered "necessary" and what was to be considered as "proper" so that "no matter how necessary the proposed means may appear…if it antagonize any of the reserved rights of the States or the people, or militate against any of the principles which underlie our liberties, then it is not proper" while "on the other hand, if the means proposed be in harmony with every principle of our institutions, but not necessary to the full enjoyment of some power granted to the Confederate government, the employment of such means by that government would be a sheer usurpation."[310]

That same year, in *Ex Parte Randle*, the Texas Supreme Court took up the issue of whether Randle, in his capacity as a principle exempted from Confederate service after hiring a substitute under the provisions of the Conscription Act of April 16, 1862, was entitled to the writ of habeas corpus as a means of liberating him from service as a

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[309] *Ibid*., 446.
[310] *Ibid*., 446.

state militiaman.[311] Moore, writing for the court, refused Randle's application, holding that Randle and others who were discharged from their original obligation through substitution, could later be obliged to render service as a militia soldier in service to Texas, even under a requisition of the Confederate government, during the same period for which they were originally discharged. The specific grant of authority to the Confederate Congress in the Constitution to raise and support armies was "separate and distinct" from congressional powers to call out the militia and this specific grant of authority included the full and necessary powers to make it effective: "Congress may raise armies by its own immediate and direct action upon the arms-bearing citizens of the State; under the second, by and through the action of the officers of the State, the militia are called for the temporary exigencies indicated in the Constitution, into the service of the Confederate States."[312] Moreover, in *Ex Parte Randle*, the Texas court established the primacy of fundamental over statutory law, preserving the constitutional order from the vagaries of political strife and the political vicissitudes of the Confederate Congress. In interpreting the extent of the Conscription Act of April 6, 1862, Moore stated that "This act was not intended and could not have the effect of a

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[311] Randle was a Texas citizen and on July 7, 1861, enlisted for one year in the 3rd Georgia Regiment. Randle's term of enlistment was extended under the first Conscription Act on April 6, 1862. On August 6, 1862, Randle furnished a substitute, 38 years of age, and was discharged from service. When he returned to Texas, Randle was enrolled in the state militia. After the Confederate commanding general for the Military District made a requisition upon the Governor of Texas in December of 1862 for 5,000 militia to protect the coast and to repel the Union invasion of the state, Randle was drafted into the state militia. He filed an application for a writ of habeas corpus in February, 1863 under the claim that he was exempt by virtue of his providing a substitute to the Confederate Army.

[312] Robards, *Synopses of the Decisions of the Supreme Court of the State of Texas*, 10.

negation or limitation of the right of the Confederate Government to call forth the militia, under the other constitutional grant of power conferring this authority."[313]

In *Thomas Barber v. William A. Irwin* Associate Justice Jenkins denied any express limitations upon the Congress's general power to raise armies and conscript men because "The Constitution makes it the duty of the Confederate States to 'protect each of the States against invasion.'" Jenkins held that the framers of the Confederate Constitution intended the Confederate Army to be the "chief instrumentality" for exercising the strength of the southern nation, particularly in offensive actions or on foreign soil.[314] Jenkins refuted a states rights oriented interpretation of the Confederate charter, holding that as a matter of constitutional law, the Confederate Government was given broad, general powers with respect to the raising of the army, within its responsibilities for the nation's safety. Therefore, there were no restrictions that the state militia could only be called out after exhausting all resources in raising the national army. The court interpreted the specific lack of limitations upon the general powers of the national government to protect the nation as evidence of the intent of the framers to give the national government fully sufficient powers within its delegated authority.[315] Jenkins rule for strict construction of the general powers afforded to the national government followed the court's reasoning that since the Confederate Constitution was "of very recent origin, and its framers not without the benefit of

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[313] *Ibid*., 11.

[314] *Thomas Barber v. William A. Irwin [E. T. Jones v. Nathaniel F. Mercer; E. T. Jones v. Issac B. Brinson; Issac Dennis, et al. V. Willis B. Scott; E. T. Jones v. William Warren*, 34 Ga. 27 (1864).

[315] *Ibid*., 35-36.

experience…in theory, at least, they [the Confederate framers] have solved the problem; and if practical efficiency be not yet fully attained, it must be sought in amendment of the fundamental law."[316]

In enunciating *effective* national government as an express goal of Confederate constitutionalism, the Mississippi state high court revealed, during its October term of 1864, that the Confederate Constitution was part of an American constitutional tradition and development in which the state rights ideology was not only diminished but rejected.[317] In *Simmons v. Miller*, the court addressed whether Mississippi possessed the authority to call up her citizens to military service before they were taken for Confederate service, to the exclusion of the right of the Confederate States to their military service, when required by that government.[318] The court explained that the constitutional tradition from which the Confederate charter had originated was not that of the Articles of Confederation but the Federalist Papers.

In his opinion, Chief Justice Handy drew from *Federalist No. 22* and specifically rejected the Articles of Confederation, referring to the latter's want of *effective* leadership and the omission of necessary national authority to address the demands

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[316] *Ibid*., 37-38.
[317] *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19 (1864).

[318] David Simmons was between forty-five and fifty years of age when the Confederate Congress passed the amended Conscription Act in February of 1864, expanding the age of conscripts to fifty. In March he received notice to enroll and in April was appointed a county deputy sheriff. Six days later he reported for enrollment and was registered as a deputy sheriff. His position as a deputy sheriff expired in August of 1864 and Simmons was arrested in January 1865 by the enrolling officer, Captain J. H. Miller. Simmons sued out a writ of habeas corpus, was tried, and after being remanded to the custody of the enrolling officer, sued out a writ of error. 40 Miss. 19, 19-20 (1864).

from the Revolution. Handy stated that the states' rights-oriented argument presented by Simmons violated the specific grants of authority and powers to the national government in the Constitution. Such an understanding of the Confederate Constitution "would render those powers wholly inefficient in time of war, and throw the Confederate Government back to the inconveniences under the articles of confederation" and a constitutional arrangement under which the national government would become "entirely dependent on the several States for troops to carry on the war, restoring the system for the most part of resorting to quotas of troops from the several States, and leaving it in their power to supply or refuse troops for carrying on the war, at their discretion."[319]

Handy dismissed the application of the state sovereignty doctrine to the issue of war powers, drawing from John Marshall's opinion in *Sturges v. Crowninshield*,[320] and the rule "whenever the terms in which a power is granted to Congress, or the nature of the power, require that it shall be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it." Handy concluded that "if each State has the right to withhold from Congress any portion of her citizens fit for military service and subject to it, she has equally the power to withhold all such persons whenever she may think fit to do so." Handy rejected this idea since "government would be wholly powerless to raise a single man within its limits to carry on the war, if the several States thought fit to retain their citizens in their service." In its holding, the court rejected this development under the

[319] *Ibid*., 26.

[320] 17 U.S. 122 (4 Wheat.) 122 (1819).

Confederate Constitution, stating "this is 'absolutely and totally contradictory and repugnant' to the provisions of the constitution referred to, and would render the war-powers granted in the constitution nugatory…It would, in effect, paralyze the war-power of the Confederate Government at the discretion of the States."[321]

In *Theodore Parker v. Charles Kaughman & Lieutenant Clark v. Robert C. Brady*,[322] the Georgia high court, in an opinion authored by Associate Justice Jenkins, affirmed its position on the grant of necessary powers. Referring to their earlier decision in *Thomas Barber v. William A. Irwin*,[323] the court again focused on the constitutional language that provided general grants of power within the appropriate spheres of government. The court held "as we understand it, the philosophy of our system is to make the grant large enough to meet such contingencies, and to provide against abuse in the structure of the Government," making clear even late into the war that the balance between limiting and empowering government would still be resolved by the implementation of the Necessary and Proper clause.[324]

Permanent Fundamental Law for A National Community

State supreme courts, through their careful and virtually consistent interpretation of constitutional provisions, their regular application of the Confederate Supremacy Clause to national wartime issues, and their articulation of national constitutional goals

[321] *Ibid.*

[322] 34 Ga. 136 (1865).

[323] 34 Ga. 27 (1864).

[324] *Ibid.*, 141.

and purposes, made fundamental law, which provides for a framework of government and controls legislative power, both permanent and national in the Confederacy. The doctrinal development of the Supremacy Clause established unequivocally the permanency of constitutional principles by placing them above mere statutory revision.[325] With the rejection of assertions of states rights used in pleadings before their courts, the state supreme court justices enunciated a nationalist constitutionalism that diminished significantly the states' rights constitutionalism that had characterized antebellum southern politics and facilitated secession.[326] Confederate framers moved away from states' rights constitutionalism in order to realize their awesome responsibilities: to create a new nation, to provide it with a sense of permanency and stability, and to empower it to fulfill its constitutional purposes.[327] Robert Smith, a Confederate framer, arriving in Montgomery on January 31, 1861, expressed his awe over having to create a constitutional framework for the new nation. He revealed to his wife that he was unsure of himself because the task that lay before him was more than the creation of a confederation of states. It was "to determine in full council the *final*

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[325] The Confederate Supremacy Clause is found in Article Six, Section 2. It provides that "This 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; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

[326] Fehrenbacher argued "states-rights constitutionalism was not so much an abiding faith as a convenient strategy of dissent from the current rulers of national affairs." Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 42.

[327] "The document is especially valuable as a testament of Confederate national purpose because it was written after the commitment of the lower South to independence but before the exigencies of war had made constitutionalism itself a luxury that could scarcely be afforded." *Ibid*, 61, 80.

form…of a Southern Confederacy…& organize with all dispatch the machinery of government." This machinery of government was to be national in scope with national purposes and goals and Smith confessed to his wife, "I still feel incompetent to fill the expectations and wants of the *country*."[328]

The Confederate Supremacy Clause became an effective tool for shaping and guiding state supreme court adjudication and it also became an important tool for expressing the primacy of the national goals and purposes above those of the states or of individuals, diminishing the importance of states' rights in Confederate constitutional government. In Mississippi, Associate Justice Handy made clear that the states were under obligation to obey and follow the duties and responsibilities expressed in the Confederate Constitution.[329] Handy held that "by the provisions of the constitution, the power to declare war belongs exclusively to the Confederate States Government" and "it was never contemplated that the separate States should carry on the war within their limits after public war was declared, except to repel invasions; and that only so far as might be done without detriment to the general power of the Confederate Government."

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[328] Robert H. Smith, Letter to "My dear Helen," January 31, 1861, from "Autograph Letters and Portraits of the Signers of the Constitution of the Confederate States," collected by Charles Colcock Jones, Jr., in Charles Colcock Jones, Jr. Collection, Special Collections Library, Duke University. The reason for the awed respect for this task of establishing a national charter were due to the long American tradition of reverence for written constitutive documents: "written charters were a familiar part of American colonial and revolutionary history and the late eighteenth-century Western political thought was infused with the view that an ideal system of government was a Newtonian clockwork: structured, mechanical, reducible to rules and precepts." Keller, "Power and Rights: Two Centuries of American Constitutionalism," 676; Stanley Pargellis, "The Theory of Balanced Government," 37-49, in Conyers Read, ed., *The Constitution Reconsidered* (New York, NY: Columbia University Press, 1938), 37-49; and Forest McDonald, *Novus Ordo Seclorum*, (Lawrence, KS: University Press of Kansas, 1985), 58-87.

[329] *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19 (1864).

The states or states' rights advocates could not use the war as an excuse to emasculate constitutional provision or principles or to diminish the supremacy of the national government. Handy rejected the assertion of states' rights, stating "when the whole country is involved in a general war, it is a grave and dangerous error to suppose that any State has the right to engage in the war, or to institute measures of war, independently of the power of Congress and in opposition to the measures adopted by that body for carrying on the war, if they are constitutional."[330]

The Georgia court affirmed this conclusion in *Thomas W. Cobb v. William B. Stallings & B. A. Baldwin v. John West*. The court held that in any conflict between Confederate and Georgia law, the Supremacy Clause of the Confederate Constitution established that Confederate law "shall be the supreme law of the land" and added "So says the Constitution, and we can not [sic] say otherwise."[331] The issue in this case was whether Confederate Tax Assessors and Collectors in Georgia, engaged in their regular duties, were liable to militia service, under the laws of the state of Georgia, and subject "to be called by the Governor into actual service for the purpose of repelling invasion."[332] In support of its holding the court cited John Marshall's opinions in *McCulloch v. Maryland*,[333] *Houston v. Moore*,[334] and *Osborne, et al. v. U.S. Bank*.[335]

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[330] 40 Miss. 19, 26-27. Two expressions of states' rights constitutionalism--state concurrent power and nullification—were refuted by southern jurists in *Ex Parte Coupland*, 26 Tex. 386 (1862) and *In Re Bryan*, 60 N.C. 1 (1863).

[331] 34 Ga. 72, 77 (1864).

[332] *Ibid*., 74.

[333] 17 U.S. (4 Wheat.) 316 (1819).

[334] 18 U.S. (5 Wheat.) 1 (1820).

State supreme courts enunciated as a matter of constitutional doctrine that the Confederate Constitution possessed a strong national orientation and form designed to facilitate national objectives and purposes. In fact, they were to make the achievement of national purposes a measure of constitutional orthodoxy.

The emphasis upon creating a permanent nation was evident in the Preamble to the Confederate Constitution where Confederate framers professed an express national purpose to form "a *permanent* and *federal* government." This was a significant step for the preamble identified the Confederate constitutional arrangement as a *federal government*, not a confederacy, implying the importance of divided responsibilities, powers, and authorities. Permanency had been an objective since the earliest days of the secession crisis and James L. Orr, Commissioner from South Carolina to the Georgia State Convention recounted how he had been "instructed to 'invite the seceding States to meet in convention…for the purpose of forming and putting in motion such provisional government…and that the same convention shall then proceed forthwith to consider and propose a constitution and plan for a *permanent* [italics added] government for such States, which proposed plan shall be referred back to the several State conventions for their adoption or rejection.'"[336] The new nation was to be *permanent*, strongly suggesting that the framers intended that secession—the most extreme expression of the states' rights philosophy--was not a valid theory under the new

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[335] 22 U.S. (9 Wheat.) 738 (1824).

[336] James L. Orr, Commissioner from South Carolina to George W. Crawford, President of the Georgia State Convention, January 16, 1861, *Official Records of the War of the Rebellion*, series IV, volume I, 57.

constitutive document.[337]

The permanency of the national government rested upon the ability to establish the Constitution as permanent and controlling fundamental law and state supreme courts were to possess the primary role in this task through their enunciation of the Confederate Supremacy Clause. State supreme courts manifested their intent to uphold the supremacy of the national government but did so without blindly favoring the national government because of wartime exigencies. In 1863, the Georgia Supreme Court wrestled with the issue of concurrent jurisdiction over national statutory interpretation under Article Three. In *James L. Mims and James D. Burdett v. John K. Wimberly*,[338] Associate Justice Jenkins held that under Article Three, Section 2, state courts could exercise concurrent jurisdiction over statutory interpretation. While the first paragraph of Section 2 defined "the extent of the judicial power of the Confederate States," including, among others, "'all cases arising under the laws of the Confederate States,'" the Constitution did not restrict jurisdiction to the Confederate courts as exclusive jurisdiction. In support of his decision, Jenkins drew from John Marshall's decision in *Cohens v. Virginia* endorsing

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[337] Alexander Hamilton Stephens, *A Constitutional View of the Late War Between the States*, 2 volumes (Philadelphia, PA: National Publishing Company, 1870), 2:335; Augustus Longstreet Hull, "The Making of the Confederate Constitution," *Publications of the Southern History Association*, IX (1905), 89; White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 11; Robert H. Smith stated the express purpose of forming the Southern nation was to create a "close bond of union" between the seceded states: "Each state had seceded with the expectation of speedily forming a close bond of union with her sympathizing sisters, and the great object of the Convention was to bind together the broken fragments of a separated, but homogeneous people." Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America by the Hon. Robert H. Smith*, 4.

[338] 33 Ga. 587 (1863).

concurrent jurisdiction with federal courts unless such jurisdiction was rendered exclusive under Article Three.[339] Yet, Jenkins also made very clear the supremacy of the national government's authority and, drawing upon the U.S. Supreme Court's decision in *Smith v. McIver*, held that if Confederate courts exercised jurisdiction over a writ of habeas corpus case, the state courts were bound to withdraw any proceedings to "avoid a conflict."[340] Jenkins' most compelling source, though, was the Supremacy Clause found in Article Six, Section 3 of the Confederate Constitution where, according to Jenkins, the judges of the several states were to be bound by the Constitution, and the laws made in pursuance thereof, as the supreme law of the land.[341]

The supremacy of the national charter was again addressed by the Georgia high court one year later in *Daly & Fitzgerald v. Harris and Harwell v. Cohen*,[342] where Jenkins refused to characterize exemption as a contract because of the civic responsibilities which he identified as part of the Confederate social compact and implicit in the Confederate Constitution. Jenkins held "that each member owes *to all other members* [in original], the duty of defending the State, as far as he is capable, and that governments instituted simply to administer the public affairs of organized society, are powerless to release him from this obligation…it is not true of all governments invested with legislative power for the common weal." The duty was owed to other members of the Confederate

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[339] *Ibid*., 595.

[340] *Ibid*., 596. Jenkins also referred to several cases in Kent's *Commentaries* that had been decided by Chief Justice Kent of New York establishing this principle. 33 Ga. 587, 597.

[341] *Ibid*., 598.

[342] 34 Ga. 38 (1864). This case consisted of several jointly decided cases: *Dennis Daly v. C. J. Harris*; *Phillip Fitzgerald v. C. J. Harris*; and *John M. Harwell v. Jonas L. Cohen*.

political community and the national government was precluded from trying to "divest either itself or its successors of any power necessary to the well-being of the State" and any belief that the Confederate government could contract itself out of its responsibilities was "contrary to first principles and subversive of all government." He added that "We need not go to remote antiquity nor inquire into first principles, upon which the social compact is founded…The solution is the question is found in a document, accessible to all, recognized as fundamental as supreme law, ordained but three years since, whereto we all were consenting."[343]

Jenkins and his brother justices made very clear their intent to do justice and resolve political conflict for the citizens of Georgia but within the framework established under the Confederate Constitution. Associate Justice Jenkins rejected any construction of the Confederate Constitution that resulted in the exercise of a power not expressly granted "in antagonism to another power expressly granted for the purpose *vital* [italics in original] to the Confederate States"[344] The courts' reliance upon the text manifested their belief that the Confederate Constitution was permanent, binding upon them, and became "a framework for action."[345]

In 1864, the Alabama court considered the extent and operation of Supremacy Clause in the matter of Polinice Pille's attempt to be discharged from the custody of Colonel William Graham, who held him as a second-class militia-man under the call of

[343] 33 Ga. 38, 51-52.

[344] 33 Ga. 38, 55. See also *Harwell v. Cohen*, 33 Ga. 38 (1864).

[345] Belz, *A Living Constitution or Fundamental Law?*, 31.

the governor.[346] The court held that, under the Confederate Constitution, the national government possessed a constitutional primacy to Pille that precluded any state interference or power to usurp the authority of the national government. Chief Justice Walker held that the applicable statute for this holding came from the Conscription Act of February 17, 1864 which had declared "'From and after the passage of this act, all white men, residents of the Confederate States, between the ages of seventeen and fifty, shall be in the military service of the Confederate States.'" From the above construction, Walker concluded that "this places every man, liable to conscription, constructively in the military service of the Confederate States; and a man in such service can not [sic] be taken into the military service of the State as a militia man."

This conclusion represented the constitutional primacy of the national government in its war-making powers and the supremacy of Confederate law and the Confederate Constitution in providing a framework for resolving political differences. Any attempt by the states to usurp this authority would violate the provisions of the Confederate Constitution: "The claim of the State to the military service must yield to the conflicting claim of the Confederate States; for the constitution, and laws of the Confederate States passed in pursuance thereof, are the supreme law of the land"[347] In this case, Walker stated that Pille was liable to conscription and to Confederate military service as long as he was domiciled in the Confederacy, even though he was a domiciled foreigner; he was not liable to state militia service while liable to Confederate service. The constitutional order in the Confederacy was configured to facilitate the *national* welfare of a Confederate people, not just citizens of individual states.

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[346] *The State, ex rel. Graham, In Re Pille*, 39 Ala. 459 (1864).
[347] *Ibid*., 460.

Concurrently, state courts enunciated that fulfilling the national purposes of the Confederacy might also require certain civic responsibilities that an individual citizen might owe to the national political community.

State supreme courts also made very clear that in any conflict over prioritizing the protection of the nation and that of an individual's rights, the individual would always be precluded from asserting a better claim since the safety of the nation was established as a constitutional goal which the national government was duty bound to facilitate. This question of whether individual rights should be protected above all other considerations was taken up by the Texas court in *Ex Parte Turman*.[348] Here, the court recognized the importance of the issues raised in this case, that "the questions involved in the case are of great magnitude, and they cannot, by any means, be said to be free from difficulty." The court weighed carefully individual rights and national interests since the case involved "some of the most important rights of the citizen, some of his highest duties to the state, the public policy of the state in respect to the punishment of high crimes, and the relation between the state government and the Confederate government."[349] The protections afforded to the individual were not to be considered as

[348] 26 Tex. 708 (1863). In January of 1863, Turman was indicted for treason by a Texas grand jury for "'knowingly, maliciously and advisedly discouraging the people from enlisting into the service of the Confederate States of America, and did then and there knowingly, maliciously and advisedly discourage the people from enlisting into the service of this state, the said state of Texas, and then and there willfully and maliciously did dispose the people to favor the enemy.'" 26 Tex. 708, 709. Turman claimed that he was held a conscript and illegally restrained of his liberty by respondent, S. M. Warner and he petitioned for a writ of habeas corpus, which he received. Turman argued that he was exempt from military service since he was under bond to appear on felony charges.

[349] *Ibid*., 709.

"supreme as to override all other considerations…They spring out of regard for the public welfare, and may be modified by considerations nearly touching the public safety."[350]

Associate Justice Bell was compelled to conduct a balancing test between the public policy concerns and individual liberties, with the conclusion that the Confederate war-making power was held to be of higher priority than the state power to compel service in the state militia: "It is held that the right of the Confederate States to compel the citizens of the states to do military service is superior to the right of the state over her militia."[351] These principles were enunciated as part of the Confederate fundamental law, they were due to more than wartime exigency and became effective upon all citizens and indicate of the permanency and stability of the Confederate constitutional order.[352]

In the Texas case of Ex *Parte Abraham Mayer*, Associate Justice Reeves addressed the claim that conscripting Mayer after he had furnished a substitute could only be done after the Confederate government refunded the money Mayer paid to his substitute and that without such a provision, the act of January 5, 1864 was unconstitutional. Mayer claimed that the January 5th act violated Article 1, section 4 which protected private property from seizure for public use without making just

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[350] *Ibid*., 710-711.

[351] Ibid., 711. Bell looked to the Texas Legislature's recent act thatprevented forfeitures of bonds issued to persons accused of misdemeanors while in military service. This act was designed to protect those in military service from unfair treatment and to encourage enlistments, not to provide a safe refuge in the military for felons. The legislature "did not think it proper to hold out any encouragement to persons accused of high crimes (felonies) to enter into the military service."

[352] Belz, *A Living Constitution or Fundamental Law?*, 1.

compensation. However, Associate Justice Reeves stated that "the right to take private property for public use is founded on the idea that private rights must yield to public necessity…The sovereign power, wherever it may be lodged, must judge of the exigencies that will justify the exercise of power, and in our system of government that power has been conferred on congress."[353] Individual rights would have to yield to public interests, when necessary, though always within the framework of the Confederate Constitution.

The Confederate Constitution was also a more innovative document by adding a more democratic procedure for amending the national charter under Article V even though this more democratic process did not threaten the permanency or the fundamental nature of the Constitution.[354] Confederate framers feared the broad interpretative power of Congress to use amendments to redraft the Constitution and, in Article V, Section 1 they created a more specified process in which the scope of constitutional amendments was limited to a consideration of only those amendments proposed by states that demanded a convention.[355] The framers removed from the

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[353] 26 Tex. 715, 724 (1864).

[354] Confederate innovations were not undemocratic since the popular election of the president continued unabated, there were no changes to the election process, and the terms of senators or congressmen were not lengthened. Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 216. This contrasted sharply with the Georgia secession convention which drafted a new state constitution and restricted democracy in several key provisions. The *Augusta Chronicle and Sentinel*, February 24, 1861; the (Atlanta) *Gate City Guardian*, op cit. in *Augusta Chronicle and Sentinel*, February 28 & March 8, 1861; Michael P. Johnson, *Toward a Patriarchal Republic: The Secession of Georgia* (Baton Rouge, LA: Louisiana State University Press, 1977), 79-187; Robinson, "New Deal in Constitutions," 460-461.

[355] Article V, Section 1 reads: "Upon the demand of any three States, legally assembled in their several conventions, the Congress shall summon a convention of all

Congress the ability to initiate the amendment process and lowered the threshold for amending the Constitution so that any three states could demand a convention of states to consider amendments. The Confederate ratification of amendments also differed from the U.S. Constitution in its requirement that two-thirds of the state legislatures or state conventions were required to ratify the amendment proposed by the constitutional convention instead of the three-fourths requirement in Article V of the U.S. Constitution. Robert Hardy Smith, Confederate framer from Alabama, understood this as a significant improvement upon the U.S. Constitution, commenting, about the Amendment process in Article V "'[t] he substituted provision imparts a wholesome flexibility to our Constitution and, at the same time, assures us against an assembling of the States for light or transient causes, or hopeless purposes, and the consultative body, when convened, will be confined to action on propositions put forth by three States.'"[356]

In the winter and spring of 1861, southerners chose to leave behind what they considered as "the deterioration of American constitutionalism, a deterioration initiated and sustained by their political rivals in the North" and they sought to define a new form of government and re-structure government to facilitate the effective management

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the States, to take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the Constitution be agreed on by the said convention, voting by States, and the same be ratified by the Legislatures of two- thirds of the several States, or by conventions in two-thirds thereof, as the one or the other mode of ratification may be proposed by the general convention, they shall thenceforward form a part of this Constitution." White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 20.

[356] Lee, *TheConfederate Constitutions* , 119; White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 20.

of political conflict.[357] Their objectives and efforts resulted in partly-conservative and partly-progressive constitutive documents that represent a significant "development in representative government," "the peak contribution of America to political science,"[358] and "an interesting new chapter...in the history of constitutional government."[359] Confederate framers retained as much of the American constitutional system as they deemed appropriate and "many of the Confederate principles are indigenous to the American constitutional system of government...the Confederate Constitution is relevant because it raised, and continues to raise, pertinent questions that cannot be glossed over if American constitutionalism is to be placed on terra firma."[360] Confederate framers tried to preserve an older republican tradition while also moving forward in a new direction and these innovative developments were rooted in "popular political-constitutional attitudes and state constitutional practice" and these changes "anticipated the direction of constitutional change in post-Civil War America,"[361] especially the attempts to strengthen state executive branches against legislative corruption and "activism," including the item veto and

[357] DeRosa, *The Confederate Constitution of 1861*, 1. Regarding new ideas about the resolution of political conflicts and partisanship. Rable, *The Confederate Republic.*

[358] Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 461.

[359] Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 67; DeRosa, *The Confederate Constitution of 1861*, 2.

[360] DeRosa, *The Confederate Constitution of 1861*, 3.

[361] Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 204.

expanding executive involvement or direction of state budgets.[362]

The wartime decisions of the state supreme courts were the result of the careful interpretation the provisions and principles of this Confederate Constitution (especially the Necessary and Proper clause and the Supremacy Clause) and they reveal the greater reliance upon managerial forms, a distinct focus upon government fulfilling national purposes and responsibilities, and a fundamental law framework national in scope and focus that challenged states rights as a national political philosophy. These decisions point to a reliance upon constitutional principles and ideas rather than political exigency and a significantly diminished importance of states' rights in Confederate constitutional and political thought.

In their wartime decisions, state court justices were compelled to analyze the text of the Confederate Constitution and to enunciate its key constitutive principles, which they did. However, the state courts also defined the crucial federal relationship between the states and the Confederacy. If states' rights was the constitutive political philosophy of the Confederate States of America, these wartime conscription and exemption cases provided an excellent political opportunity for individual state supreme courts—as state institutions—to enunciate principles that would limit the power and authority of the Richmond government and assert the supremacy of state governments. Instead, wartime jurists manifested a determined intent to interpret carefully the provisions of the Confederate Constitution. Consequently, they enunciated a doctrine of federalism that did not dispel the important role of states in Confederate constitutional governance, but it did undermine the preeminence of states' rights in the

[362] *Ibid*., 212-213.

Confederate political philosophy. In these interpretations of the Constitution, we may find a "light" to reveal its "true meaning" on the relationship between national and state governments and gain insight into the implementation of "principles and purposes of those who established the Confederate Government."[363]

[363] Curry, *The Southern States of the American Union Considered in their Relations to the Constitution of the United States*, 91.

Chapter Four

Preserving Balanced Authority

On July 16, 1862, only three months after the promulgation of the first Confederate Conscription Act, a young Texan, F.H. Coupland, sought a writ of habeas corpus under the claim that he had been arrested "without any order or process whatever, or any color of either" and that he was illegally restrained of his liberty by a Confederate officer, Colonel R. T. P. Allen.[364] Coupland, like many other wartime litigants, claimed exemption from Confederate military service under a states' rights-oriented argument that the conscription statute—the Richmond government's direct effort to raise a national army—was unconstitutional because it interfered with the authority and power of the states.[365] Coupland claimed that this statute was in derogation of the "reserved rights of the states" to mobilize citizens via the militia and he argued that the states could assert *a greater claim* to call up individuals into military

[364] *Ex Parte Coupland*, 26 Tex. 387 (1862). The first conscription act was passed by the Confederate Congress on April 16, 1862. *Public Laws of the Confederate States*, 1 Cong., 1 Sess., 1862 (Richmond, VA: R.M. Smith, 1862), Chapter XXXI, section 1. This act was entitled "An Act to further provide for the public defence [sic]."

[365] At trial, Allen testified that Coupland was enrolled as a Confederate conscript under the April 1862 statute and, subsequent to his enrollment, had selected and joined his company. Chief Justice Royall T. Wheeler, sitting *in vacation*, concluded that Coupland had been properly enrolled under the conscription legislation and remanded him as a conscript back to the custody of Colonel Allen whereupon Coupland appealed Wheeler's decision before the Texas Supreme Court, sitting *en banc*. An *in vacation* decision is rendered by an individual justice who adjudicates independently in between the regular sessions of the court. *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979), 1388. *In vacation* decisions were considered authoritative and good law until such time as the entire court, sitting *en banc* during a regular session of the court, overturned the *in vacation* opinion.

service, over that of the national government.[366]

A decision by the combined Texas court affirming Coupland's claim and an explanation of the Confederate Constitution as embodying a states' rights political philosophy—essential to Coupland's claim—would have benefited Texas by giving the state the constitutional authority to nullify Confederate conscription. In Texas, frontier defense was a major issue leading to secession and of concern to the state's citizens throughout the war and state officials would have had sufficient incentive to limit the authority and power of the national government in Richmond. A decision by the state's high court asserting the authority of the state to stop the removal of desperately needed men and resources to the eastern theater of operations would have allowed Texas to better protect state citizens and property from attacks by Indians and bandits.[367]

However, the Texas court focused upon its task of enunciating constitutional principles and clarifying provisions in the Confederate Constitution rather than local political issues. Coupland's legal claim required the Texas court, like many other southern state supreme courts during the war years, to determine the correct division of authority and power between the state and national governments under the Confederate

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[366] 26 Tex. 387, 392.

[367] As early as 1862, anxious newspaper editors in Texas advocated greater attention to *local* military needs: "We used to think that Texas was always regarded as a little outside corner of the world by the U.S. Government. When in that Government we contributed our full share to its resources and glory; but whenever any of the benefits of a Government were wanted we had to rely on ourselves…If we wanted the Indians whipped we had to do that…In fact we were, to all intents and purposes, a neglected province.…On the inauguration of the new [Confederate] Government, we hoped, and had a right to hope for better things…." *Houston Tri-Weekly Telegraph,* May 9, 1862; the *Austin State Gazette*, May 18, 1861. "Texas has now 64 regiments in the field, a large proportion of which are out of the State. She ought not to be deprived of any more men if it can be avoided." The *Houston Tri-Weekly Telegraph*, Nov. 17, 1862.

Constitution and to explain whether the Confederate national charter was premised solely upon a states' rights political philosophy. Cases like *Coupland* provided an excellent opportunity for individual state supreme court justices—as officers of state institutions and in response to the interests of their local and state constituencies—to enunciate principles that would have restricted the power and authority of the Richmond government and asserted the supremacy of state government.[368]

This 1862 Texas decision, the first state supreme court decision to address federalism and one of the most clearly enunciated pronunciations of the doctrine of federalism in the Confederacy, is important for it reveals two essential doctrinal principles in Confederate federalism that were enunciated by other southern state supreme courts during the war.[369] The Texas high court fashioned a doctrinal development that rejected states' rights as the preeminent configurative constitutional principle. Writing for the court, Associate Justice George F. Moore vigorously asserted the *federal* nature of the Confederate nation, holding that the Confederate government,

[368] Political scientist Marshall DeRosa concluded very differently, arguing that the Confederate Constitution was premised upon two principles: "recommitment to state sovereignty" and institutional limitations upon the Confederate government. DeRosa, *The Confederate Constitution of 1861,* 133.

[369] Texas was an interesting forum for examining national constitutive principles, especially federalism, because the state included a wide range of interests and loyalties, a diverse population, and it shared characteristics common to both the South and the West. Moreover, because the state was so remote from the rest of the Confederacy, Texans' understanding of the war, federalism, adherence to constitutional principles, and related issues was shaded by local factors such as geography, isolation, and group identity. David C. Humphrey, "A 'Very Muddy and Conflicting' View: The Civil War as Seen from Austin, Texas," *Southwestern Historical Quarterly*, vol. 94, No. 3 (January 1991):369-414, 370, 414.

especially Congress, was *more than the agent of the states*.[370] Moore was explicit in stating that states' rights was not "the theory of our government, when properly understood" and his pronunciation would be repeated by other state supreme courts.[371] Secondly, *Coupland*, and other southern state supreme court decisions, established the division of governmental authority and power as a normative feature of Confederate federalism.[372] Both national and state governments possessed specific spheres of responsibility and grants of power under the Constitution and the conscription laws were consistent with a specific grant of power to the national government under Article I, Section 8 of the Constitution. These courts held that the national government had been was invested with sovereignty directly, *by the people,* rather than by the states.

Recent historiography on Confederate political philosophy and legal developments has discounted the importance of political principles and concepts in the development of Confederate federalism.[373] These writings largely neglect important

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[370] 26 Tex. 387, 398.

[371] *Ibid*., 403.

[372] *Ex Parte Coupland*, 26 Tex. 386 (1862); *Jeffers v. Fair*, 32 Ga. 347 (1862); *In Re Bryan*, 60 NC 1 (1862); *Ex Parte Turman*, 26 Tex. 708 (1863); *Ex Parte Hill, in re Willis, Johnson, and Reynolds v. Confederate States*, 38 Ala. 429 (1863); *Ex Parte Tate*, 39 Ala 254 (1864); *Ex Parte Lee and Allen*, 39 Ala. 457 (1864); *Burroughs v. Peyton*, 16 Va. 470 (1864); *Thomas W. Cobb v. William B. Stallings & B. A. Baldwin v. John West*, 34 Ga. 72 (1864); *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19 (1864); *Gatlin v. Walton*, 60 NC 205 (1864); *Ex Parte William A. Winnard*, [unreported Texas decision] (1865).

[373] Mark Neely argued that the necessities of complete wartime mobilization overshadowed adherence to constitutional principles. Southerners exaggerated their emphasis upon legal and constitutional principles during the antebellum period and the secession crisis and once war came, they abandoned these principles and became a mirror image of the consolidationist northern government they had earlier rejected. Unprincipled consolidation based upon wartime needs was so extensive that state

state supreme court decisions enunciating Confederate constitutional principles and contend that Confederate federalism was shaped either by wartime necessities or blind adherence to states' rights rather than federalism principles found in the Constitution.[374] In what has become the foremost study of Confederate federalism, Curtis Amlund argued, incorrectly so, that as the Civil War progressed, the constitutional commitment to any substantive federalism principles and doctrines, whether based upon states' rights, state sovereignty principles, or dual federalism, became displaced by military exigencies. He argued that "despite their firmly held states' rights beliefs, southerners were compelled by wartime exigencies to increase the powers of the central government far beyond what was intended originally." Wartime exigencies were so severe as to make it necessary, even popular, to support a consolidated and national Confederate government, in derogation to constitutional principles.[375] Modern war had the effect of transforming the nature of the Confederate political revolution and "in this on-going process of change a governmental system evolved that revealed a striking resemblance to the one from which the South had withdrawn."[376]

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judges and the state bars were "largely complicit with Confederate government power." Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*, 45, 62-63, 79.

[374] Amlund, *Federalism in the Southern Confederacy*. Daniel J. Elazar argued that the Confederate Constitution was a dual federalist document but the demands of the war made state-national cooperation virtually impossible. Following Owsley, Elazar believed that states' rights dictated the adoption of a "doctrinaire attitude" by Confederate leaders and led to "state intransigence" and resistance to Confederate efforts to prosecute the war successfully. Elazar, *American Federalism: A View From the States*, 2nd ed., (New York, NY: Thomas Y. Crowell Company, 1972), 330-335.

[375] Amlund, *Federalism in the Southern Confederacy*.

[376] *Ibid*., v.

However, the state supreme courts interpreted the Confederate Constitution based upon a strict construction of its provisions regardless of military exigencies. These courts resolved conflicts of authority between national and state governments by implementing the principles and the provisions of the Confederate Constitution since it "clearly defines the powers conferred upon the former, and as carefully and certainly secures the residuum to the latter." As the Georgia court would explain about the Confederate Constitution in 1864, "if that instrument be rightly understood and faithfully obeyed, conflict is impossible. If, in the unguarded exercise of power by either, conflict ensue, there can be no difficulty in determining which shall yield."[377]

As Jefferson Davis had stated in his Inaugural Address, judicial interpretation would become the "light which reveals [the] true meaning" of the Confederacy's constitutional principles.[378] The study of southern wartime state supreme court decisions reveals the central importance of federalism to Confederate constitutionalism and its important role in the political philosophy of the Confederacy. In their wartime opinions, southern state supreme court justices discerned and declared whether the political purpose of the Confederacy was to create a weak national government to serve state interests or whether the Confederacy was founded upon a commitment to create a *national and federal* republic. Though the sovereignty of the states was included in the Confederate Constitution, this concept was secondary to the *national and federal* framework and possessed a limited role in defining or shaping Confederate constitutional

[377] *Thomas W. Cobb v. William B. Stallings & B. A. Baldwin v. John West*, 34 Ga. 72, 76 (1864).

[378] The Provisional Constitution was approved February 8th, 1861. The Permanent Constitution was approved just three weeks later on March 11th, 1861.

doctrines, especially the doctrine of federalism.[379] State supreme courts defined the extent of Confederate governmental power over its citizens, how political power was to be apportioned under the war powers of the Confederate Constitution, and how the constitutional government designed by the Confederate founders was to be implemented.

Historical Importance of Federalism

In its most basic form, American federalism is a specific "mode of political organization" and a constitutional doctrine in which administrative and governmental functions and "powers" are allocated or divided between national and state or local governments. Each governmental entity usually possesses "a sphere of jurisdiction within which it is supreme."[380] Within the federal model,[381] the national government

[379] Provisions that favored the states included the Article I, section 2, clause 5 provision for impeaching federal officials and Article I, section 8 prohibitions against granting bounties, protective tariffs, and internal improvements. Fitts in "The Confederate Convention: The Constitutional Debate," 198-200. Other provisions include Article VI, Sections 5 and 6, which correspond to the 9th and 10th Amendments in the U.S. Constitution. States were protected by the prohibition in Article III, Section 2, clause 1 against a citizen of one state suing another state; the provisions in Article I, Section 10, clause 3 that gave the states the power to enact duties on ocean-going vessels for purposes of internal improvements to harbors and river passes without Congressional approval, and, again without Congressional approval to enter into agreements with other states on the navigation of common rivers. Hardaway, "The Confederate Constitution: A Legal and Historical Examination," 18-31. Robinson argued that an underlying tenet of the Confederate Constitution was states rights and the framers' great unwillingness to restrict the states. Robinson, Jr., "A New Deal in Constitutions," 454.

[380] See Martin Diamond, "What the Framers Meant," 25; Robert K. Carr, *American Democracy in Theory and Practice* (rev. ed.; New York, NY: Rinehart and Co., 1955)), 78; William V. Holloway and Emile B. Ader, *American Government* (New York, NY: The Ronald Press Co., 1959), 13. Despite his argument, Amlund conceded "Within a federal system there is a division of political authority between the national

exercises authority or jurisdiction over the "entire territory" of the nation, yet both national and state or local governmental entities are united "within an overarching political system by distributing power [and responsibilities] among general and constituent governments in a manner designed to protect the existence and authority of both."[382]

Federalism was an important constitutional principle in the American colonial experience and to the framers of the Constitution of 1787 because the allocation of power and authority could result in the creation of energetic, efficient, and limited government.[383] The experiences of the colonial era, revolution, and the Articles of

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government and the state governments, each one of which is more or less autonomous within its own sphere of action." Amlund, *Federalism in the Southern Confederacy*, 13.

[381] There are many forms of federalism within the American constitutional tradition including dual federalism, state-centered federalism, nation-centered federalism, creative federalism, cooperative federalism, pragmatic federalism, the New Federalism, marble-cake federalism, layer-cake federalism, and birthday cake federalism. Morton Grodzins, *The American System* (Chicago, IL: Rand-McNally, 1966) and Elazar, *American Federalism: A View From the States*, 47.

[382] Elazar, *American Federalism: A View From the States*, 2. Within each respective sphere of responsibilities, each governmental entity possesses primacy and complete authority. Paludan, "The American Civil War Considered as a Crisis in Law and Order," 1016. Political scientist William Riker provided a similar definition in *Federalism: Origins, Operation, Significance* (Boston, MA: Little and Brown, 1964), 11. Riker argued that a constitution was distinctly federal if it possessed three characteristics: "(1) two levels of government rule the same land and people; (2) each level has at least one area in which it is autonomous, and (3) there is some guarantee (even though merely a statement in a constitution) of the autonomy of each government in its own sphere."

[383] *Federalist No. 15* ("The Insufficiency of the Present Confederation to Preserve the Union"); *Federalist No. 21* ("Other Defects of the Present Confederation"); *Federalist No. 22* ("The Same Subject Continued: Other Defects of the Present Confederation"); *Federalist No. 23* ("The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union"); *Federalist No. 41* ("General View

Confederation made clear the benefits of a national government with limited powers co-existing and balanced by state or local governmental entities that retained residual powers.[384] The Articles of Confederation, "the work of a confederation loosely linked commonwealths seeking to free themselves form an imperial central authority," failed because its emphasis on state sovereignty made for a weak national government and it was replaced by the Constitution of 1787.[385]

Despite the fundamental definition of federalism and its important role in American constitutional governance, the framers of 1787 never clearly defined it as a doctrine in the U.S. Constitution and ambiguity over its meaning led to a great divergence of interpretations, fueling some of the most prominent, intense, and enduring debates over governmental power in American history.[386] The Constitution had "at is core…a

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of the Powers Conferred by the Constitution"); and *Federalist No. 44* ("Restrictions on the Authority of the Several States") in *The Federalist*, edited by Jacob E. Cooke.

[384] The importance of federalism in the American colonial constitutional experience is explained by Lutz in *The Origins of American Constitutionalism* and Jack P. Greene in *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788* (New York, NY: W.W. Norton & Co., 1986). Federalism was a critical issue at the Constitutional Convention and became a focus of both Federalists and Antifederalists in the debate over ratification. Elazar, "Introduction: The Meaning of American Federalism," in *Politics of American Federalism*, xvi. Defining the balance of power between state and national governments was an integral issue in the creation of the Confederate Constitution. DeRosa, *The Confederate Constitution of 1861*, 3 and *Journal of the Confederate Congress*.

[385] Paludan, "Federalism in the Civil War Era," 27. DeRosa, *The Confederate Constitution of 1861*, on the Antifederalist influence in Confederate constitutionalism.

[386] Elazar, "Introduction: The Meaning of American Federalism," in *Politics of American Federalism*, xvi.

calculated ambiguity regarding the balance of power between state and nation."[387] In the absence of any consensus over the proper definition and form of federalism, protests such as the Virginia Resolutions of 1798 declared that the states, as co-equal governmental entities, formed a compact in which individual states could determine whether the federal government had exceeded its constitutional powers and decide upon the constitutionality of federal acts and legislation.[388] The resulting political and constitutional crises in America "evolved not as a challenge to the Constitution itself but as an impassioned, sustained, and intricate conflict among varying constitutional

[387] Paludan, "Federalism in the Civil War Era," 27. Paludan argued that the framers had to appeal "to as broad a spectrum of opinion as possible on fundamental issues; and nothing was more fundamental than the issue of how much power would yield to the new national authority." See also Kilpatrick, "The Case for States' Rights," 92. Grant McConnell argued "The founders of the American federal system were…not entirely clear in their intentions. What they created was partly an inheritance from their recent past, partly a pragmatic compromise of contemporary issues, in which different men among them saw different virtues." Grant McConnell, *Private Power and American Democracy* (New York, NY: Knopf, 1967), 92, op cit. Richard H. Leach, *American Federalism* (New York, NY: W.W. Norton and Company, Inc., 1970), 5. Leach concluded that "in the end, the Constitution merged with no real clues as to what was in the framers' minds as they voted on the several resolutions before them or how they expected the federal system they had brought into being to work in practice...they failed to make clear what should be the precise relationship between them or how either level might relate to local or private sources of power. " *Ibid*., 7-8. For more on the lack of agreement on the meaning of federalism, see *Federalist No. 9 and No. 16* (Hamilton), and *Nos. 39 and 40* (Madison). Alpheus T. Mason and Richard H. Leach, *In Quest of Freedom: American Political Thought and Practice* (Englewood Cliffs, NJ: Prentice Hall, 1959), 152-155.

[388] The *Virginia Resolutions* read "the states who are parties thereto, have the right, and are in duty bound to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them." *The Annals of America*, volume 4 (Chicago, IL: Encyclopedia Britannica, Inc., 1968), 62-67; Amlund, *Federalism in the Southern Confederacy*, 8.

interpretations."[389]

Consequently, the first century of American nationhood was "dominated by conflict over the relative powers of the states and the national government" in a series of "conflicts over internal improvements, banking, currency, the tariff, the public lands, and ultimately, secession and slavery were defined and fought out primarily in terms of the constitutional powers of the nation and the states."[390] National government powers were limited and generally weak while state governments exercised great power within their jurisdictions and, at times, even the precise extent of state sovereignty was uncertain.[391]

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[389] Keller, "Power and Rights: Two Centuries of American Constitutionalism," 682; Ericson, "The Nullification Crisis, American Republicanism, and the Force Bill Debate," 251. The Confederate Constitution was "a restoration of the original federal order" that had been corrupted and the "disregard" for federalism as provided for in the Constitution of 1787. DeRosa, *Confederate Constitution of 1861*, 121.

[390] Keller, "Power and Rights: Two Centuries of American Constitutionalism," 676; Amlund, *Federalism in the Southern Confederacy*, 3.

[391] Ralph K. Huitt, "Congress: Retrospect and Prospect," *The Journal of Politics*, vol. 38, Issue 3, (August 1976): 209-227, 211. Southern state government exercised considerable power and authority within the U.S. federal system and, with the advent of secession, southern states would be able to continue the normal business of the state without much interruption. According to Bensel, "in 1860 the weak American state did not have the will or capacity to play a mediating role between the great free- and slave-state sections…the federal government contained no statist-bureaucratic element that could prepare for the secession crisis." Bensel, *Yankee Leviathan*, 36-37, 85. According to Ericson, the belief in divided sovereignty existed during the debate over nullification and the Force Bill in Congress. Rives of Virginia "made it a matter of theory, of divided sovereignty between the states and the nation, of a balance of power between the federal and the state governments, and of dual citizenship in his beloved Virginia and the United States. Rives envisioned a true compound republic in America, and he placed himself squarely within a 'Partly federal, partly national' republican tradition of discourse." Ericson, "The Nullification Crisis, American Republicanism, and the Force Bill Debate." Ericson argues, "Ellis is wrong to distinguish these two states-rights traditions [Rives (federalists) and Calhoun] in terms of the strength of their commitments to democracy rather than to federalism." Ericson, "The Nullification Crisis," 266-267; Kilpatrick, "Case for 'States' Rights," 92-93.

In March of 1861, when the framers of the Confederate Constitution met in Montgomery, Alabama to draft a permanent constitutive document for their new southern nation, they did so with the challenge and purpose to address this antebellum ambiguity and to provide greater clarity and specificity with respect to federalism.[392] The principal distinction between the U.S. and the Confederate Constitutions was the locus of sovereignty and in the Confederate Constitution, the framers provided for "sovereignty within a federal framework."[393] When the Confederate framers convened in Montgomery in 1861 to discuss and to make decisions about "powers and privileges," there were several attempts to inject states' rights, and its most extreme expressions—nullification and secession—into the Confederate constitutional order.[394] Among the Confederate framers, both Rhett and T.R.R. Cobb favored strengthening state authority

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[392] Fitts, "The Confederate Convention: The Constitutional Debate," 194-204; DeRosa, *The Confederate Constitution of 1861*, 1, 9, 16-17.

[393] DeRosa, *The Confederate Constitution of 1861*, 121. According to DeRosa, this idea was an eighteenth century idea borrowed from the Antifederalists.

[394] Many delegates were determined to prevent what they considered "abuse" of the former federal system that had caused such irreconcilable problems. "To understand the Constitution of the Confederate States of America, one must realize that the Confederate founders were not dissatisfied with the United States Constitution. Rather, they were dissatisfied with the federal government's interpretation of the Constitution during the years before the Civil War" and that "the States withdrew not from the Constitution, but from the wicked and injurious perversions of the compact." Curry, *Civil History of the Government of the Confederate States*, 11-41, 50; White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 5. Charles E. George argued that in the drafting of the Constitution and the establishment of the Confederate judiciary, the framers were determined that states' rights were to be protected from the central government and the doctrine of states' rights was to become constitutive to the Confederate nation. According to George, the states retained their independent and sovereign throughout the war. Charles E. George, "The Supreme Court of the Confederate States of America," 592-599; T.R.R. Cobb to Marion Cobb, February 4, 1861, T.R.R. Cobb Papers, University of Georgia, Athens.

and eliminating the General Welfare clause, especially because of the implications of such a move toward expanding national taxing powers. Rhett's South Carolina Plan would not be adopted completely, but that his idea about amending the Constitution via convention when three of the states demanded the assembling of a convention incorporated Calhoun's ideas from the *South Carolina Exposition &Protest* and was added to Article V, Section 1, Part I of the Constitution. This, together with the removal of diversity jurisdiction, was used as "a weapon against the enlargement of federal power by judicial action and, with these innovations, the "Montgomery convention drew the lines between state power and federal power more clearly."[395] James Chestnut also proposed that nullification be recognized as an appropriate remedy but this was rejected. Hill of Georgia tried to introduce secession as remedy for disputes between states and the Confederate government after a period of waiting and Chestnut sought to amend this to provide for a simple right of secession but both were tabled and never raised again.[396] The attempt to fashion a state-centered federalism[397]

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[395] Fitts, "The Confederate Convention: The Constitutional Debate," 204.

[396] *Ibid*., 195-204.

[397] "State-centered federalism" is premised upon the belief that state action created the U.S. Constitution especially state representation in Philadelphia and state ratification. The emphasis upon limited national government and the sovereignty of the states includes maintaining vigilance to protect the states from encroachment by the national government. The enumerated congressional powers provided in Article I, section 8 were designed to limit the power of the national government and to safeguard the power of the states by preventing the subsequent expansion of national government power. Specific delegations of power to the national government were to be construed narrowly. The principle of limited government in American constitutionalism and politics was important and long a part of the historical tradition. Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, NC: University of North Carolina Press, 1999), 178-181, 276-277, 265-266 and the letters of the Anti-Federalist, "Agrippa," especially those letters addressed

was rejected in favor of implementing a federal system with authority and power balanced between the state governments and a strong national Chief Executive leading an efficient and lean national bureaucracy.[398]

When war came in 1861, though, it was uncertain whether state jurists, adjudicating within state courts and accountable to state constituencies would inject states' rights into their interpretation of national legislation or the Constitution. Southern state supreme court justices possessed a diversity of social, educational, and political backgrounds and they could be swayed by various local influences. These men often would have to balance the influences of "political sectionalism and legal nationalism" in their unique roles as "guardians of constitutional principles."[399] Wartime jurists manifested a determined intent to interpret carefully the provisions of the Confederate Constitution.[400] Consequently, they enunciated a doctrine of federalism

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to the people of Massachusetts on December 3, 11, 14, 18, 1787; Herbert J. Storing, ed., *The Anti-Federalist: Writings By the Opponents of the Constitution* (Chicago, IL: The University of Chicago Press, 1985), 234-242. Calhoun claimed that states had been vested with and retained sovereignty. Since the Constitution was a mere compact amongst the states, an individual state could assert their own interests over that of the Union, even to the point of nullifying national laws that did not produce any benefit for the state. Calhoun, *The South Carolina Exposition and Protest*; Richard B. Ellis, *The Union At Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York, NY: Oxford University Press, 1987); William W. Freehling, *Prelude to Civil War :The Nullification Controversy in South Carolina, 1816-1836* (New York, NY: Harper and Row, 1965, 1966), 159-176, 183-186, 205-213, 226-259.

[398] The careful balance of authority between Confederate and state governments is an important key to understanding Confederate federalism. Fitts, "The Confederate Convention: The Constitutional Debate," 194.

[399] Huebner, *The Southern Judicial Tradition*, 1, 2, 4, 6-7.

[400] Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, MA: Harvard University Press, 1976), 271-301; Kermit Hall, "West H. Humphreys and the Crisis of the Union," *Tennessee Historical Quarterly*34 (1975),48-

that did not dispel the important role of states in Confederate constitutional governance, but did undermine the preeminence of states' rights in the Confederate political philosophy.[401]

In the 1920s, Frank Owsley presented his influential thesis that states' rights was such a powerful configurative concept in the Confederacy that blind adherence to it during the war inhibited Confederate efforts and reduced the military capability of the Confederacy. He argued "that the governmental system was destroyed through

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69; B. Patricia Dyson, "Contract Stability in Wartime: The Example of the Confederacy," *American Journal of Legal History* 19 (1975), 216-231; Robinson, *Justice in Grey*, 625; Zant, "Confederate Conscription and the North Carolina Supreme Court," 75.

[401] According to Paul Finkelman, there were four general applications of "states' rights": the assertion of "independent or state concurrent power," "the denial of interstate cooperation and comity," "state noncooperation with…or nullification of federal law," and secession, as explained in "States' Rights North and South in Antebellum America," in Hall and Ely, *An Uncertain Tradition: Constitutionalism in the History of the South*, 126. Two of these, state concurrent power and nullification, would be refuted by southern jurists in applying Confederate federalism. *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19 (1864); *Ex Parte Coupland*, 26 Tex. 386 (1862); *In Re Bryan*, 60 NC 1 (1863). James Chesnut's amendment providing for a right of nullification was defeated as well as the proposal to provide constitutional language providing for right of secession. William C. Davis, *A Government of Our Own: The Making of the Confederacy* (New York, NY: Free Press, 1994), 228, 248, 250 and *Journal of the Confederate Congress*. Confederate federalism in no way was intended to reduce the power of the states. The framers of the Constitution introduced several measures which supplemented state powers such as the right of impeachment of federal officials (Article I, section 2, clause 5), the simplified system of amending the Constitution (Article V), the prohibitions against bounties, protective tariffs, and internal improvements (Article I, section 8, clause 1). Fitts, "The Confederate Convention: The Constitutional Debate," 195-204. However, state jurists in the South were not generally willing to assert state sovereignty as a constitutive doctrine or "a constitutional article of faith." Huebner, *The Southern Judicial Tradition*, 6-7. Donald Nieman maintains that the focus on states' rights has obscured an appreciation of the relevancy and importance of the innovations made in1861 and to the configurative effect of the document. Nieman, "Republicanism, the Confederate Constitution and the American Constitutional Tradition," 201.

adherence to these rights" and that the Confederacy's "preoccupation with such rights so obstructed Richmond's prosecution of the war that the Confederacy failed."[402] According to Owsley, so strong was this political philosophy that the Confederacy "Died of State Rights."[403]

Owsley contended that this commitment to establishing the preeminence of the states over the national government was so pervasive that the states "assumed or tried to assume functions whose exercise must of necessity devolve upon the central government" and "this assumption by the states of the power of the central government and the controversies that ensued extended to practically every field of activity connected in any way with the conduct of the war."[404] State and local concerns dominated wartime efforts to the extent that southerners thought more in terms of their states than the Confederate nation and that state rights thwarted the national goal to win independence. Subsequent histories of the Confederacy perpetuated Owsley's argument, contending that the original intent of the Confederate Constitution and its system of federalism was to serve the states' rights political philosophy.[405]

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[402] Owsley, *States Rights in the Confederacy*.

[403] *Ibid*., 1-2.

[404] *Ibid*., 1-3.

[405] E. Merton Coulter, *The Confederate States of America, 1861-1865* (Baton Rouge, LA: Louisiana State University Press, 1950); Thomas, *The Confederate Nation:1861-1865*; Paul D. Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (Baton Rouge, LA: Louisiana State University Press, 1978); Robinson, "A New Deal in Constitutions," 454. Lee, in *The Confederate Constitutions*, argued that the Confederate Constitutions (Provisional and Permanent) "represent the ultimate constitutional expression of state rights philosophy and the state sovereignty concept in nineteenth century America" (150). States were an important and vital governmental entity in the nineteenth century. Phillip Paludan, emphasizing this

However, the extent to which states' rights shaped the political philosophy of, or the importance of this doctrine as a constitutive concept within the Confederate States of America, may not be as extensive or significant as Owsley suggested.[406] Owsley failed to consider the importance of the body of wartime state supreme court decisions and the opinions of the state court justices who enunciated the principles of the Confederate Constitution. His omission is significant for the wartime state supreme court decisions reveal that states' rights was not the configurative concept shaping either the Confederate Constitution or the constitutional doctrine of federalism in the Confederacy.

Separating Spheres and "Balanced" Federalism

Confederate framers attempted to make their national charter more precise and specific than the Constitution of 1787 with regard to the powers delegated in the Constitution and the scope and extent of state and national governmental authority and power to act. Subsequently, the doctrine of federalism enunciated by state courts rigorously divided state and national spheres of governmental power and responsibility into "areas of action." State supreme courts preserved the constitutional division of

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importance and vitality of the states, argued that the Union went to war with the specific goal of preserving "a union in which states were expected to play vital and important roles." Paludan, "Federalism in the Civil War Era," 28.

[406] Richard Bensel argued that once secession was completed, states' rights ceased to be a major shaping concept in the political philosophy of the Confederacy, that "out of the Union, the South jettisoned states' rights and built a central state much stronger than either the antebellum or post-Reconstruction federal governments." Bensel, *Yankee Leviathan*, 13.

government power into separate spheres that largely resembled *dual federalism*.[407] Under the doctrine of *dual federalism,* both governmental entities are coequal and the individual states retain sovereignty. The national government is one of "enumerated powers" and the states retain the residuum of powers as a co-equal and sovereign entity. Each governmental entity possesses specific responsibilities and the powers to fulfill their responsibilities, within its own respective "sphere of authority." Each entity is limited to its respective sphere and may not usurp power and authority from the other nor intrude into the sphere of the other entity.[408] However, in their wartime decisions, state supreme

[407] The dual federalism model--with each governmental entity (national and state governments) operating within its own separate sphere of responsibilities--was characteristic of the nineteenth century, as argued by Lord Bryce in *The American Commonwealth*. Morton Grodzins argued that the nineteenth century was "the preeminenet period of duality in the American system." The U.S. Supreme Court never really adhered to a "separatist doctrine" nor had to confront "the issue of cooperation vs. separation as such," it did, as was the case with the state courts of the Confederacy, concern itself with "defining permissible areas of action for the central government and the states; or with saying with respect to a point at issue whether any government could take action." Morton Gordzins, "The Sharing of Functions," in *The Politics of Federalism,* edited by Daniel J. Elazar (Lexington, MA: D.C. Heath and Company):11-14.

[408] Dual federalism is based upon an understanding of the Constitution as a "compact" among states that retained their sovereignty, delegating to the national government specific enumerated powers necessary to fulfill a limited number of responsibilities and purposes. Harry N. Scheiber, "Dual Federalism," in Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York, NT: Oxford University Press, 1992), 236. Constitutional historian Edward S. Corwin labeled this idea of divided sovereignty "dual federalism" explaining it as doctrine in which "the purpose and scope of the delegated powers of Congress are impliedly limited by the existence of the reserved powers of the states." A "basic assumption" of dual federalism is "that the reserved powers of the states are intended to be a fixed bundle of powers, subject to change only by formal constitutional amendment." Edward S. Corwin, *The Twilight of the Supreme Court: A History of Our Constitutional Theory* (New Haven, CN: Yale University Press, 1934), Chapter One; as discussed in *Walter H. Bennett, American Theories of Federalism* (University, AL: University of Alabama Press, 1964), 180. Dual federalism was an important feature of nineteenth century political and constitutional ideas. R. Kent Newmyer, *The Supreme Court Under*

courts rejected the state-oriented dual federalism, refusing to allow state governments general supremacy over the national government or co-equal status in national governance.

Despite significant state interests, the Texas justices articulated that division of power and authority under Confederate federalism, and held that conscription laws did not contradict constitutional grants of power because the power to raise armies was granted specifically to the national government. Associate Justice Moore explained that states' rights was not "the theory of our government, when properly understood" and that any states' rights interpretation of the Constitution would necessarily eviscerate the specific grant conferred upon the Confederate Congress, reducing "its authority" within its sphere.[409] Within this federal system, an assertion of state sovereignty violated constitutional orthodoxy since *both* governments were vested with sovereignty—each within its own sphere—*that neither could alter* [410] According to the court, "nothing is

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Marshall and Taney (Wheeling, IL: Harlan Davidson, Inc., 1968), 82-83, 116-118; Bennett, *American Theories of Federalism*, 180-181. Examples of judicial pronouncement of the doctrine of dual federalism can be found in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 519 (1839); and *Cooley v. Pennsylvania Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

[409] 26 Tex. 387, 398.

[410] *Ibid.*, 403 Chief Justice Royall T. Wheeler concurred with Moore's decision in *Coupland* while Associate Justice James H. Bell, a Unionist from West Texas, dissented from the majority decision. Bell's lengthy and much-publicized dissenting opinion included Bell's Unionist views and would later play a part in Bell's failed re-election bid in 1864. For more on Texas politics and the judicial election of 1864 see Nancy H. Bowen, "A Political Labyrinth: Texas in the Civil War—Questions in Continuity," (Unpublished Ph.D. dissertation, Rice University, 1974), 255-282 and James Marten, *Texas Divided: Loyalty and Dissent in the Lone Star State, 1856-1874* (Lexington, KY: University Press of Kentucky, 1990), 51.

better established than that neither of these governments is inferior or superior to the other…each of them represents the sovereign, and both have within their mutual spheres of action just such powers and functions as have been conferred upon them by the constitution creating them."[411]

Interpreting the Confederate Constitution carefully and stringently, Moore rejected Coupland's claim that Texas retained *undivided sovereignty* and would therefore have had to *confer* upon the Confederate government the specific power to conscript. The justices held that the powers of the Confederate government should not "be construed in subordination to those of this *immediate representative of the sovereign state*"[of Texas] [italics in original]. Both governments possessed "'sovereign powers,' neither of them are themselves sovereign, but each of them represents the sovereign, and both have within their mutual spheres of action just such powers and functions as have been conferred upon them by the constitution creating them."[412]

The Texas court, like its sister courts, preserved what it understood to be a constitutional "division of political power" (and responsibilities) between state and national governments. Moore stated that governmental power and authority had been constitutionally created and allocated to state and national governments according to their respective spheres. The sovereignty of the people was divided between both state

[411] 26 Tex. 387, 403. Interestingly, one year after the court's decision in *Coupland*, Bell, whose staunch Unionism and opposition to secession was widely known, authored the court's opinion in *Ex Parte Turman* (26 Tex. 708 (1863)) and upheld the doctrine of federalism he had dissented from earlier in *Coupland*. *Ex Parte Turman* also appears as *Ex Parte E.M. Turner* in Robards, *Synopses of the Decisions of the Supreme Court of the State of Texas*, 8-9.

[412] 26 Tex. 387, 402-403.

and national governments.[413] Consequently, there could be no alteration of these spheres, except by amending the Confederate Constitution. The constitutionality of the conscription legislation was beyond question, according to Moore since the war-making power was an explicit grant of power conferred by the people upon the Confederate Government in the Constitution: "the war-making power is given directly to the agents of the people, who can only be supposed to act under their directions, and to speak their sentiments, even if there had been no express grant of power given to congress [sic] to raise and support armies."[414] Two years later, in *Ex Parte Abraham Mayer*,[415] the court affirmed the court's enunciation in *Coupland* that the people had been the source of that sovereignty vested with the Confederate government and the court specifically rejected any belief that the Confederacy was the creation of the states.

Soon after Texas issued its decision in *Ex Parte Coupland*, other state supreme courts in the South declared that the conscription laws did not violate dual federalism's division of governmental authority into separate spheres because the power to raise armies was granted specifically to the national government in the Confederate

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[413] Amlund argued that as in 1776 external sovereignty passed from the British to the Americans, so too, then, did it in 1861. If the same powers were transferred to the Federal Constitution of 1787, then these same powers were also transferred to the central Confederate government and "states did not retain their sovereignty intact" because the body politic divided sovereignty as had occurred in the Union. This made the Confederacy's system of federalism little different from the Union since sovereignty of the people meant that "the Confederacy was a union of people rather than one of sovereign states." Amlund, *Federalism in the Southern Confederacy*, 130.

[414] 26 Tex. 387, 394.

[415] 26 Tex. 715 (1864).

Constitution.[416] In Alabama, the state's high court held that not only did such power fall within the national sphere of authority under the Constitution but that this grant in the Constitution would work as a permanent bar against state claims to concurrent authority over this power. In 1862, three young men, Asa J. Willis, E. P. Johnson, and Calvin Reynolds all claimed exemptions from Confederate service due to their physical disabilities but were captured and kept in custody as conscripts. They petitioned the Montgomery County probate judge for writs of habeas corpus, which were granted. Thereupon, the Confederate enrolling officer, L. H. Hill, applied for writs of prohibition to enjoin Alabama courts from any further interference with his detention of recusant conscripts. Hill raised the question of whether Alabama state courts possessed the jurisdictional authority to discharge individuals being held under the authority of the Confederacy. Alabama's Supreme Court preserved the doctrine of federalism and held not only that state courts could not exercise such jurisdiction but in fact were precluded from doing so because it interfered with a specific constitutional grant of power to the national government to raise armies. In the court's opinion, Chief Justice A.J. Walker emphasized the important configurative role of federalism, holding that though "the Confederate government exists by virtue of delegated authority, its powers, *within their appropriate boundary* [italics added], are not subordinate to those of the States."[417]

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[416] 26 Tex. 387, 398; see also *Jeffers v. Fair* 32 Ga. 347 (1862);*James L. Mims & James D. Burdett v. John K. Wimberly*, 33 Ga. 587 (1863); *Ex Parte Stringer*, 38 Ala. 457 (1863); *Burroughs v. Peyton*, 16 VA (Gratt.) 470 (1864); *Daly & Fitzgerald v. Harris*, 33 Ga. 38 (1864); *Ex Parte Lee and Allen*, 39 Ala. 457 (1864); *Theodore Parker v. Charles Kaughman*, 34 Ga. 136 (1865); and *Ex Parte Ainsworth*, 26 Tex. 731 (1865).

[417] *Ex Parte Hill, in re Willis, Johnson, and Reynolds v. Confederate States*, 38 Ala. 429, 435 (1863).

In a concurring opinion in *Ex Parte Hill, in re Willis*, Alabama Associate Justice George W. Stone, echoed the language of other state courts by stating that under the Constitution, both state and national governments were limited by "constitutional authority" to specific powers "within their sphere of operation" and he added that such a division could not be modified due to wartime necessities or at the insistence of the states.[418] Stone had supported secession in 1861 and even advocated state sovereignty as a justification for disunion. However, here he held that the Confederate constitutional order and the principle of federalism were fixed and "[t]he jurisdictional area of each government should be kept distinct—restraining the Confederate government within the boundaries of its delegated authority, and not allowing the State governments to trespass on Confederate jurisdiction."[419] The Confederate Congress had been granted specific powers to act directly upon individuals and "to raise armies by direct means, without calling to its aid State authority."[420]

The courts' vigorous preservation of divided governmental authority led to a rejection of states' rights as the political philosophy of the Confederacy by limiting the capability of states to enlarge their governmental power beyond the separate spheres provided for in the Constitution. As confrontations between state and national entities continued during the war over control for administrative personnel, courts adjudicated claims about which government could exercise a better claim for these men under the

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[418] *Ibid*., 456. See also Chief Justice Pearson's decision in *Wood v. Bradshaw*, 60 NC 269 (1864) and his dissent in *Gatlin v. Walton*, 60 NC 205, 229, 232 (1864).

[419] *Ibid.*

[420] Stone also discussed the restrictions upon states, that the Constitution also imposed "several restraints upon State authority." 38 Ala. 429, 446, 454.

Confederate Constitution. In *Ex Parte Lee and Allen,*[421] the Alabama court continued its earlier discussion, outlining further the division of national and state government powers and limiting the court's own power to utilize the writ of habeas corpus as a tool for extending state court jurisdiction over national issues. Justice Stone opposed any interference with national government powers within its appropriate sphere, even when the petitioner used the writ of habeas corpus as a shield. Stone held that since both Solomon and Allen were sworn into Confederate service "no court of this State is authorized to discharge them" under Alabama statutory law.[422]

The rigidity of the jurists' application of federalism principles may seem unusual set against the broad application of congressional war powers, which seems inconsistent with the goal of creating limited government in the Confederacy. In *Thomas Barber v. William A. Irwin,* Associate Justice Jenkins provided a framework for explaining this doctrinal development. He explained that the Confederate government was created in reaction to the ambiguity of federalism during the antebellum period and the abuses resulting from expansive government powers. Moreover, he added, "the philosophy of our system is, to make the grant large enough to meet such contingencies, and to provide against abuse, in the structure of the government." Jenkins here explained how unlimited powers could be consistent with limited government. The framers of the Confederate Constitution removed the general welfare clause as a way of preventing the expansion of the federal grant of authority, as had occurred during the antebellum period. National authority came in the form of explicit delegations, as in the

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[421] *Ex Parte Lee and Allen*, 39 Ala. 457 (1864).

[422] 39 Ala. 457, 459.

case of congressional war powers. Concurrently, the framers retained the necessary and proper clause to give government broad powers within the limitations of its constitutional authority under the specified delegations.[423]

In Virginia, in 1864, when litigants challenged the exercise of the war power as a usurpation of state authority and power, the state's Supreme Court of Appeals, like the courts in Alabama and Georgia, found the answer to this challenge in the Confederate Constitution. In *Burroughs v. Peyton*, the Virginia high court considered whether Congress possessed the constitutional authority to conscript individuals under the conscription acts or whether this authority was "retained" by the states.[424] Burroughs and his fellow appellant L.P. Abrahams had provided substitutes for military service but after the repeal of substitution, they were arrested and sought exemptions by challenging Confederate constitutional authority to conscript. In their appeal, they argued that Congress possessed no power to compel "citizens of a state" into the Confederate Army and "[t]hat a power so to do, would be despotic in its nature" and "inconsistent with the rights of the state; putting their very existence at the mercy of the Confederate government."[425]

Associate Justice Robertson recognized that the case raised the fundamental question of which government—state or Confederate—possessed the authority to call individuals into military service. This question required a determination as to "the

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[423] 34 Ga. 27, 37-38 (1864).

[424] Conscription Acts of April 16 and September 27, 1862. See also *Burroughs v. Peyton*, 16 Va. 470, 472, 473 (1864).

[425] *Ibid*, 473.

proper distribution of political power between the two governments."[426] Robertson stated that such "a power so vast and dangerous" would have been prohibited in the Constitution if it was not specifically intended. He referred to the care taken to construct the Confederate Constitution and the history of federalism-related problems during the nineteenth century. For Robertson, that these powers were specifically included in the Confederate charter "shows that the framers of the constitution of the Confederate States did not agree in opinion with those who think that the power in question is fraught with danger to the liberties of the citizen or the rights of the states, or they would have taken care to use language which would leave no doubt that they did not intend to confer it, instead of retaining that which had been construed, by many of the wisest statesmen under the government of the United States, to give it."[427]

In support of his decision he referred to the language in *Federalist No. 23* calling for energetic national government and held the same rationale guided the provisions and spirit of the Confederate Constitution.[428] Robertson reflected upon the rationale provided in *Federalist No. 23*, that the United States required energetic national government so that it might fulfill the duties and responsibilities for which it had been created. Drawing upon the language from *Federalist No.23*, Robertson stated "such was the construction of the constitution in the papers of the Federalist, written with the view of inducing the people of the states to adopt it; and recommending it to them because it invested the Federal government "with full power to levy troops; to

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[426] *Ibid*, 474.

[427] *Burroughs v. Peyton*, 16 Va. 470, 478-479.

[428] *Ibid*, 478-480.

build and equip fleets; and to raise the revenues which will be required for the support of an army and navy, in the customary and ordinary modes practised [sic] by other governments."[429] The court held that "[t]he true interpretation of the constitution in reference to this matter would seem to be, that the power to use the whole military force of the country was conferred upon Congress…it might be done by taking men from the militia either as volunteers or as conscripts—the action in either case being upon the individual citizen, and not upon the militia as an organized body." [430] As in Alabama, Virginia's justices held constitutional the exercise of national war powers as a power within the separate sphere of the national government.

That same year the Georgia high court also rejected the expansion of state authority or power beyond its constitutional sphere. In *Thomas W. Cobb v. William B. Stallings & B. A. Baldwin v. John West*,[431] the court addressed the issue of whether Confederate tax assessors and tax collectors in Georgia, engaged in their regular duties, were liable under the laws of the state of Georgia for militia service. Attorneys for the state argued that this power was a fundamental right and power retained by the State of Georgia and that all state citizens were liable "to be called by the Governor into actual service for the purpose of repelling invasion." However, Associate Justice Jenkins refused to expand state powers beyond its respective sphere, despite the military emergency that Georgians faced along the Atlanta front, because constitutional

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[429] *Ibid*., 479.

[430] *Ibid*., 483.

[431] 34 Ga. 72 (1864).

principles had to be preserved.[432] Jenkins stated that both governments had their respective areas of responsibility which were to be respected, *even in wartime* [italics added], yet both governmental entities were to be "coordinate within the territorial limits of any State; they operate upon the same persons, and are intended, by their separate but harmonious action, to accomplish the grand results of security against wrongs, external and internal, and progress in civilization."[433]

In a unique development in Mississippi in 1864, the court declared the preservation of the national government's sphere a matter of state policy. When the court was called upon to determine whether state militia laws could be used to enlist men who were already liable to Confederate military service, Chief Justice Handy examined the legislative intent behind the state militia enlistment statutes. He stated emphatically that "It is clear by the 4th section of the act of January, 1863 [state act], that the legislature intended not to interfere with persons liable to the Confederate service as conscripts, by claiming their services in the militia, but that they should be surrendered to the service of the Confederacy…[t]hus the State establishes *a policy* not to interfere [emphasis in original], for her own service, with persons liable to Confederate service, recognizing the right of the Confederacy to the service of her citizens, embraced in the acts of Congress, and affording her aid to that government in enforcing that right"[434]

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[432] *Thomas W. Cobb v. William B. Stallings & B. A. Baldwin v. John West*, 34 Ga. 72, 74 (1864). This case was decided during the court's November Term in Milledgeville.

[433] *Ibid*., 76.

[434] 40 Miss. 19, 22 (1864).

Mississippi's state high court, consistent with its sister states, enunciated this division of powers by rejecting petitioner David Simmons' claim that the state was vested with the authority and power to enlist men into the state militia "to the exclusion of the right of the Confederate States to their military service, when required by that [state] government."[435] Simmons argued that Mississippi had the paramount claim to him since the power to raise armies given to Congress was not an exclusive but a concurrent power which empowered the states to also muster troops via the state militia. Handy, writing for the court, dismissed this reasoning, stating that the national government's war powers were enumerated powers and specified in the Confederate Constitution as a power within the national sphere of authority and responsibility. Where the Confederate Constitution enumerated national authority over specific matters, the states were to defer. Handy held that "the power of a State, in such cases, is subordinate to that of the Confederate States Government; and, whenever it is exercised by the latter, it excludes the power of the State over the subject-matter." In Mississippi, the exclusivity of the national government's enumerated powers under Article I, Section 8 of the Confederate Constitution was established clearly. Going even farther, though, the Mississippi court stated plainly that when the Constitution enunciated specific powers within the national government's sphere of authority and responsibility, the state was prohibited from interfering, rejecting the notion that concurrent powers might exist unless explicitly provided for in the national charter.[436]

State supreme court justices repeatedly held that within the system of

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[435] *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19, 21 (1864).
[436] *Ibid*., 24-25.

Confederate federalism there were specific and separate spheres of power and responsibility for state and national governments and, in this, they enunciated a doctrine that strongly resembled *balanced* federalism. This was a crucial distinction to make if the Confederacy truly was a federal government for "the essential federal characteristic is the 'division of political power,' a division of supremacy (sovereignty, as used to be said) between member states and a central government, each having the final say regarding matters belonging to its sphere." According to Diamond, "a *federal* system combines states which *confederally* retain sovereignty within a certain sphere, with a central body that *nationally* possesses sovereignty within another sphere; the combination is thought to create a new and better thing to which is given the name federalism."[437]

Rather than applying a firm dividing line based upon states' rights or abstract notions of powers and authority, the measures by which state courts considered carefully the provisions of the Confederate Constitution were the *purposes and responsibilities* to which each governmental entity was held to fulfill. State courts defined the "areas of action" in which each could operate and the extent to which they were to cooperate in support of these purposes and responsibilities. In so doing, they emphasized the qualitative element of dual federalism, making Confederate federalism a substantive and purposive constitutional doctrine.

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[437] Diamond, "What the Framers Meant," 26. Diamond said, "a confederacy and a nation are seen as the extremes. The defining characteristic of a confederacy is that the associated states retain all the sovereign power, with the central body entirely dependent legally upon their will; the defining characteristic of a nation is that the central body has all the sovereign power, with the localities entirely dependent legally upon the will of the nation. In this view, then, federalism is truly the middle term, for its defining characteristic is that it modifies and then combines the best characteristics of the other two forms."

The demise of states' rights as an influence upon Confederate federalism was also evident in the state supreme courts' rejection of concurrent powers to make war and field military forces. The Texas high court was the first state court in the Confederacy to address this issue, adjudicating the more immediate legal question of whether the Texas and the Confederate government could hold equal claims for military service on a Texas citizen. In *Coupland,*[438] the court stated that the Confederate government had been vested with "the sole power to determine upon the questions of war and peace, and that it has consequently made it the duty of that agent [the Confederate government] to protect the state itself and its local agency from attacks from both domestic and foreign foes" and the government had been "clothed…with the power to do this by authorizing it to raise and support armies, and to provide and maintain a navy, to the extent that in its judgment it should deem necessary."[439] National needs could be prioritized higher that state interests.

Within its respective sphere of responsibility, the Confederate government could restrict the local use of the state militia or any state restrictions on the national government's use of the state militia because the Confederate sphere of responsibility included the defense of the *entire* nation. Furthermore, the range of powers provided with this authority to make war was quite extensive and Richmond was "further authorized to call upon the other agency [the state government] to bring to its aid, if necessary, all of the arms-bearing -population it had left still under the control of the local agent, for whose organization it was required to provide, that the local agency,

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[438] 26 Tex. 386, (1862).

[439] *Ibid*., 403-404.

might be thus prepared to meet the call that these sudden emergencies might occasion."[440] Regardless of the state's interest in restricting the national government's use of state militia troops, the Texas court held that such interests could not blur the separate spheres within the Confederate system of federalism nor could it bar the Confederate government from fulfilling its constitutional responsibility to provide for the defense of the nation. Nor could the state use the appointment power to name state civil officers as a means to exempt men from national military service.

Even by 1864, despite military demands, growing political opposition in the states, and popular disaffection for the war, federalism was still a vibrant doctrine. In *Ex Parte William A. Winnard*,[441] Texas Associate Justice Oran M. Roberts iterated the fundamental principles from *Coupland* and *Turman* and refuted the claim that the national government could expand its own powers, pointing out that the federal and state governments were created with an "established division of powers." Neither was "competent to absorb the others…In the formation of the State and Confederate Governments, it was contemplated that the two should harmoniously co-exist, as long as the system of government remained unchanged by the people, who made both, and delegated to them their separate or concurrent powers." The constitutional limitations on government power applied also to state government, precluding the Texas Legislature from asserting any right "to take a soldier, regularly enrolled, from the

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[440] Ibid. Keller, "Power and Rights: Two Centuries of American Constitutionalism," 681.

[441] Robards, *Synopses of the Decisions of the Supreme Court of the State of Texas*, 20.

control of the Confederate States, and retain him as a civil officer."[442] The Texas court preserved the principle that the Confederate government was a *federal* government in which the division of powers and responsibilities was to be taken seriously and enunciated vigorously. State claims for an individual's service as a civil officer would not exempt him from conscription under Confederate authority.

While state courts maintained the separate spheres of federalism, their wartime cases led them to reject concurrent jurisdiction and the understanding that state and national governments were co-equal. This represented a significant break from traditional dual federalism. In *Coupland*, the Texas court delivered a stunning blow to proponents of concurrent jurisdiction, holding that not only were these separate spheres to be maintained, but each sphere was not co-equal. The question of which government enjoyed primacy over the other was dependent upon the particular tasks and spheres within the exercise of authority was being made. As the Texas court made clear in *Coupland*, there was a specific hierarchy of powers and authorities contained within the Confederate Constitution which had been ordained by the people of the Confederacy. National and state governments possessed "distinct powers," they were required "to look for their performance to the citizens," and the political will of the people was to be manifested in the nation's constitution. Even when they might exercise jurisdiction over the same issues or individuals and this might "at times…present seemingly conflicting grants of power," the court made clear that "the limited and subordinate must yield to the general and superior" and "such as usually pertain to or are indices of sovereign power, must control, and be regarded as superior to those of a local and

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[442] *Ibid*., 21.

domestic character."[443]

Edward White argued that Article I of the Confederate Constitution was a document of limited national authority and power since the legislative powers of the national government were delegated rather than granted. He drew upon J.L.M. Curry's statement that "'[t]he permanent Constitution was framed on the States rights theory, to take from a majority in Congress unlimited control, and to give effective assurances of purity and economy in all national legislation.'"[444] White went on to argue that Congress became the "agent of the individual states" and that "the states could withdraw the power they had given Congress whenever the need arose." But, between 1862 and 1865, state supreme court justices across the Confederacy rejected the preeminence of the states' rights ideology in Confederate federalism and specifically *rejected* such a doctrinal holding in their wartime decisions.[445]

The Confederate framers may have been conservative in terms of attempting to preserve the essential tenets of American constitutionalism but they were not interested in re-instituting national governance on the model of the Articles. The specific goal of dividing sovereignty and establishing more clearly those separate spheres of action for national and state governments was not to facilitate any purpose of creating a state-centered and weak federal governmental arrangement for the Confederacy.

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[443] 26 Tex. 386, 404.

[444] Curry, *Civil History of the Government of the Confederate States*, 69.

[445] White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 11; Hardaway, "The Confederate Constitution: A Legal and Historical Examination," 23.

Governmental authority and powers were to be divided between both state and national government to effect more efficient and representative governance of the political communities and to facilitate both local and national interests and goals. The war and local pressures both presented significant challenges to state supreme courts for the preservation of these principles. Yet, these courts rejected the state centered model of the Articles of Confederation in their wartime decisions and rendered constitutional decisions in conformity to the provisions and principles of the Confederate charter and enunciated a substantive and purposeful doctrine based upon national goals and purposes provided for in the Confederate Constitution.[446] The decisions of the state high courts contradict an understanding of the Confederacy as a loose confederation of states, each acting independently.

By enunciating that sovereignty had been vested by the people of the Confederacy in both state *and* national governments at the funding, state supreme court justices made the principle of federalism a vibrant constitutional doctrine—partly state and partly national in orientation—designed to facilitate specific national objectives provided for in the Confederate Constitution. The state supreme courts enunciated a balanced form of federalism in which government would possess the full range and scope of powers to fulfill the duties and responsibilities it had been authorized in the Constitution to achieve. During the war, the enunciation of Confederate federalism

[446] Moore argued that the supremacy of the Confederate government seemed to contradict the state sovereignty emphasized by secession and the founding period. He argued that the courts enforced a powerful national government which bore a striking resemblance to the government from which southerners had seceded, that "the principle of State sovereignty apparently never established itself as firmly on the bench as it did in the councils of state and in the norms of political philosophy." Moore, *Conscription and Conflict in the Confederacy*, 162-163.

became increasingly important because it addressed the issue of the importance of states' rights in defining the goals and the creation of the Confederate nation, it laid down a doctrinal structure for Confederate governance, and it articulated a philosophy about the national purposes of the Confederacy. Even more importantly, these state supreme courts articulated these principles as matters of national constitutional doctrine, making it less likely that these principles could be easily ignored after the war.[447]

[447] Weidner argued that "Federalism sets severe limitations on the authority of central government officials in dealing with the lower governmental units. Constitutionally, they are forbidden to alter in any way the power of officials in lower units to act." Weidner, "Decision-Making in a Federal System," 212-213. Under the Confederate Constitution and federalism principles, Confederate officials were prohibited from altering the authority of the state officials, including state court justices, and the state supreme courts ensured that the general government did not intrude upon the sphere of authority of the state governments.

Chapter Five

Federalism and National Purposes

In the Confederacy, the division of governmental power was a normative principle and the state supreme court justices rigorously enforced this tenet of Confederate constitutionalism. However, in early 1862, it was not clear whether the Confederate government would fulfill its obligations, under the Confederate Constitution, to mobilize, marshal resources, and prosecute a successful war in the interest of national mission and preservation. If the doctrine of federalism merely limited government by dividing authority and powers, then it could be shaped by state supreme courts to assert states' rights, elevate the interests of the state above those of the nation, and limit the national government's effectiveness and capability to realize national goals and purposes. As the state supreme courts enunciated in their wartime decisions, federalism in the Confederacy was "a means, not an end," a doctrine with certain specific components and features and designed to facilitate effective governance *for the Confederate nation.*[448]

In its decision in *Coupland*, the Texas court, looking to the text of the Confederate Constitution as a guide on the extent of national government authority and power, focused upon national and constitutional rather than local political purposes and interests.[449] The Constitution identified a common union of southern states and the articulation of common political purposes. The common purposes and goals of the

[448] Morton Grodzins, "The Federal System" in *Goals for Americans: The Report of the President's Commission on National Goals* (Englewood Cliffs, NJ: Prentice-Hall, 1965), 265.

[449] *Ex Parte Coupland*, 26 Tex. 387 (1862).

nation naturally would be prioritized above those of the state as a matter of construction. In the state supreme court decisions, the justices articulated, that the states were to be sometimes supreme and other times subordinate to the national government, depending on the sphere of governmental responsibility. As John Marshall had done in *Cohen v. Virginia* in 1821, the courts also made very clear that within its sphere, the national government's authority and power to fulfill its constitutional duties was supreme.[450] Even though the state supreme court justices interpreted Confederate federalism as possessing a strong element of nation-centered federalism, particularly enunciating as essential the Supremacy Clause of the Confederate Constitution, the courts preserved the doctrine as a doctrine of *balanced federalism*. This weakened the importance of states' rights as a principal configurative theory in Confederate constitutionalism and proved to enable more effectively the task of facilitating *national* purposes.[451]

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[450] 19 U.S. (6 Wheat.) 264, 414-415. Marshall wrote "The American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union…. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; *to all these objects, it is competent*. *The people have declared, that in the exercise of all powers given for these objects, it is supreme*…These states are constituent parts of the United States. They are members of one great empire—*for some purposes sovereign, for some purposes subordinate*…. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, *so far as respects those objects, and so far as it is necessary to their attainment* [italics added]." 19 U.S. (6 Wheat.) 264, 414-415; G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*. Abridged Edition (New York, NY: Oxford University Press, 1991), 504-524.

[451] Nation-centered federalism emphasizes national power and is premised upon the belief that the Constitution was created and ratified by the American people, not the states. It is the national government that bears the primary responsibility for addressing

The Preamble, Sovereignty, and National Purposes

The purposes for which the Confederacy had been created were identified in the document's Preamble and merit important consideration.[452] While the preamble lacks a prescriptive character and "strictly speaking, is not part of the Constitution," it is, according to Edward S. Corwin, reflective of the purposes for which the nation is created. Corwin stated that the Preamble provides two critical pieces of information since "it indicates the course from which the Constitution comes, from which it derives its claim to obedience, namely, the people" and "it states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad, liberty, and the general welfare" [this last purpose was omitted in the Confederate Constitution].[453]

When the Provisional Congress, convened as a constitutional convention to draft the preamble to the Confederate Constitution, their debate and their final version

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the needs of the nation and in furtherance of these goals the national government may obligate the state governments. A focal point for nation-centered federalism is the supremacy clause found in Article I, section 2 of the Constitution. Leach. *American Federalism,*10-12.

[452] The Confederate preamble stated "We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity invoking the favor and guidance of Almighty God do ordain and establish this Constitution for the Confederate States of America."

[453] Corwin, *The Constitution and What It Means Today*, revised by Harold W. Chase and Craig R. Ducat, 13th edition (Princeton, NJ: Princeton University Press, 1973), 1-3.

represented a decisive move away from states' rights.[454] The original draft language of the Preamble from the "Committee on [the] Permanent Constitution" read "We, the people of the Confederate States, *each state acting for itself*."[455] The obvious statement of state autonomy in this phrase did not articulate the common purpose for which the Confederacy was being created and so the framers struck "each state acting for itself" from the Preamble.[456] Simultaneously, the framers refused to remove the phrase, "We the people," from the nation's constitutive document.[457] Like the United States Constitution, the Confederate charter began with the declaration that it was created by the intent of the people of the entire Confederacy and reflects the intention of the people of the nation at the time of the drafting to come together and create a common framework of government that would reflect the principles, ideas, and purposes of the people as a nation.[458]

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[454] Charles Lee stated that although there was no constitutional provision for secession, that this was "implied" by the "phraseology" of the preambles of the Confederate Constitutions. Lee, *The Confederate Constitutions*, 145. Interestingly, Lee did not include any analysis of the discussions or proposals by the Confederate framers as to the language and intent of the preamble.

[455] *Journal of the Confederate Congress*, 1:851.

[456] Existing historiography on Confederate federalism contends that the original intent in the preamble was not to form "a more permanent federal government" but to safeguard state sovereignty. Robinson, "A New Deal in Constitutions," 454.

[457] Thomas Jefferson Withers of South Carolina was a member of the Provisional Confederate Congress a former Circuit Solicitor and member of South Carolina's Secession Convention sought to increase state power and authority in the Preamble with his February 28, 1861 motion to amend the Preamble by removing the phrase, "We, the people of…." His motion was rejected. *Ibid.*

[458] Joseph Story, in his *Commentaries on the Constitution*, expressed a similar rule for interpretation, stating that the "true office" of the Preamble "is to expound the nature and extent an application of the powers actually conferred by the Constitution, and not substantively to create them." Story, *Commentaries on the Constitution*, (Cambridge, MA, 1833), 462.

The result was a revised second phrase of the Preamble ("each State acting in its sovereign and independent character") which has been interpreted, ironically enough, as a strong statement of states' rights ideology.[459] In actuality, the Confederate framers here rejected states' rights as the preeminent constitutional principle, choosing instead to recognize and affirm the importance of the state, *as a unit of political organization and political activity at that time,* which was necessary for the ratification or adoption of the Confederate Constitution.[460] This revised language in the Preamble reflected the political reality existent at the time of the creation of the Provisional Confederate Constitution since the states had seceded from the Union as political units. Following secession, southern political leaders who met to form a common national government did so as "the Deputies of the Sovereign and Independent States of South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana, invoking the favor of Almighty God" that they might, "in behalf of these States, ordain and establish this Constitution for the Provisional Government of the same."[461] The framers seemed intent on eliminating

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[459] Lee argues that this phrase "affirms the state sovereignty concept of its framers" but the genesis of the language of the preamble and the preamble, read, in its entirety as a statement of constitutional purpose, suggests otherwise. Lee, *Confederate Constitutions*, 89; DeRosa, *The Confederate Constitution of 1861*, 20-21.

[460] This phrase, according to Alexander H. Stephens, actually Stephens, writing after the war, stated, "'In this, the words 'each State acting in its Sovereign and Independent Character' were introduced to put at rest forever the argument of the Centralists, drawn from the old Constitution, that it had been made by the people of all the States collectively, or in mass, and not by the States in their several Sovereign character.'" Stephens, *A Constitutional View of the Late War Between the States*, 2:335; op cit. Lee, Confederate Constitutions, 89. Lee argued that the viewpoint of Stephens was shared by Curry. Hull, "The Making of the Confederate Constitution." Hull was the grandson of Confederate framer and general, Georgian T.R.R. Cobb.

[461] *Journal of the Confederate Congress*, 1:899; see generally, 899-909.

ambiguity about federalism in the Confederacy by clarifying the role and authority of the states at the time the national government was formed.[462]

Doctrinally, state supreme court justices rejected the understanding that the nation had been created by the states rather than directly by the people, rejecting a states' rights conception of Confederate constitutional forms as well as the proposition that the states exercised a general supremacy over the national government. In the Confederacy, sovereignty emanated from the people, a principle that reflected nation-centered more than state-centered federalism. In the 1862 case of *Jeffers v. Fair*,[463] the Georgia Supreme Court defined the divided spheres within Confederate federalism and how sovereignty had been vested by the people in both state and national governments for the performance of the respective goals by each. The court held that the national government possessed the authority to call into national military service a state official, even when judged by the state to be necessary for the proper operation of state governance. Associate Justice Jenkins, looking to the form and purposes under the Constitution and the structure of Confederate federalism, stated that sovereignty emanated from the people from the states and that Confederate constitutional government was created *by the people* of the Confederacy in order to serve national and

[462] DeRosa stated that "the C.S.A. framers were determined to avoid ambiguity regarding the status of the states within the Confederacy." However, their intention, according to DeRosa, was not to assert the supremacy of the states over the national government but to protect the states from national government consolidation; in other words, their intention was to preserve the federal arrangement from corruption. DeRosa, *Confederate Constitution of 1861,* 20.

[463] 32 Ga. 347 (1862).

common purposes.[464] Two years later, in *Cobb v. Stallings*, Associate Justice Jenkins pointed out the fallacy inherent in allowing the states to interfere with the exercise of national governmental authority. Such state actions would interfere with "the unobstructed operation of the machinery of their common Government, established by consent of all."[465]

The Preamble identified the people and not the states as the source of sovereignty in the Confederacy and the creators of the nation, representing the weakening influence of states' rights as the configurative political philosophy of the Confederacy. The phrase in the Confederate Constitution, "We the people of the Confederate States" emphasized the people of the nation as the creators of the national purposes of Confederate government also influenced some understanding of sovereignty in the Confederate government. In North Carolina, in 1862, Chief Justice Richmond M. Pearson, traditionally held out by historians as "captious" and obstructionist to the government in Richmond, declared that the Confederate government was "distinctive," that sovereignty had not been vested solely with the state, and that philosophical principles about divided sovereignty had been given specific form in the Constitution when "all these states were compelled to give up a portion of their former respective sovereignties, and to invest the newly created government with them."[466] Two years

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[464] *Ibid*., 366.

[465] 34 Ga. 72, 76 (1864).

[466] *In Re Bryan*, 60 N.C. 1, 10 (1862). This principle was not a dry question of law but a matter of public discussion. The Salisbury *Carolina Watchman* noted the limitations upon state government, based upon the sovereignty that had been vested in the national government by the people: "The State has delegated to the Confederate Government the sole right to declare war and make peace.--While *in* the Confederacy...the

later, Pearson's brother justice William Battle echoed this idea in *Gatlin v. Walton*,[467] explaining in his examination of the Federal (and implied, the Confederate) Constitution that the central government was formed as states surrendered a portion of their sovereignty.[468] In 1864, the Texas Supreme Court again rejected any belief that the Confederacy was the creation of the states. Associate Justice Reeves held that the Confederate government was the creation of the people of the Confederacy, that "the government of the Confederate States, like the government of a state, is derived from the same source, the people, and founded on their authority; that the constitution and laws of the Confederate States are the supreme law of the land, and not in any sense dependent on the constitution of a state for their authority."[469]

The Preamble to the Permanent Confederate Constitution, though similar to the preamble in the United States Constitution, differs significantly because of its emphasis on creating a *federal* national republic. Confederate framers replaced the U.S. Constitution's objective to create "a more perfect Union" with the more specific objective in their Constitution, to create "a permanent federal government."[470] This phrase identified the people of the Confederate nation, acting through their states, as

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State cannot make peace or negotiate for it. To do this...the State must first recall the rights of sovereignty which she has vested in the Confederate Government." The Salisbury *Carolina Watchman*, May 2, 1864.

[467] 60 N.C. 205 (1864).

[468] *Ibid*., 208-209.

[469] *Ex Parte Abraham Mayer,* 26 Tex. 715 (1864).

[470] George Anastaplo argued that the specific use of new phrases emphasizes the "importance of words" and the importance of changes. Anastaplo, *The Amendments to the Constitution: A Commentary*, 133.

fulfilling a national purpose to come together and to form "a *permanent* and *federal* government."[471] This was a significant step for the preamble identified the Confederate constitutional arrangement as a *federal government*, not as a confederacy, stressing the importance of divided responsibilities, powers, and authorities rather than a loose collection of autonomous states.[472] The new nation was also established to be *permanent*, strongly suggesting that the framers intended that secession—the most extreme expression of the states' rights philosophy—was not a valid political or constitutional theory or option under the new document.[473]

Superior Duty to Fulfill National Purposes

While the Preamble provided several specific national goals, to "establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and

[471] Preamble. Nieman, "Republicanism, the Confederate Constitution, and the American Constitutional Tradition," 203 and Fitts, "The Confederate Convention: The Constitutional Debate," 189-210.

[472] Joseph Story, *A Familiar Exposition of the Constitution of the United States*, (Boston, MA: Marsh, Capen, Lyon, and Webb, 1840; reprint, Lake Bluff, IL: Regenery Books, 1986), 58-60.

[473] Diamond, "What the Framers Meant," 27. An idea raised by Diamond is the inaccuracy of modern understandings of nineteenth-century terms. According to Diamond, federalism in the nineteenth century meant then exactly what we mean now by confederalism ("a sort of association or league of sovereign states"). Diamond, "What the Framers Meant," 27 (the sources Diamond drew upon included Samuel Johnson's *Dictionary of the English Language*, 2 vols. (Heidelberg: Joseph Englemann, 1828). John Walker's *Pronouncing Dictionary and Expositor of the English Language* (Philadelphia: Ambrose Walker, 1818). White argued that a secession clause was unnecessary in the Confederate charter because "they [the framers] were committed to the compact theory," that any restriction or rejection of the right to secede would have "contradicted" it, and that the right of secession was "evident" in the language of the preamble to the charter. White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 8.

our posterity," it would fall, ironically, to state institutions, the state supreme courts, to overcome the assertions of theories and ideas that might inhibit the national government's fulfillment of these constitutional goals. This principle was established in 1862, early in the war, in two major decisions in Texas and Georgia. Writing for the Texas court in the case of *Ex Parte Coupland,* Associate Justice George F. Moore vigorously asserted the federal nature of the nation, holding that the Confederate government, especially Congress, was more than simply an agent of the states.[474] In the Georgia case of *Jeffers v. Fair,* Associate Justice Jenkins refused to allow the state government to interfere with the "instrumentalities of the national government which were necessary for the fulfillment of its responsibilities and duties to the nation." Under Article Four, section 3 of the Confederate Constitution, the national government guaranteed to the states a republican form of government, but Jenkins asked "can a republican form of government be maintained without the necessary instrumentalities?" Moreover, Jenkins stated that it was equally unacceptable to have any interference with or abdication by the national government of its duty to employ its full powers to provide for such constitutional goals and purposes: "if…such instrumentalities, whilst in the exercise of their proper functions, within any State, were forcibly withdrawn, would not that act violate the constitutional guaranty?"[475]

The constitutional obligations of the Confederate government and of Confederate citizenship were more specifically pronounced later that year in another Georgia decision, *Thomas Barber v. William A. Irwin, et al.*, a decision arising from

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[474] *Ex Parte Coupland,* 26 Tex. 387 (1862).

[475] *Asa O. Jeffers v. John Fair,* 33 Ga. 347, 368 (1862).

five separate cases.[476] Against the claim that the conscription acts were unconstitutional, the Georgia court, with Associate Justice Jenkins writing for the court, reaffirmed its holding in *Jeffers v. Fair*,[477] in which it had held the conscription acts to be constitutional as a valid exercise of constitutional power and added here that this specific action by the national government was consistent with its constitutional "duty" to "'protect each of the States against invasion.'"[478] In *Cobb v. Stallings*, this principle was more completely explained by the Georgia Supreme Court. The national government in Richmond was more than the common agent of state interests because of the common purposes for which the national government had been created. Because of these national purposes, the national government was supreme within its sphere of power and authority.[479]

The duties of the national government were taken seriously and preserved from usurpation by state governments attempting to exercise concurrent jurisdiction, chiefly state government attempts to exercise concurrent war powers. In December of 1864, North Carolina's Associate Justice Manly handed down his opinion in *Smith v. Prior*[480], addressing the question of whether the defendant, Robert H. Smith, was entitled to exemption from military service due to his position as watchman in Salisbury even though

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[476] 34 Ga. 27 (1864). The five jointly-decided cases were *Thomas Barber v. William A. Irwin*; *E.T. Jones v. Nathaniel F. Mercer*; *E. T. Jones v. Isaac B. Brinson*; *Isaac Dennis, et al. v. Willis B. Scott*; *E.T. Jones v. William Warren*.

[477] 33 Ga. 347 (1862).

[478] 34 Ga. 27, 31.

[479] *Cobb v. Stallings*, 34 Ga. 72 (1864).

[480] 60 N.C. 267 (1864).

his military enrollment was prior to his appointment. Manly, writing for the court, stated that "His enrollment, prior to such appointment, put Smith in military service, and he could not be elected out of it into a city watch. It is not necessary that one should be in the field, as we conceive, to constitute him a soldier. If he has been enrolled by legal authority, and put on furlough, his status is as firmly fixed as if he were in the trenches, confronting the enemy."[481] Manly rejected the state's right to provide such exemptions from Confederate service and remanded Smith back into the custody of the Confederate Army: "We can conceive of no greater reason why the State should have the power to take away from the Confederate States persons appointed to places of duty than the reverse of the proposition. Neither, in our opinion, is necessary, and neither is constitutional...especially when we consider the paramount powers and duties of the General Government in respect to war."[482]

Another significant development in the enunciation of the Confederate doctrine of federalism was the high priority afforded to national purposes and the authority of the Confederate Constitution in determining this prioritization. In North Carolina in *Gatlin v.*

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[481] *Ibid*., 268.

[482] *Ibid*. Amidst local citizens, the substitution provisions of the conscription laws caused a great deal of anger and frustration amongst North Carolinians, as it did for other southerners. By the end of 1863, the ability to escape conscription by hiring a substitute was a "chief cause" of discontent amongst troops already in Confederate service. Under the provisions of the substitute law, "many able bodied young men were left undisturbed at home to carry on private business on their own account...." The substitute law "guaranteed exemptions to speculators, while the equivalent service contemplated by the furnishing of a substitute was seldom rendered." Writers from the *Carolina Watchman* interviewed troops in December of 1863 and wrote "we verily believe that unless they are appeased on this subject by the faithful execution of the law bearing upon it, we shall witness in the Spring more fearful demoralization in the army than ever before." *Richmond Whig*, in Salisbury *Carolina Watchman*, February 15, 1864.

Walton[483] Associate Justice Battle explained that the national purposes for which the federal arrangement had been created could not be altered since doing so would violate the constitutive reasons for which the national charter had been created. When the national government's power to make war was challenged by the state sovereignty argument, Associate Justice Battle explained that such a power had been vested by the people as part of the public trust and "it [the national war power] cannot be abdicated, contracted away, or encumbered, but should be kept as a trust to be used for the public safety when there is need for it, unembarrassed by claims of private right…The Government is but the representative of the people, and it has, therefore, in substance, the right which the people have to call upon one another for aid." He further explained that this idea was ensconced in constitutional principles and provisions: "These principles are reasonable, consist with natural law and with the law of the land, and should be present in the minds of all citizens making contracts among themselves or with the Government."[484]

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[483] 60 N.C. 205 (1864).

[484] Ibid., 216. Walton was conscribed in August of 1862 under the act of April 1862, obtained a substitute (as provided for under section 9 of the act), and was discharged from service. Walton was later conscribed under the act of January 5, 1864 but claimed that by virtue of his obtaining a substitute for conscription under the first Conscription Act, he was discharged from any further military duty for the war. Associate Justice Battle referred to the language of the April 1862 act which addressed substitution, "Persons not liable to duty may be received as substitutes for those who are, under such regulations as the Secretary of War may prescribe." 60 N.C. 205, 217-218. The issue for the court was clear, whether the act of Congress of January 5, 1864, entitled "An act to put an end to the exemption from military service of those who have heretofore furnished substitutes" was constitutional? At the root of this issue was the question of whether Walton, by furnishing a substitute under the April 16, 1862 act and obtaining a discharge from service, had entered into a binding contract with the Confederate government, a contract which the Congress possessed no authority to impair. The court held that "If a contract were made between the Government and the conscript, by which the latter furnishes a substitute, under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract by virtue of the power

Battle maintained that the superior duty lay in the central government's duty to protect the population and that the war power wielded by the central government was a significant grant of power: "Let it be remembered that the Government had the absolute power to control the citizens for military duty, limited only by the exclusion of State officers…a service was thus demanded of him, which he owed, and from which he had no escape as a matter of right…it has unlimited authority to use his personal service. It has but to command, and he must obey." To consider substitution as an irrevocable contract with the principal would result in the "weakening and fettering its military power" and "must diminish the force of the Nation— [it] cannot augment it."[485]

The national government's constitutional duty to protect the nation by implementing its war powers would be maintained even when the state supreme courts came into direct conflict with state military authorities over the issue of home defense. In *Ex Parte Tate,*[486] the Alabama court established the primacy of the national government's claim to men and material in constitutional terms. The court held that "the war-and-peace power, conferred on the congress of the Confederate States by the constitution, is the highest and most vital trust confided to that government; because upon its proper exercise the maintenance and protection of every valuable right, whether of individuals or the body politic, and involving the very existence of both,

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inherent in all governments whose organic law does not expressly deny to them that power." 60 N.C. 205.

[485] *Ibid*., 219.

[486] 39 Ala 254 (1864).

must, in case of insurrection or foreign invasion, ultimately depend."[487] The justices held that under the Confederate Constitution, "there are certain attributes of sovereignty--certain high functions of government--which the legislature has no right to give or grant away" and concluded that, because of the high importance of this trust and delegation of authority upon the national government, the Congress could not surrender its obligations but that they "must be kept and held by the legislature, entire and undiminished, for the benefit of the people—the nation—as public functions and attributes of sovereignty."[488] Furthermore, that "to execute this high trust, it is the imperative duty, as it is the manifest right of that government, to exhaust, if it becomes necessary, the entire military force of the country, in men, money, and every other available material of war; but especially to hold under its control and to employ all the males of the country capable of bearing arms, or of performing other military service."[489] The act of Congress which limited exemptions were "not violative of any constitutional provision, but are valid, and within the scope of the powers conferred on the general government."[490]

In North Carolina, in *Wood v. Bradshaw*,[491] the state supreme court had to decide whether Thomas S. Wood, the owner and manager of more than fifteen able-bodied slaves, who also met the qualifications of the Act of February 17, 1864 and was considered to be a

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[487] *Ibid*., 256.

[488] *Ibid*., 259.

[489] *Ibid*., 273.

[490] *Ibid*., 256.

[491] 60 N.C. 269 (1864).

bonded exempt under that law, could be made to perform military service in the Home Guards of the state. The case raised a federalism issue and whether Wood could be considered, by an act of Congress, in the service of and performing duty for the Confederate Government when he was arrested by the defendant, John A. Bradshaw, for service in the Home Guard. This required the court to consider whether Congress was empowered by the Constitution to conscript Wood for other services of a military nature. Battle concluded that the Confederate Congress did possess the power to conscript for services other than a military kind under the authority to raise and support armies conferred by the Confederate Constitution. Battle added that when the government should find itself in need of money and supplies to support its armies, then there should not be any reason to prevent the government from compelling individuals, who might otherwise be in the field as soldiers, to furnish provisions and munitions for the army. Battle concluded that if this authority would be challenged by the state governments, "The supremacy of the war power of the Confederate over that of the State Government cannot be disputed." Battle went to establish clearly the primacy of the Confederate government in fulfilling its war-making responsibilities: "The personal service which the Confederate Government has a right to demand, and has demanded, of the petitioner is inconsistent with that which the State demands of him; and, such being the case, the latter must give way to the former…The Confederate Government cannot exempt from the service of the State any person who is not called into its own service; but every one who is doing service for it must, of necessity, be protected from being forced into an inconsistent service for the State."[492]

[492] *Ibid*., 271.

Pearson concurred with Battle, upholding the principle that the war provided a broader construction of the power of the central government, that "in case of necessity, the power of the Confederate States is unlimited so far as the citizens are concerned. It is my duty to conform to that decision." With regard to the question of the power of the states to infringe upon the power of the central government and that the central government was thusly limited, Pearson stated "I think not, for the reason that the States have, by the provisions of the Constitution, subordinated the State war power to that of the Confederate States. 'No State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay'…So the war power of the State is secondary, and imposes no limitation on that of the Confederate States."[493]

In rendering decisions about the nature of Confederate federalism, Southern state supreme jurists manifested their intent to preserve *national* constitutional principles through a strict construction of the Confederate Constitution. In *Ex Parte M. C. Talkington* and *Ex Parte* Randle, the Texas court enunciated the supremacy of the national government, *under the Confederate Constitution,* within its respective sphere of authority, refusing to allow state law to become supreme over Confederate law.[494] Following an earlier decision, Moore refused and rejected the argument that affirmed that decision: "A party who has furnished a substitute in the provisional Army of the Confederate States, under the Conscript Laws, is not thereby exonerated from military service as a militia man, under the laws of the State; nor is he thereby excused from a

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[493] *Ibid*., 272.

[494] *Ex Parte M. C. Talkington*, [unreported decision] (1863). Robards, *Synopses of the Decisions of the Supreme Court of the State of Texas*, 12. *Ex Parte Randle* [unreported decision] (1863) appears in Robards, *Synopses of Decisions*, 10.

draft ordered by the Governor, in response to a call made upon him for a part of the militia for Confederate service" since the commanding general would be acting "by the direction and in obedience to the orders of the President."[495]

In *Simmons v. Miller*, the Mississippi court vitalized the Supremacy clause of the Confederate Constitution, holding that there was no other conclusion to be reached since "this results necessarily from the constitution, and the laws made by the Confederate States in pursuance of it, being the supreme law of the land."[496] The Confederate supremacy clause and the specificity contained within the Confederate Constitution precluded the primacy of the state to interfere with Confederate responsibilities or to subsume into state authority the responsibilities and powers to be exercised by the national government.[497] Borrowing from Marshall's opinion in *Sturges v. Crowninshield*,[498] Chief Justice Alexander Handy stated "that 'whenever the terms in which a power is granted to Congress, or the nature of the power, require that it shall be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it.'"[499]

When state governors, state agencies, and litigants asserted state concurrent jurisdiction over military affairs or state troops, state courts refused to accept such ideas because of constitutional provisions, especially the Supremacy clause in the

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[495] *Ibid.* 12-13.

[496] 40 Miss. 19, 24-25.

[497] *Ibid.*

[498] 17 U.S. (4 Wheat.) 122 (1819).

[499] 40 Miss. 19, 25.

Confederate Constitution. In Alabama, the justices held that there were distinct spheres of responsibility granted to state and national governments and any attempt by either to assert itself within the jurisdiction of the other would be unconstitutional.[500] In *Ex Parte Hill, In Re Willis, Johnson, & Reynolds v. Confederate States*, the Alabama State Supreme Court *restricted the expansion of its own state court jurisdictional authority* over issues belonging within the Confederate sphere by invoking the supremacy clause of the Constitution.[501]

National Purposes and Defining Citizenship

National purposes enabled the Confederate government to make demands upon a national citizenship, even for foreigners or when state interests conflicted with national interests. When state governments asserted a right to call up and retain state militia troops, conflicts arose with the national government as to which entity possessed better authority over the state troops. In wartime decisions, state supreme courts turned to the Confederate Constitution and the doctrine of federalism for the resolution. Although

[500] In the *Plan of a Provisional Government* from 1861, the language of the document had empowered the President to call up the militia and assume command over them until such time that the Congress had provided for this in legislation: "The President shall be, ex officio, Commander-in-chief of the Army and Navy, and also of the Militia of the States, when called into service. He shall have power to call into service any part of the Militia or regular troops of any State, and to organize and employ the same for the proper defence [sic] of the Confederacy, or of any State of the same until other regulations shall be made by the Congress." *Plan of a Provisional Government*, 5.

[501] 38 Ala. 429, 454. Article VI, sections 3 through 6, established the Confederate Constitution as the "supreme law of the land" and also included the 9th and 10th amendments of the U.S. Constitution. White, "The Constitution of the Confederate States of America: Innovation or Duplication?," 21.

Frank Owsley argued that "each state insisted upon the right to maintain 'troops of war,'" especially after the February 17, 1864 law that removed state troops to Confederate service, in reality, state supreme courts held this type of state power to be unconstitutional and they ruled against the states. Owsley's conclusion that "practically every state arrayed itself against the central government on the conscription question"[502] fails to consider the decisions by the state supreme courts.

The attempts by states to exercise control over state militia troops and thereby frustrate Confederate conscription raised issues about the larger purposes for which a national government existed and whether it was intended that the state governments should retain sovereignty, even at the expense of the national government. In *Ex Parte Coupland*, the Texas court addressed whether the state could exercise a better right to a state citizen as a member of the state militia than the Confederate government's claim to the same individual as a conscript under the conscription legislation. Although Coupland's legal strategy was to attack the constitutionality of the act and claim that the national legislation was in derogation of the rights of the state government to its citizens, the Texas court said no, that the national government's claim to Coupland, made in accordance with constitutional powers and in furtherance of the national purpose for which the constitutive document had been created, was superior to Texas' claim to Coupland. Here, the court held that "when the citizen goes into the army raised by congress, either voluntarily or in obedience to the law requiring him to do so, he does this as a citizen and not as a militiaman" and the even though the Congress was limited to the exercise of constitutional powers within its own sphere, "the citizen, when

[502] Owsley, *States Rights in the Confederacy*, 204.

placed in its [Confederate] service, is temporarily withdrawn from the control of the state as a militiaman" and "the right of the state, or more properly speaking, the right of the state government over him, must yield to the more pressing and important demand for his services by the Confederate government, to enable it to discharge the duties for which it has been authorized to raise and support armies."[503]

In Mississippi, attorneys representing David Simmons decided to pursue a unique legal strategy that relied upon the preeminence of state citizenship. Unlike claims filed in other cases that had challenged conscription by asserting state supremacy, state concurrent war powers, or state court concurrent jurisdictional authority, Simmons claimed that Mississippi possessed a prior right to his services because of "the power [of Mississippi] to place her citizens in her military service [the militia] before they are taken for Confederate service, and to the exclusion of the right of the Confederate States."[504] However, Chief Justice Handy, writing for the court, stated that "the power of a State, in such cases, is subordinate to that of the Confederate States Government; and, whenever it is exercised by the latter, it excludes the power of the State over the subject-matter…This results necessarily from the constitution, and the

[503] 26 Tex. 387, 397-398. When the petitioner owed obligations to both the state and the Confederate governments, it was clear which government must yield, even if the state asserted that it would not be able to find another qualified person. The North Carolina court held "The State must, in such a case, yield to the prior claim of the General Government, and select some other man to fill its office...the General Government may not be able to procure another fit person for a soldier." In *Bridgman v. Mallett*, the court determined that Bridgman was not essential to the administration of the state government, as recognized by the state Constitution. Therefore, Associate Justice Battle reversed his earlier decision and remanded the petitioner to the enrolling officer, Major Peter Mallett. *Bridgman v. Mallett*, 60 N.C. 321, 326.

[504] *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19, 21 (1864).

laws made by the Confederate States in pursuance of it, being the supreme law of the land."[505] Handy then made it clear that the tradition being drawn upon in Mississippi was that of the Federalist Papers (*Federalist No. 22*) and not the Articles of Confederation. Rejecting a states rights interpretation of the Constitution, Handy referred to the want of effective leadership and power under the Articles of Confederation to address national concerns. He dismissed Simmons' claims because it would have rendered the national government "wholly inefficient in time of war, and throw the Confederate Government back to the inconveniences under the articles of confederation."[506]

Chief Justice Handy, a firm believer in states' rights and secession,[507] drew from John Marshall's opinion in *Sturges v. Crowninshield*,[508] proving that even secessionist justices could proudly draw from John Marshall in order to uphold these constitutional

[505] *Ibid*, 24-25.

[506] *Ibid*, 26. According to Martin Diamond, "the delegates, Madison argued, knew that the creation of a union adequate to the achievement of all these things in their fullness was the real task of the Convention. Here was where all were agreed. Now the delegates must surely see that no federal system could accomplish the desired ends. If, as under the Articles, coercion was denied, the ends would go by default; it would be as if there were no union." Diamond, "What the Framers Meant," 40; *Documents Illustrative of the Formation of the Union of the American States*, ed. C. C. Tansill (Washington, DC: U.S. Government Printing Office, 1927), 229.

[507] Along with Alexander H. Handy, the Mississippi wartime bench consisted of William L. Harris (1858-1867), Cotesworth Pinckney Smith (1851-1863), David W. Hurst (1863-1865), and Henry T. Ellett (1865-1867). The latter two served as representatives to the Mississippi Secession Convention, and Ellett assisted in drafting the state's ordinance of secession.

[508] 17 U.S. (4 Wheat.) 122 (1819).

principles.[509] Handy dismissed the idea of concurrent war powers, adding "if each State has the right to withhold from Congress any portion of her citizens fit for military service and subject to it, she has equally the power to withhold all such persons whenever she may think fit to do so…this is 'absolutely and totally contradictory and repugnant' to the provisions of the constitution referred to, and would render the war-powers granted in the constitution nugatory…It would, in effect, paralyze the war-power of the Confederate Government at the discretion of the States."[510] Mississippi's high court made clear that despite the Confederate nation's origins in secession, state sovereignty could not be asserted to diminish a constitutional grant.

The courts were also called upon to define the extent of national authority and power to conscript citizens, even when these citizens were claimed by the state as necessary for the proper functioning of state government and were "of two separate and distinct sovereigns, to both of which they owe duty and allegiance citizens." In North Carolina, Associate Justice Battle refused to accord the state governments with any parity of authority or power due to the Supremacy Clause in the Confederate Constitution.[511]

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[509] The legal and constitutional opinions of the United States Supreme Court played a significant role in state jurisprudence of Confederate constitutional issues, however, what is questionable is Moore's argument that it should not be surprising that state jurists supported the central Confederate government in Richmond since most of these jurists were "grounded" in the opinions of John Marshall and considered themselves bound by the doctrine of *stare decisis*. However, Moore's premise is that the Confederate Government was "fundamentally a replica of the Federal Government," as he stated in *Conscription and Conflict*, 163.

[510] 40 Miss. 19, 26.

[511] In *Bridgman v. Mallett*, the North Carolina court reaffirmed the supremacy of the national government by pointing out that the Confederate Constitution "asserts the supremacy of the Confederate States, as to the powers conferred upon the Government, by declaring that 'this Constitution, and the laws of the Confederate States made in pursuance

Battle pointed out that the authority of the Confederate government to wage war was due to the delegation of power from the states to the central government. However, the resolution required an analysis of the applicable constitutions and "If the constitutions upon which their respective governments are based be rightly construed, and rigidly adhered to, there will be little or no danger of their clashing or interfering with each other in their respective demands of service from the people." In any conflict over the right of the Confederate States to conscribe men also claimed by the states for militia or other duties, there could be only one conclusion: "In the distribution of the powers of sovereignty it is conceded that the States have conferred upon the Confederate Government the war power; that is, the power to declare war and to raise and support armies. It has been held by all the greatest statesmen and judges of the country that this power is, with a slight exception, unlimited."[512] Displaying a remarkable adherence to national constitutional principles, state supreme courts—as state institutions—played a critical role defining the authority of the national government within the national sphere within the Confederate Constitution and under the Supremacy Clause.

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thereof, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding.'" 60 N.C. 321, 324.

[512] 60 N.C. 321, 324. In the Alabama case of *Ex Parte Bolling, In Re Watts*, 39 Ala. 609 (1865), the court upheld the primacy of the Confederate over the exercise of state war powers (authority to call up the militia), even in 1862 when prospects were good for the Confederacy. Moore wrote that "the claim and call of the Confederate States must prevail over the claim and call of the State government, on the ground that the constitution of the Confederate States, and laws made in pursuance thereof, are the supreme laws of the land."

Invocation of the Supremacy Clause

State supreme courts enunciated a strong national purpose in the Constitution and held that the Supremacy Clause was a vital provision designed to elevate national needs and priorities above purely state interests. This clause gave full authority and power to the national government to fulfill its constitutional duties. In the wake of secession and the powerful assertion of states rights in 1860-1861, this represented a significant constitutional development which, ironically, was provided through judicial review by state supreme courts. In Georgia, North Carolina, and Texas, the courts held that sovereignty was divided and delegated to state and national governments, a feature common to dual federalism, yet, the prominence of achieving national purposes raised serious doubts about a purely dual federalist understanding of or the preeminence of states' rights and state-centered federalism in the Confederacy.

The invocation of the Supremacy clause was due to both an emerging emphasis upon war-related national purposes and objectives and an increasing attempt by petitioners to wield states' rights as a bar against national powers. As a result, state courts were compelled to consider their enunciation of the doctrine of Confederate federalism more broadly, in terms of the effect of their decisions upon national goals and objectives identified in the Constitution. In May of 1862, J.C. Bryan was liable to Confederate service but hired a substitute to take his place. After his substitute was conscripted for service, Bryan was seized as a conscript and sought a writ of habeas corpus and exemption from Confederate service. Although Pearson could have asserted a North Carolina statute that required state courts to hear habeas corpus cases, he

instead turned to the Alabama decision in *Ex Parte Hill*.[513] Chief Justice Pearson held that state courts were bound to observe the then-congressional suspension of the writ, and "as the acts of Congress made in pursuance of the Constitution are the supreme law of the land, it follows that such an act [observance of the suspension] would be as imperative on the State courts and judges as on the tribunals of the Confederate States."[514] He added that the supremacy of national law was foundational in the Confederacy and furthered "the purpose of forming a new and distinct government." The Chief Justice observed that sovereignty was not vested solely with the state and that the philosophical principles on federalism had been given specific form: "all these states were compelled to give up a portion of their former respective sovereignties, and to invest the newly created government with them."[515] This included the ability of the national government to now bypass the states and reach individuals directly in the fulfillment of constitutional responsibilities and duties.[516]

While the state supreme courts upheld the supremacy of the national government, they did so within the sphere of national authority and power. In Georgia, Associate Justice Jenkins established the primacy of Confederate law over Georgia law, drawing upon the decisions of John Marshall, and pointing out that in any conflict

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[513] 38 Ala. 429 (1863).

[514] 60 N.C. 1, 7.

[515] *Ibid*, 10.

[516] *Thomas Barber v. William A. Irwin*, where Associate Justice Jenkins refuted the view that "the unlimited power to place in the army of the Confederate States all citizens capable of bearing arms is incompatible with the sovereignty of the several States." This interpretation of the Confederate Constitution, claimed Jenkins, would render the national government incapable and "too weak to accomplish *the ends for which it was instituted* [italics added]." 34 Ga. 27, 36-37 (1864).

between the two, the supremacy clause of the Confederate Constitution, provided in Article Four, section three established that Confederate law "shall be the supreme law of the land." As precedent for his decision under the Confederate Constitution, Jenkins referred to *McCulloch v. Maryland*,[517] *Houston v. Moore*,[518] and *Osborne, et al. v. U.S. Bank*.[519] On the supremacy of Confederate law, Jenkins concluded, "So says the Constitution, and we can not [sic] say otherwise."[520]

National purposes enabled Confederate government to make demands upon a national citizenry that included foreign residents of the Confederacy. In *The State, ex rel. Graham, In Re Pille*,[521] the Alabama court asserted the primacy of national government authority over state authority within its respective sphere. Walker stated that the February 17, 1864 legislation that called into national military service "all white men, residents of the Confederate States, between the ages of seventeen and fifty" placed every male "liable to conscription, constructively in the military service of the Confederate States."[522] Any attempt by Alabama to usurp this authority would go beyond the scope of the Confederate Constitution and "the claim of the State to the military service must yield to the conflicting claim of the Confederate States; for the constitution, and laws of the Confederate States passed in pursuance thereof, are the

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[517] 17 U.S. (4 Wheat.) 316 (1819).

[518] 18 U.S. (5 Wheat.) 1 (1820).

[519] 22 U.S. (9 Wheat.) 738 (1824).

[520] 34 Ga. 72, 77.

[521] 39 Ala 459 (1864).

[522] *Ibid*., 460.

supreme law of the land."[523] Walker concluded that Pille was liable to conscription and to Confederate military service as long as he was domiciled in the Confederacy, even though he was a domiciled foreigner.

In Mississippi, Associate Justice Handy made clear that the states were under obligation to obey and follow the respective duties and responsibilities of each sphere of government under Confederate federalism and the Confederate Constitution: "By the provisions of the constitution, the power to declare war belongs exclusively to the Confederate States Government…It was never contemplated that the separate States should carry on the war within their limits after public war was declared, except to repel invasions; and that only so far as might be done without detriment to the general power of the Confederate Government, and consistently with the support which it is the high duty of each State to give to all the constitutional measures of that government for the prosecution of the war. And, *when the whole country* [italics added] is involved in a general war, it is a grave and dangerous error to suppose that any State has the right to engage in the war, or to institute measures of war, independently of the power of Congress and in opposition to the measures adopted by that body for carrying on the war, *if they are constitutional*" [italics added][524]

State supreme court justices could have been influenced by local officials or local politics, yet they did not because they adjudicated according to the principles found within the Confederate Constitution. When confronting a clash between national and state government authority over the same subject, they adjudicated according to

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[523] *Ibid*. Pille was not liable to state militia service while liable to Confederate service.

[524] *David Simmons v. J.H. Miller, Enrolling Officer* 40 Miss. 19, 26-27 (1864).

divided spheres of national and state authority and, when the power lay within the national sphere, they invoked the Supremacy Clause of the Confederate Constitution, upholding the supremacy of Confederate over state government within the appropriate sphere of authority.[525]

One of the important goals of the framers in 1787 was to "create a political system that would protect the people from despotic governments, whether they be large or small, democratic or not." The mechanism for "checking the despotic tendencies, majoritarian or other" was a system of federalism in which the sovereign powers were to be exercised by the general and state governments. Yet "the interdependence of the national and the state governments was to ensure their ability to check one another while still enabling them to cooperate and govern energetically."[526] This did not mean for the Confederacy that the powers delegated to the general government were to be restrictive or limited to the point of restricting its efficacy to govern and fulfill its responsibilities to the people of the nation. Rather, the powers delegated to the general government were to be adequate to meet the responsibilities within the appropriate sphere, including the division of the "decisions and functions of government," the ability of each governmental entity to operate directly upon individual citizens, a "final

[525] Confederate public policies were maintained possibly because of the professionalism which resulted from consensus on shared values between Confederate and state officials. Edward W. Weidner, "Decision-Making in a Federal System," in Elazar, *Politics of American Federalism*, (Lexington, MA: D.C. Heath and Company, 1969):202-216, 214.

[526] Elazar, "Introduction: The Meaning of Federalism," in *Politics of American Federalism*, xi.

reference, usually a judiciary," and "a willingness both to cooperate across governmental lines and to exercise restraint and forebearance in the interests of the entire nation."[527] The determination of adequacy, however, would be a measure requiring adjudication and evaluation according to the principles enunciated in the Confederate Constitution and according to the purposes for which the nation had been formed.[528]

When state jurists enunciated principles of federalism and enforced the war powers of the Confederate government, they facilitated the implementation not the alteration of constitutional principles. Contrary to the limited historiography on Confederate federalism, state court justices articulated a national doctrinal development in which the supremacy of the national war powers resulted neither from military necessity nor political exigency.[529] In their decisions, justices articulated principles at odds with states' rights but derived from the Constitution, and, most notably, the creation of "a more perfect *federal* government," even amidst war, one more balanced, more efficient, and more clearly defined that that under the Constitution of 1787.[530]

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[527] Grodzins, "The Federal System," 265; Leach, *American Federalism*, 1-2.

[528] *Ibid*., xii.

[529] Existing historiography on Confederate federalism contends that the original intent in the preamble was not to form "a more permanent federal government" but to safeguard state sovereignty as in Robinson, "A New Deal in Constitutions," 454. In *Federalism in the Southern Confederacy*, the principal study of Confederate federalism, Curtis Amlund argued that as the war progressed, constitutional principles became displaced by military exigencies and a balance of power between state and national governments was replaced by a consolidated Confederate government.

[530] This is a significant development. Charles Lee argued that "the greatest constitutional question in the United States between 1787 and 1861 was: 'What was the

Ironically, like the federalism articulated by John Marshall, the doctrine of federalism that southern state supreme courts enunciated possessed the following characteristics: 1) an emphasis upon distinctly national goals, objectives, and responsibilities, as provided for in the nation's Constitution; 3) the competency of the national government to address its responsibilities within its sphere; 4) supremacy within the federal structure depended upon in which sphere—state or national—the powers were to be exercised; 5) sovereignty emanated from the people, not the states; and 6) within its sphere of responsibilities, there was to be no question that the national government was supreme.[531] In the Confederacy, federalism operated as a rather dynamic procedural system for the general and state governments, rather than a theoretical end in and of itself.

In the process of enunciating and implementing federalism principles during war, the justices also began to enunciate a *national* purpose. The constitutional order in the Confederacy was configured to facilitate the *national* welfare of a Confederate people, not just citizens of individual states. The national government was vested with sovereignty to fulfill its responsibilities to the people of the nation, rather than to the states. State jurists understood the Confederate Constitution as something substantive. Operating as a *de facto* supreme court, they considered its text and principles seriously. They upheld the exercise of *constitutional* Confederate war powers, within a system of federalism, to facilitate distinctly national purposes. And, in their decisions on the

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nature of the Union under the Constitution?'" and "Basic to this question was the location of sovereignty in the Federal Union." Lee, *Confederate Constitutions,* 141.

[531] G. Edward White, *The Marshall Court and Cultural Change, 1815-1835,* 504-524.

Confederate Constitution and the doctrine of federalism, we may have another light “to reveal its true meaning.”

Chapter Six

Separating Functions to Fulfill National Goals

During the Civil War, the repeated demands within the Confederacy to mobilize men and material for prosecuting America's first modern war compelled the national government to become increasingly active in the lives of its citizens. The Confederate Congress initiated America's first draft in April of 1862 and shortly thereafter the Confederate War Department began issuing a series of wartime regulations and guidelines that attempted to shape the implementation of these acts and restrict statutory exemptions and discharges from the Confederate military. Passage of Confederate conscription[532] and exemption laws[533] raised many legal and constitutional challenges from litigants who alleged the War Department's usurpation of the judicial function to interpret statutory meaning and congressional intent and to determine whether the statutory requirements for exemption had been satisfied. In the resulting cases, state supreme courts in North Carolina, Alabama, Virginia, Georgia, and Texas were compelled to define the separation of powers under the Confederate Constitution and to address the challenge imposed by the war of defining secondary delegations of legislative power made by the Congress to the War Department. Such delegations were necessary due to the increasingly complex circumstances of the Civil War and the need to create

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[532] The first Conscription Act ("An Act to further provide for the public defence [sic]"), passed by the Confederate Congress on April 16, 1862, conscripted men between the ages of 18 and 35. *Public Laws of the Confederate States*, 1 Cong., 1 Sess., 1862 (Richmond, VA: R.M. Smith, 1862), Chapter XXXI, Section 1. This was followed by a second act on September 17, 1862 ("An Act to amend an act entitled 'an act to provide further for the public defense,' approved 16th of April, 1862."), which expanded the age liable to military service to 45, see *Public Laws of the Confederate States*, 1 Cong., 2 Sess., 1862, Chapter XV.

[533] See Chapter 1, footnote 99, *ante*.

regulations and procedures necessary for implementing conscription and exemption.[534]

The expansive governmental power was challenged by men who desired to be exempt from Confederate military service and they raised their challenges in wartime litigation. These litigants argued that the expanding scope of governmental power during wartime threatened to overshadow the preservation of constitutional principles such as limited government, the separation of governmental powers and functions, and the protection of political liberty. In these cases, critical questions were raised about the political priorities and purposes of the nation and which government branches were empowered to legislate, modify legislation, or interpret its meaning. State supreme courts were forced to balance two seemingly conflicting constitutional goals, that of separating government power in order to preserve political liberty and another to establish and maintain an effective national government with the necessary powers to preserve the Confederate nation during war.[535]

What resulted was a corpus of cases across many southern jurisdictions in which state supreme court justices confronted this "constitutional tension" and enunciated the

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[534] State-specific historiography on this topic includes Memory F. Mitchell, *Legal Aspects of Conscription and Exemption in North Carolina, 1861-1865* (Chapel Hill, NC: The University of North Carolina Press, 1965) and David P. Smith, "Conscription and Conflict on the Texas Frontier, 1863-1865," *Civil War History*, vol. XXXVI, no. 3 (1986):250-261.

[535] The Confederate Constitution provided for three specific branches of government with specific delegations to the legislative, executive, and judicial branches in the first section of Article I, Article II, and Article III, respectively, in the Confederate charter. The Confederate government was also under a positive duty to preserve the Confederate nation under Article IV, Section 3, clause 4 whereby it was declared that "The Confederate States shall guarantee to every State that now is, or hereafter may become, a member of this Confederacy, a republican form of government; and shall protect each of them against invasion; and on application of the Legislature or of the Executive when the Legislature is not in session) against domestic violence."

Confederacy's doctrine of the separation of powers as meaningful, workable, and purposeful. Despite this tension, they upheld a doctrine of separation of powers that was rigid enough to separate and limit government powers from usurpation of another branch's functions and powers and to preserve political liberty yet flexible enough to maintain a national government with considerable powers for prosecuting modern war.[536] Simultaneous with the focus on separating government functions and the challenge of enunciating how limited government could also be effective government during wartime, the state supreme courts also preserved a focus on national goal and national purposes, as provided for in the Confederate Constitution.

A Bar Against Usurpation

The separation of powers is a constitutional doctrine in which government possesses the primary responsibilities of making and enforcing laws but each branch of government is distinct and charged with different functions and responsibilities.[537] An

[536] Mark Neely has focused on the subject of individual civil liberties and concluded that "In the case of the Confederacy, it appears that modernization went hand in hand with proscription of civil liberty." Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*, 10. Richard Bensel argued that mobilization transformed the Confederacy, that "in terms of mobilization of national material and manpower resources, however, it was the Confederate state…that was by many measures the modern response to the political economic challenge of war" and the "all-encompassing economic and social controls of the Confederacy were in fact so extensive that they call into question standard interpretations of southern opposition top the expansion of federal power both in the antebellum and post-Reconstruction periods." Bensel, *Yankee Leviathan*, 95.

[537] The mechanisms for doing so include bicameralism, a system of checks and balances in government, and the limitation upon the executive branch to enforce and administer the law only. With the separation of powers, there is a focus on balancing governmental powers and not social classes and the separation of powers doctrine rejects the mixed theory of government in which the political and social authority are

"essential" part of a "pure" separation of powers doctrine is the division and vesting of governmental power in three separate and independent branches—the executive, the legislative, and the judicial branches—in order "to effect a system of checks by each department on the other two."[538] The purposes for this "necessary element" in the doctrine are "to balance the freedom of the individual citizen with the necessary exercise of governmental power," to prevent "arbitrary abuse of power by officials," and to establish and maintain political liberty.[539] Political liberty results from the creation of divisions between the three branches of government which prohibits its domination by any single group or government branch. Of constant concern was this balance between too little division, by which one branch might dominate the other two, and too much division, by which the branches might become too restricted, leading to weak and ineffective government. Corresponding to each branch is an "identifiable function of government, legislative, executive, or judicial" and each branch "must be confined to the exercise of its own functions and not allowed to encroach upon the

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assumed to be identical. Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. 1, 71-73. Like the progressives decades later, Confederate framers understood that there was a fundamental difference between politics and the administration of government in the following ways: (1) policy-making and legislation belong to the popularly-elected branches; (2) the executive only proposes policies; (3) the legislature disposes of policies, providing an element of accountability; and (4) once the sovereign will is enacted, its implementation depends on the administration (which was believed to be outside of the sphere of politics). *Ibid*., vol. 2, 414.

[538] M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2nd edition, (Indianapolis, IN: Liberty Fund, Inc., 1998), 14.

[539] Arthur T. Vanderbilt, The *Doctrine of the Separation of Powers and Its Present-Day Significance*(Lincoln, NE: University of Nebraska Press, 1963), 35. See also Michael Conant's Introduction to the 1963 edition, Ibid., especially v-vi for more on "purposes" and the "ambiguity" understanding and defining the doctrine or key terms such as "power." Vile, *Constitutionalism and the Separation of Powers*, xi.

functions of the other branches."[540] In the spring of 1862, the Confederate founders created a permanent national constitution apportioning the national governmental power, creating national legislative, executive, and judicial branches.[541]

When southern state supreme courts rendered wartime constitutional decisions, they vigorously preserved the separation of powers doctrine, chiefly as a bar against executive usurpation of legislative functions by the War Department, because of the belief that Congress was best able to fulfill representative functions and promote political liberty and representative government, even during wartime.[542] The purpose for the doctrine is "to assert the supremacy of the people's representatives in lawmaking and, by denying the executive branch any share in the highest and most important power of government, to confine him to merely an administrative function." In a republican form of government, the separation of powers established a measure of "popular control," elevating the people's representatives to a dominant role in contrast

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[540] Vile, *Constitutionalism and the Separation of Powers*, 14. John Adams stated that "It is by balancing each of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the Constitution." John Adams, *The Works of John Adams, Second President of the United States: With a Life of theA uthor, Notes and Illustrations, by his Grandson Charles Francis Adams*, vol. 4 (Boston, MA: Little, Brown and Company, 1850-1856), 185-186), op cit. Vanderbilt, The *Doctrine of the Separation of Powers and Its Present-Day Significance*, 4.

[541] DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism*, 81-82; Walter Bagehot, *The English Constitution and Other Political Essays* (New York, NY: D. Appleton & Co., 1877), 47, 82, 84.

[542] William Riker has pointed out that in Federalist No. 47, Madison wrote: "'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty" than the "maxim that the legislative, executive, and judiciary departments ought to be separate and distinct." William H. Riker, "Sidney George Fisher and the Separation of Powers During the Civil War," *Journal of the History of Ideas*, vol. 15, Issue 3 (June, 1954):397-412, 397.

to the executive and vesting in them the sole responsibility for lawmaking.[543]

It was the wartime state supreme courts, in the doctrine they enunciated, that guarded against usurpation of the powers and function of Congress to enact legislation on behalf of the nation, as provided in Article I, Section 2 of the Confederate Constitution. Just one year after the creation of the Permanent Confederate Constitution, in Texas, the supreme court highlighted the important legislative role and functions assigned to Congress to create laws on behalf of and for the benefit of the nation. Associate Justice Reeves stated in his opinion that "The sovereign power, wherever it may be lodged, must judge of the exigencies that will justify the exercise of power, and in our system of government that power has been conferred on congress."[544] This vigilance in protecting legislative functions resulted from the understanding that "the legislative power is a sovereign power to make general rules of conduct for the political community enforceable in the future by the physical force of the state."[545] The force of the state became embodied in wartime legislation on April 16, 1862, when the Confederate Congress passed its first conscription act.

That summer, a young North Carolinian, J.C. Bryan, who was liable to conscription, hired a 39-year-old substitute to take his place in the Confederate military.

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[543] Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. 1, 71-73. In the *Federalist No. 70*, Publius wrote that the legislative powers are plural "since 'deliberation and wisdom' in the legislative process demand ' a numerous legislature.'" Riker, "Sidney George Fisher and the Separation of Powers During the Civil War," 397.

[544] *Ex Parte Abraham Mayer*, 27 Tex. 715, 724 (1864).

[545] Vanderbilt, The *Doctrine of the Separation of Powers and Its Present-Day Significance*, ix. In a modern nation, the "'negative' approach to the checking of power" was balanced by a need to have legislation created in accordance with the wishes of the people, see *Ibid*., x.

On July 29, 1862, enrolling officers received Bryan's substitute at Camp Holmes in Raleigh and Bryan was given a discharge for the war. The following year, on June 16, 1863, Bryan was arrested as a conscript under the Conscription Act of September 1862 (which expanded the age of the draft to age 45) after Bryan's now 40-year-old substitute was conscripted. Bryan petitioned for a writ of habeas corpus under the claim that he was being unjustly detained since he had been discharged from conscription for providing a substitute, as required under section 9 of the April 1862 Conscription Act, and therefore could not again be enrolled as a conscript under the September 1862 act. Bryan raised the separation of powers issue when he questioned whether the War Department possessed the power under the Constitution to interpret the September act and create regulations that contradicted what he argued was the intent of the Congress in the April 1862 act to exempt him for the duration of the war.

In North Carolina, preservation of liberty fell to the courts and, in the case of *In Re Bryan*, the court held that it could exercise jurisdiction "to discharge a citizen by the writ of habeas corpus whenever it is made to appear that he is *unlawfully* [italics in original] restrained of his liberty by an officer of the Confederate States." Such an important charge for the court had been "confided to it '*as a sacred trust,*'" [italics in original] and the court was to maintain its vigilance over this liberty regardless of wartime necessity.[546] Liberty is an essential goal in the separation of powers doctrine

[546] Pearson's attention to constitutional principles included his careful vigil against the excesses of executive power. After Governor Vance had ordered the state militia to arrest Confederate deserters, the militia had attempted to do so in Yadkin County. But after a brief skirmish in which state militia troops were killed and deserters subsequently jailed, Pearson stated that he "could find no clause in the Constitution, no Ordinance of the Convention, and no act of Congress or the Legislature conferring such power on the Governor...." Pearson seemed to be irritated by Vance's willingness to

and Americans who lived between the time of "the adoption of the Constitution until at least the Civil War…believed—if they believed in their system of government at all—that the separation of powers assured their liberty"[547] The court had "no discretion and no right to be influenced by considerations growing out of the condition of our country, but must act with a single eye to the due administration of the law, according to the proper construction of the acts of Congress."[548]

Among southern states, the importance of contract principles to legal reasoning was perhaps strongest on the North Carolina Supreme Court which was noted for a characteristic emphasis upon the individual. North Carolina was the only southern state in which slaves were subject to the fellow servant rule and were even held to be "fully formed human beings with....'moral qualities.'" The North Carolina court was also distinguished by a rigid application of rules of construction and doctrines in private and public law, a quality which helps to explain Chief Justice Pearson's particular style of jurisprudence and his wartime opinions so closely focused on individual liberty.[549] Because of its focus on individual liberty and contract principles, the North Carolina came into direct confrontation with the War Department and Chief Justice Pearson

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comply with a request from Secretary of War Seddon, asking Vance to call out the militia for this purpose. Pearson also seemed irritated by the Legislature's ensuing passage of the legislation which gave Vance the authority to call out the militia "for local and temporary service." "Explanatory Letter from Judge Pearson," Salisbury *Carolina Watchman*, June 22, 1863.

[547] Riker, "Sidney George Fisher and the Separation of Powers During the Civil War," 397.

[548] 60 N.C. 1, 9 (1863).

[549] Reuel E. Schiller, "Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court," *Virginia Law Review* 78 (August 1992), 1240.

began to assert more frequently between 1862 and 1864 the authority of the judiciary against the national government in order to prevent usurpation of the judicial powers. Pearson's jealous guarding of judicial independence and a more rigid balance of powers between branches of government may have been influenced by his political perspective. Pearson was an old-line Whig, but, with the advent of the war, his political ideology led him to join the new Conservative party in North Carolina. The Conservatives, who emerged from the ranks of the old Whig party, maintained that, though the war should be conducted efficiently, its direction and objectives should never impinge upon the civil liberties of individual North Carolinians nor should military power and authority threaten to supersede that of the civil authorities.[550]

Pearson's expansive understanding of the need to promote liberty interfered with the War Department's needs to mobilize Confederate manpower and brought him into constant conflict with Richmond.[551] The Assistant Secretary of War, J.A. Campbell, a former Associate Justice of the U.S. Supreme Court, emphasized for Colonel Peter

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[550] Most of the Whigs in North Carolina opposed secession and campaigned against it in 1860-1861. Thomas E. Jeffrey, *State Parties and National Politics: North Carolina, 1815-1861* (Athens, GA: The University of Georgia Press, 1989), 305. The party also incorporated into its ranks those who had supported remaining in the Union up until the time of Lincoln's proclamation. Marc W. Kruman, *Parties and Politics in North Carolina, 1836-1865* (Baton Rouge, LA: Louisiana State University Press, 1983), 236-37. At the 1860 Whig state convention in Raleigh, "Old Whigs" dominated in the drafting of the party platform. It included a denouncement of the "'unusual and dangerous powers in the hands of the executive.'" Jeffrey, *State Parties and National Politics*, 273.

[551] Pearson was reportedly an ardent opponent of secession but during the war was known for his decisions on conscription and exemption where he liberally dispensed exemptions. He "...stood as a symbol of freedom to many soldiers who appealed to him for discharge and his decisions caused consternation to both state and Confederate military authorities." Mitchell, *Legal Aspects of Conscription and Exemption*, 4.

Mallett, the commandant of conscripts in North Carolina, his duty to apply the Secretary's General Order No. 84 (issued September 8, 1862) which stated that "'a substitute becoming liable to conscription renders his principal also liable, unless exempt on other grounds'" and General Order No. 82 (issued November 3, 1862) which directed that "'In all cases in which a substitute becomes subject to military service, the exemption of the principal by reason of the substitute shall expire.'" Campbell also noted that "'The opinion of Chief Justice Pearson is not regarded by the Department as a sound exposition of the act of Congress and you will not regard it in your official action as such.'" North Carolina newspapers made public the Confederate position that Pearson's opinions were not authoritative and would not be regarded as having the force of law.[552]

State supreme courts could be adamant about preserving judicial authority to interpret statutes because of their interest in securing individual liberty and preserving their "sacred trust" to protect the rights of citizens.[553] When P.P. Meroney was arrested in North Carolina without much regard for the court's earlier decision in *In Re Irvin*,[554] because the Secretary of War considered the construction of the act given by the court in that case to be an unsound exposition, Chief Justice Pearson castigated the Secretary for usurping the judicial function. In the case of *In re Meroney*,[555] Pearson challenged the Secretary's ability to challenge their ruling, stating "Who made the Secretary of War

[552] Hamilton, "The North Carolina Courts and the Confederacy," 370-371.

[553] *John B. Weems v. Joseph H. Farrell*, 33 Ga. 413 (1863).

[554] 60 NC 60 (1863).

[555] 60 NC 64 (1863).

a judge?" and questioned the Secretary's assignment to the War Department of the judicial function to construct the conscription. The court felt that the War Department's regulations for conscription officers created a new legislative intent and, in so doing they had usurped the power of the courts to interpret Congressional acts, which was wholly unacceptable.[556] The North Carolina court had affirmed the importance of the statutory law and the judiciary's role in interpreting its meaning according to the separation of powers doctrine.[557]

In *John B. Weems v. Joseph H. Farrell*,[558] the Georgia court adjudicated the limitations upon statutory exemptions. It enunciated several principles about national interest and individual duties owed to the nation that would later be drawn upon in the substitution cases. In *Weems*, Associate Justice Jenkins considered whether the Secretary of War's April 29 regulations limiting statutory exemptions under the conscription acts were consistent with the intent of the Congress in the Conscription Act of April 16, 1862. The Secretary's regulations anticipated the direction that the Confederate Congress would take in amendatory acts and the court considered these subsequent acts when examining congressional intent. If they were not consistent with congressional

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[556] 60 N.C. 1, 22-25. The citation for *In re Meroney* is the same as I*n Re Bryan* because it was never reported as a separate opinion but was printed as a lengthy footnote in *Bryan*.

[557] The tension between preserving liberty and mobilizing men for the Confederate war effort would perpetuate the battle waged between the War Department and North Carolina high court for another year. In May of 1863, Secretary of War James A. Seddon wrote to Governor Vance asking the governor to "retrain the too ready interposition of the judicial authority in these questions of military obligation." *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series I, Volume 51, Part 2, 715-716.

[558] 33 Ga. 413 (1863).

intent, the court then had to decide whether the exercise of this authority amounted to a usurpation of judicial authority to interpret statutes and was therefore beyond the intent of Congress.[559] Jenkins, delivering the opinion of the court, explained that "the first section of the [April 16, 1862 Conscription] Act imposes upon all persons therein described a legal duty—one of perfect obligation" and this duty was owed to the nation, with the national government representing the nation.[560]

Jenkins went on to explain the strong public interest and common good of the nation as essential to congressional intent behind the conscription acts and that this intent was manifested in "the ninth section [of the Conscription Act which] provides a conditional exemption from that duty."[561] Jenkins stated that while individual rights were important, the results whereby individuals could easily avoid military service through manipulation of the statutory language would contradict the interest in safeguarding the public service. Yet, Jenkins made clear that the court was not contriving the legal principles to fit into a particular outcome beneficial to the war effort. Rather, "as expounders of the law" they asked "whether it consists with the intent and meaning of Congress as expressed in the ninth section of the Act of April 16." The court held "that the second section of the Secretary's order of April 29, is a better, more faithful exposition of that intention, and in this we are sustained by the subsequent course of the

[559] Throughout the war, state courts were vigilant in protecting their role in judicial review, especially War Department regulations on the scope and application of statutory exemption which appeared to be interpretations of statute and a usurpation of judicial review. This is discussed more in Chapter Five, *supra*.

[560] 33 Ga. 413, 419-420.

[561] *Ibid*.

Congress."[562] In Georgia, the state high court held that substitution was not a contract but a "gratuitous privilege...subject to the will and discretion of Congress."[563]

In *Tyson v. Rogers*,[564] Associate Justice Lyon of Georgia held that the legislative role was absolutely critical for operationalizing the intent of the Confederate people and in the absence of any legislative enactment, military necessity was an inadequate reason for military authorities to impress slaves as military laborers in military hospitals. Lyon wrote, "It is no answer to this that the public service required that all able-bodied soldiers should be sent to the field; because it was the duty, or rather the province, of Congress to declare what was for the good of the public service, and not the commanders in the field or at posts."[565] The protection being afforded here was the individual right to property and the court held that seizure of property could not be made "no matter how great may be the public exigency, so long as the law affords protection, unless such seizure be especially authorized by law, and then only upon just compensation made of which the impressing officer, the Government, nor its agents must judge."[566]

The court was also called upon to address another separation of powers issue, distinguishing executive from judicial functions. In 1863, Bell urged military and

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[562] 33 Ga. 413, 420-421 and *Wiley A. Moncrief v. William L. Jones*, 33 Ga. 450 (1863).

[563] *John B. Weems v. Joseph H. Farrell*, 33 Ga. 413 (1863).

[564] 33 Ga. 473 (1863).

[565] *Ibid*., 476.

[566] *Ibid*., 475.

judicial authorities to cooperate and for military authorities to respect the judicial authority of the Texas courts.[567] But, by 1864 the military situation west of the Mississippi had become serious and military exigency was becoming an important factor in determining the actions of many military officials. In March, an interesting series of events in Austin resulted in a major conflict between the court and the military in Texas and a sequence of cases in which the court had to arrest executive usurpation of judicial functions. [568]

In *The State v. J. H. Sparks*, Associate Justice Moore characterized the abrupt arrest and seizure by the Army of five recusant conscripts, who were in the custody of the court under writs of habeas corpus, as an "outrage committed upon the authority of the court." The act violated the constitutional authority of the court and undermined the sanctity of legal procedure, especially since the individuals had already been

[567] In *Ex Parte Turman* (26 Tex. 708 (1863)), Bell reminded the court of the necessity of cooperation between military and civil authorities. Moore insisted that there was a major constitutional issue to be resolved here, that the court would be "derelict in the discharge of the high trust committed to us by the constitution and the laws, if we should permit to pass unquestioned so palpable and glaring an outrage upon the law and the mandates of the court in which we have been called to preside." 26 Tex. 708, 713 (1863).

[568] The principal case was *The State v. J. H. Sparks*, 27 Tex. 627 (1864). Major J. H. Sparks, a Confederate Army officer and commandant of the post in Austin, ordered his men to remove Richard R. Peebles, D. J. Baldwin, O. F. Zinke, Reinhart Hildebrand, and Ernest Seeliger from the custody of the sheriff of Travis County. Major General John Bankhead Magruder, commander of the military district of Texas, New Mexico, and Arizona, had ordered their arrest under charges that they had committed treason and conspiracy against the Confederacy. Major Sparks stated that the prisoners were arrested under orders from Magruder, who acted under orders from Lieutenant General Kirby Smith, commander of the Trans-Mississippi Department, and that they were held as prisoners under the "recent" congressional suspension of habeas corpus. Sparks believed that although the court had refused his request to place the prisoners in his custody, his duty was to capture them in obedience to his superiors. 27 Tex. 627, 628-630.

charged under the Constitution and Texas law. What was most contemptible about the action taken by the general officers here was the indignation shown the court. Military authority in Texas was still subject to the law and such an "illegal act" could not be justified, even when orders were issued from the highest Confederate official in the War Department: "Military officers are bound to obey all legal orders of those by whom they are commanded...the soldier is still a citizen, and as such is always amenable to the civil authority." Yet, despite the outrage by members of the court, propriety and procedure suggested that the court proceeded cautiously, with a due regard for evidentiary standards and with all fairness to General Magruder, "the principal offender." Although Moore wanted to compel Magruder to appear to answer the contempt charge, the court decided against such a move, wishing to afford him all rights of citizenship and the opportunity to respond to the complaint. The court ordered Magruder to answer the complaint and to show cause for contempt when the court convened in Tyler in April.[569]

Moore's condemnation of the military was premised upon constitutive principles rather than political motives. Magruder had not only disregarded the authority of the court but, as an agent of the Executive Branch, he had exceeded his role and transcended the executive responsibility to enforce the laws. Magruder had "'turned the instrument against the power that ought to wield it; for it is the civil government alone that stands for the state, and the military is only an instrument that it uses as its judgment requires'" and that this was "a vital blow at the constitution, and the principle upon which our government is organized." Moore added that it would have been better "for the prisoners who are in custody of the court, though doubly guilty beyond all that

[569] 27 Tex. 627, 632, 634, 631, 632, 634 .

has been charged against them, to go unwhipped of justice than for the civil authorities of the state to be subordinated to [the] military."[570]

When the court considered the case in Tyler, it wanted to afford Magruder the opportunity to defend himself "from so disreputable an imputation, and the court from the painful duty of pronouncing the highest military officer of this department guilty of using the authority with which he has been entrusted for the public welfare and the defense of the state, as a means of violating the law." However, the court was "wholly disappointed" with Magruder's return in which the general argued that "the court does not acquire jurisdiction of the persons of the applicants for a writ of habeas corpus."[571] It was Magruder's disregard for the legal and constitutional order that became so objectionable to the members of the court; the court condemned Magruder for "interfering with and contemning [sic] the authority and princess of its courts, and thus *violating social order* [italics added], which he should have been the first to have upheld and sustained." An officer in Magruder's position was often called upon to protect people and property and that "it is not expecting too much of him, if ignorant of the plainest and simplest principles of the administration of the law, that he should inform himself in respect to them before undertaking to interfere with and control the judicial tribunals of the country."[572] Moore also intended to prevent any further executive usurpation of court authority by eradicating any legal grounds for Magruder's assertions. Moore rejected Magruder's claim that he acted in pursuance of the

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[570] 27 Tex 627, 633.

[571] 27 Tex. 705, 706-707.

[572] *The State v. J. H. Sparks and J. Bankhead Magruder*, 27 Tex. 705, 709 (1864)).

congressional act suspending the writ of habeas corpus. Although the court would have been fully justified if it fined or imprisoned Magruder, it did not do so for two reasons. It would not improve the military situation in Texas and the removal of Magruder was a political question that the governor would have to address. The court forwarded a copy of the entire proceedings to the governor and a judgment, including costs, was rendered against the defendants.[573]

One year later, the Georgia court affirmed its earlier holding when James Cody tried to secure a discharge from military service due to medical incapacity. On March 5, 1863 a surgeon, Dr. G. B. Powell, certified Cody's incapacity for discharging the duties of a soldier. But the trial court judge ruled the certificate issued by Dr. Powell to be insufficient to exempt Cody from service because it came from one doctor only rather than the board of surgeons as required by law and he remanded Cody to the custody of the enrolling officer. Upon appeal, Chief Justice Lumpkin held that Dr. Powell's certificate was insufficient to certify Cody's incapacity for discharging the duties of a soldier. Lumpkin concluded that "The act vacating all previous exemptions required rules to be prescribed by the Secretary of War. He required a *medical Board* [italics in original] to act in case of alleged physical disability. It was competent for the Secretary of War to make the rule, and therefore the certificate of a single physician will not answer."[574]

In deference to the legislative function and the protection of that function from executive usurpation by the War Department, state supreme courts applied a strict

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[573] *Ibid*, 711.

[574] *James M. Cody v. Radford C. Rhodes*, 34 Ga. 66, 67 (1864).

construction to the statute and refused to permit the War Department from expanding the scope of its secondary delegation of legislative power as contravening the intent of Congress. In a "disorganizing opinion" in *Bryan*, the North Carolina court refused to allow the War Department to usurp the legislative function, regardless of the exigencies facing the nation.[575] Both Battle and Pearson agreed that under the April 1862 act, certain rights had been vested and with the War Department's construction that substitutes in the age group mentioned in the September 1862 act were now liable themselves for conscription thereby causing their principals to become liable for conscription was essentially a retrospective law affecting those rights. Battle held that the Congress *alone* possessed the authority to pass retrospective laws and giving the War Department discretion here would constitute executive usurpation of the legislative function.[576] He added that it was not contemplated at the time that the First Conscription Act was passed that another act might be passed which would alter the previous provisions for substitutes. However, this did not matter since the court could only interpret what Congress had legislated and the court denied the War Department any power to legislate. In so doing, Battle wrote, "it was a *casus omissus*, for which Congress neglected to provide, and it is

[575] This decision was described as a "disorganizing opinion" and became the subject of frustration in a letter from Assistant Secretary of War Campbell to North Carolina's governor, Zebulon Vance. In the War Department, Robert Kean read of this case and concluded that "The local judiciary [in North Carolina] are doing what they can to defeat the conscription and encourage desertion in many places." Robert Garlick Hill Kean, *Inside the Confederate Government*, Edward Younger, ed. (New York, NY: Oxford University Press, 1957), 64.

[576] "The Secretary of the War had no power afterwards to make an order to have a retrospective operation to affect rights already attached. The Legislature may pass retrospective laws, but it is very certain that no other department of the Government can." 60 N.C. 1, 22-25. *General Order No. 29*.

too late for the War Department to attempt to remedy the mischief by assuming to legislate under the name of regulations."[577]

In some cases, the courts seemed so determined to preserve the separation of powers and functions that they employed strict construction to hold Congress to their poorly-worded legislation and poorly expressed intent, preventing the War Department from expanding the scope of conscription beyond the statutory language. In October of 1863, in an vacation opinion, *In Re Prince*,[578] Chief Justice Pearson did just that. Miles H. Prince obtained a substitute who entered military service on March 5, 1862 but since the substitute was under the age of 18 years when received, the colonel receiving Prince's substitute issued him a certificate of exemption. While the colonel insisted that Prince was exempted only until the substitute reached 18 years of age, Pearson, combining the statute and the War Department regulations of October 1861, stated that Prince's exemption was for the war. Before the court, the issue was whether the provisions for exemption, as set out in the certificate of acceptance provided when Prince's substitute was received, modified the construction of the conscription act. Pearson stated that in looking to the statute, age seemed immaterial, "at any time, there was no act of Congress in force having reference to any particular age or making the age of the substitute at all material, and, of course, the colonel could not vary or annul the legal effect of the fact of substitution, and there was no act of Congress which could, by reference, vary the legal effect." Pearson held that "where the substitution is made before the passage of the conscription acts, under the regulation of the War Department…there being no act of Congress in force making

[577] 60 N.C. 1, 25.

[578] *In re Prince*, 60 N.C. 116 (1863).

citizens, either presently or prospectively, liable to service in the Confederate Army, the age of the substitute is immaterial." Pearson focused on what he considered as "the only essential requirement" and that was "that he [Prince] is 'an able-bodied man, fit for military service in the field'" and "it is the law which discharges the principal, and not the colonel or captain." Pearson refused to allow any modification of the provisions of the War Department regulations of October 1861 and vigorously asserted that the proper conclusion of law was to exempt Prince for the war, regardless of the age of his substitute, and he was discharged from service.[579]

Secondary Legislative Functions

Under the conscription and exemption legislation, the War Department was charged with the creation of regulations—including procedures for adjudicating claims for exemptions under the statutes—for the *efficient* administration of enrollments and statutory exemptions.[580] The courts followed the rigid lines separating the branches, refusing to allow litigants to seek legal remedies before they had exhausted these

[579] 60 N.C. 116, 117.

[580] "An Act to exempt certain persons from enrollment for service in the Armies of the Confederate States," Chapt. LXXIV in *The Statutes at Large of the Confederate States of America, Passed at the First Session of the First Congress; 1862. Public Laws of the Confederate States of America, Passed at the First Session of the First Congress; 1862*. The legislation provided "that all persons *who shall be held to be unfit for military services under rules to be prescribed by the Secretary of War* [italics added]." Note the provision in the first phrase providing that exemptees must held as unfit according to the rules and regulations established by the War Department. This distinction and whether the Executive Branch could interpret both the statutory intent of the Congress and the duties and responsibilities contained with the Confederate Constitution would become material issues and prompt many of the state supreme courts to enunciate a constitutional doctrine of the separation of powers. Hamilton, "State Courts and the Confederate Constitution," 431, footnote 29.

procedures provided by the War Department under the exemption legislation.[581] As the state supreme court justices made clear in their decisions, these delegations were not unlimited and there were significant differences between "non-delegable legislative power" and "delegable secondary legislative functions"[582]

Under the conscription and exemption legislation, the War Department was specifically charged with the delegable legislative function of creating and implementing regulationsand procedures . In Alabama, in a jointly decided separation of powers case, *Ex Parte Hill, In Re Armistead v. Confederate States & Ex Parte Dudley*,[583] the state supreme court addressed whether a state court could overrule decisions by the commandant of conscripts and the Secretary of War refusing a conscript's appeal under its regulations and these delegable legislative functions. W. B.

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[581] *Mann v. Parke*, 16 Va. (Gratt.) 443, 449, 452-453 (1864); *Ex Parte Hill, In Re Willis, et al.*, 38 Ala. 429 (1863); *Ex Parte Hill, In Re Armistead v. Confederate States & Ex Parte Dudley*, 38 Ala. 458 (1863); *Ex Parte David S. Read* (1863), reported in Robard's, *Synopses of the Decisions of the Supreme Court of the State of Texas*, 11-12; *Ex Parte Richard R. Peebles, and Others* (1864), reported in *Ibid*.; and *Ex Parte Mitchell*, 39 Ala. 442 (1864).

[582] Vanderbilt, *The Doctrine of the Separation of Powers and Its Present-Day Significance*, xi. Such delegations did not diminish the doctrine since the complex demands of a modern war and conscription would require a certain degree of flexibility in the formulation of detailed operational guidelines: "The doctrine of the separation of powers is a general constitutional principle, and it was neither conceived nor has it ever operated as a rigid rule. The special cases where one branch performs some particular function of another branch are both explicit and implied by the very nature of government. But the special cases are determinable and limited, for the rule of separation of powers is meaningless if it can be circumvented completely." Michael Conant's reading of Vanderbilt regarding that the doctrine was never intended to be meaningless by design nor was it intended to be rigid, thatdelegation was consistent with the flexibility of the doctrine. "In our technically complex society, the legislature may lack the skill to develop the detailed rules that will carry out a general regulatory policy." *Ibid*., ix, 50, x.

[583] 38 Ala. 458 (1863).

Armistead, a newly conscripted soldier, sought release from the custody of an enrolling officer on the ground that he had obtained a discharge from military service in August of 1862 by virtue of his placing a substitute over the age of 35 in his place and under the proscribed War Department regulations. In adjudicating Armistead's claim, the court considered whether the legal effect of that discharge should be to exempt Mr. Armistead from conscription under the Second Conscription Act and whether the officer was capable of interpreting the statute as to the effect of the substitution and discharge.[584] In Charles H. Dudley's case, he had provided a substitute but was ordered back to camp when it was determined that his substitute had been obtained through fraud and duress. Dudley then applied to the Secretary of War for leave to examine witnesses, and to cross-examine those against him. Later, when pressed to proceed, he again applied to the Secretary of War to open and extend the time for the examination of witnesses, but his application was refused, with the Secretary ruling that the substitution was set aside for fraud.[585]

Despite the claim that such procedures usurped legislative functions by adding additional criteria to the statutory requirements enacted by Congress, Associate Justice Stone looked to the War Department regulations that implemented the conscription acts, namely *General Order No. 37*, passed on May 19, 1862 and *General Order No. 64*, passed September 8, 1862 as delegated secondary legislative functions.[586] Stone

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[584] 38 Ala. 458 (1863).

[585] *Ibid*.

[586] The April 16, 1862 Conscription Act conveyed a statutory authority upon the War Department by providing that the statute was to be implemented "'under such regulations as may be prescribed by the secretary of war.'" *General Order No. 37* also

affirmed the delegable secondary legislative function that Congress had conveyed to the War Department and rejected any interference with this delegation, even by the judiciary, and he imposed a restriction even on the Alabama high court's ability to interfere.[587]

Although the right to appeal to the Secretary of War was unquestionably logical, Stone refused to allow any further appeal before the state courts due to the bar imposed by the separation of powers doctrine under the Confederate Constitution and because to do so would violate the specific delegation made by Congress. The issue here was purely one of law and Stone stated that the Secretary of War and the commandant of conscripts had addressed the issue of fraud in their study of the available evidence: "give to the courts of the State government appellate jurisdiction over the commanding officers, commandant of conscripts, or the secretary of war; officers who receive their appointments from the Confederate government, and who are specially charged, by that government, with the performance of these functions."[588] Here, Stone, borrowing from *McClung v. Silliman*[589] and *Ableman v. Booth*[590] made the distinction here between

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copied the language of the first exemption statute and provided that "'No persons, other than those expressly named, or properly implied in the above act, can be exempted, except by furnishing a substitute exempt from military service, in conformity with regulations already published'" and *General Order No. 64* provided that "'A substitute becoming liable to conscription, renders his principal also liable, unless exempt on other grounds.'" *Ex Parte Hill, In Re Armistead v. Confederate States & Ex Parte Dudley*, 38 Ala. 458, 472, 475 (1863).

[587] The court imposed the same restriction again in *Ex Parte Hill, In Re Willis, et al.* 38 Ala. 429 (1863).

[588] 38 Ala. 458, 466, 469-470.

[589] 6 Wheat 598 (1821) [5 L.Ed. 340].

usurpation through the wrongful exercise of power and the erroneous exercise of authority. The exercise of power, without the appropriate authority to do so, was to be regarded as a serious wrong to which the state courts might respond, while the wrongful exercise of power within the range of authority granted was to be addressed within its respective branch. Stone, like Pearson in North Carolina, held Congress accountable for its legislation, and he stated that if "the commandant of conscripts, or the secretary of war, in violation of the plain rules of law, cancelled the substitution…on evidence furnished by ex parte affidavits, or refused to require notice of the time and place of taking the testimony, or did not afford to Mr. Dudley an opportunity to cross-examine the witnesses against him" then such actions should be considered as "an erroneous exercise of rightful authority—not usurpation." This delegation might also include the ability to entertain appeals and render final decisions. The delegation here had done just that: "The redress, if there be any, must be invoked from the authorities of that government which created the offer, and clothed him with his functions and his motion was rightfully denied."[591]

The longstanding feud between the North Carolina court and the War Department again flared up with the court's decision in *In Re Huie*.[592] Huie was a 29 year old overseer of more than 20 slaves on his family's plantation, which he shared with his aged mother and 19-year-old sister. The two women were the only white persons on the plantation. On October 11, 1862, Huie reported to the camp of instruction, but was

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[590] 21 How. 506 (1858) [16 L.Ed. 169].

[591] 38 Ala. 458, 470-471.

[592] *In re Huie*, 60 N.C. 92 (1863).

sick and after it was determined that he had bronchitis, he was ruled unfit for field service and returned home. He was later arrested at home as a recusant conscript under the theory that his reporting at the camp of instruction on October 11, 1862 had worked as a constructive enrollment and hew ceased to be considered as an overseer on that day. Here, the North Carolina court, with Pearson writing for the court, gladly took up the issue of whether the War Department could exercise jurisdiction over Huie by applying a construction of the conscription and exemption acts. Pearson refused any such understanding as a violation of the separation of powers doctrine, holding that "The construction of the conscription and exemption act, like other acts of Congress, so far as they concern the rights of a citizen, as distinguished from military regulations and rules which the Secretary of War is authorized to prescribe…is [a] matter for the courts, and any construction put on the acts by the officers of the executive department, as to who is liable as a conscript or who is entitled to exemption, is subject to the decision of the judiciary. This principle of constitutional law is so clear that I suppose it will be conceded by every one."[593] Pearson rejected usurpation of a judicial role by the Secretary of War, stating "whether a man is entitled to exemption or not depends on the construction of the act, which it is the privilege of the courts to make" and he restricted the War Department to creating regulations only, explaining "the authority of the Secretary of War is simply to prescribe rules and make regulations in order to have the fact determined whether a man is or is not fit for military service in the field." The other role of creating legislation was the task "for which purpose *alone* the representatives of the people in Congress assembled, to whose wisdom is confided the trust of making laws, had declared it necessary to take

[593] *Ibid*., 93.

citizens from their homes against their consent." Pearson held the War Department bound to the statute and exempted Huie under the conclusion that "The act exempts all persons held to be unfit for 'military service in the field,' and clearly no rule prescribed by the Secretary of War could defeat this express provision."[594]

In *In Re Bryan*,[595] the North Carolina court took up the issue of usurpation of the legislative powers and the court had to consider the propriety of granting of Bryan's application for the writ and whether any judicial branch—state or Confederate—could usurp the legislative function by ignoring the legislation suspending the writ that had been promulgated by the Confederate Congress for the good of the nation. Bryan's attorneys argued that congressional suspension of the writ did not apply to state courts and state tribunals to which Mr. Strong, the Confederate District Attorney pointed to the power given to Congress to suspend the writ of habeas corpus under Article I, section 9, clause 3[596] and asked the court "Now, if the courts of the States can issue writs of habeas corpus, in all cases where parties are detained under Confederate authority, and if Congress cannot suspend those writs, is not the right of Congress, which is recognised [sic] in the above clause of the constitution, nullified? Why suspend the privilege of the writ as exercised through a Confederate Judge, when, in the very same case, it may be exercised through all State Judges, which, in this State, number eleven?"[597]

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[594] *Ibid*., 94.

[595] *In Re Bryan* (60 N.C. 1 (1863).

[596] Article 1, section 9, clause 3, of the Confederate Constitution declared "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."

[597] 60 N.C. 1, 21-22.

Pearson also referred to a series of applications for writs submitted to him during the spring of 1863 in which he said he applied the necessary regulations of the War Department, as required under the Exemption Act, and had rejected several applications for exemptions "on the ground of being 'unfit for military service in the field by reason of bodily incapacity,' because by the proper construction of the exemption act, only those persons are exempted, who shall be held 'unfit for military service in the field, by reason of bodily incapacity under rules to be prescribed by the Secretary of War.'" Pearson refused to intervene in the matter because the War Department regulations required "that the party should be examined by a surgeon, or board of surgeons appointed for that purpose, and the certificate of the surgeon or board of surgeons, was the only evidence of bodily incapacity that could be acted on as evidence of the fact." Pearson refused their claims, concluding that "the parties were not unlawfully restrained of their liberty, but were lawfully in custody of the officer of the Confederate States, under the authority of the acts of Congress, according to their proper construction."[598]

Similarly, in Virginia, in the case of *Mann v. Parke*,[599] the state supreme court took up the issue of whether the secondary legislative delegation to the War Department

[598] *Ibid*., 42. Associate Justice Battle concurred in Pearson's decision (on its merits) that Bryan should be discharged since those individuals conscripted under the April 16, 1862 act and discharged for providing a substitute could not be liable under the provisions of the September conscription act. However, he also raised the important question about congressional power to remedy such a discrepancy. It was perhaps this question, addressing the intent and purpose of the amendatory act of September, 1862, which helped to erode the acceptance by brother justices of Pearson's strict, positivistic interpretation of the conscription acts. Hamilton, "The North Carolina Courts and the Confederacy," 374-75.

[599] *Mann v. Parke* 16 Va. (Gratt.) 443 (1864).

included its ability to render final decisions upon appeal. In *Mann*, the Virginia court further clarified the application of this principle, explaining the circumstances under which a claimant could raise a claim in the courts and when he was supposed to do so before officials from the War Department.[600] Mann had joined a volunteer company in April of 1862 and was mustered into military service. One month later, Mann hired a substitute, who at that time was forty years old and not subject to conscription, and four months later returned to his regular trade as a millwright. Later that year, when his substitute became liable to military service, Mann attempted to secure a statutory exemption since millers and millwrights working at their vocations were exempted under the same statute. The issuebefore the court was whether Mann could be exempted from military service on the basis of a statutory exemption as a miller after having become a miller subsequent to his having enlisted in a company of volunteers and hiring a substitute, who then himself became liable to military conscription?[601]

Associate Justice Moncure held that the writ of habeas corpus could not be issued to a claimant seeking an exemption under the Exemption Act or due to substitution, "until he has failed to obtain the relief to which he is entitled by pursuing the regulations on the subject prescribed by act of Congress or the War department."[602] Moncure distinguished between those who were within the ages of the conscription legislation (ages 18 to 45) and therefore were compelled to seek relief through a Confederate authority, versus those who were not within this age group and could,

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[600] *Ibid.*, 452-453.

[601] *Ibid.*, 449.

[602] *Ibid.*, 452-453

therefore, seek discharge and release from a circuit court or a circuit court judge sitting in vacation.[603] The court held that an individual whose age placed them within the age group of the statute was required to seek remedies before the military; only after a reasonable time could the complainant raise a claim of unlawful detention and seek a writ of habeas corpus.[604] Alternatively, an individual whose age was over 45 and clearly not contemplated within the conscription statute, was not obligated to seek a remedy before military authorities, but could petition for a writ of habeas corpus before a court of the Confederate States, a circuit court judge or a judge in vacation, and after proving his case, could be discharged from duty.[605]

By February of 1864 the Confederate Congress enacted new conscription legislation that expanded the age range of men now liable to military service and restricted the statutory exemptions over previous legislation and this in response to the demands and needs of the nation.[606] Yet, even despite a worsening military situation,

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[603] *Ibid*. In *Smith v. Cloud* and *Stillwell v. Cloud*, an unreported decision, the court decided that a man older than 45 at the time of the amended statute who was conscripted into service, was not bound to seek discharge and release from Confederate authorities but could go to state authorities, specifically the state courts to seek a writ of habeas corpus.

[604] 16 Va. 443, 454.

[605] *Ibid*., 453. Moncure also raised a pleadings issue, stating that upon appeal, the party or parties for whom the regulations of the War Department had some impact were to include these regulations in their appeals as a matter of record; the objective here was to raise the awareness of controversies that could be resolved without litigation. 16 Va. 443, 455.

[606] On the new legislation, see *Official Records of the War of the Rebellion*, series IV, vol. III, 178; J.B. Jones, *A Rebel War Clerk's Diary at the Confederate States Capital***, (**Philadelphia, PA: Lippincott, 1866), 2:127-129, 138, 152; *Richmond Examiner*, February 20, 1864 (and contra in *Richmond Whig*, February 29, 1864); Albert Burton Moore, *Conscription and Conflict in the Confederacy* (New York, NY:

especially in northern Alabama, in *Ex Parte Mitchell*,[607] the Alabama supreme court continued its commitment to render decisions in accord with the legislative intent of Congress. Even though the court affirmed the delegable secondary legislative function that had been assigned to the War Department by the February 17, 1864 legislation, it resisted permitting a broad exercise of executive powers because of the expressed military need addressed by Congress and it preserved the separation of powers doctrine as a substantive constitutional doctrine.[608] In the case, Mitchell applied for an exemption from service as an agriculturalist and submitted a bond. His application and bond were both approved by the country enrolling officer on May 20, 1864 and subsequently approved by the district enrolling officer. However, the state commandant sent the application and bond back to the district enrolling officer for revisions on July 20, 1864 with the instruction that the bond had to be made in accordance with the circulars issued by the commandant on June 20 and July 8, 1864. On appeal, the court

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The MacMillan Company, 1924), 311. See opinions of generals in the field in *Official Records of the War of the Rebellion*, series II, vol. XXXII, Pt. II, 511, series II, vol. XXXIII, 1087; Jones, *A Rebel War Clerk's Diary*, Vol. 2, 126; *Savannah Republican*, February 1, 1864; *Richmond Examiner*, January 12, 1864; *Jacksonville Republican*, January 23, 1864.

[607] 39 Ala. 442 (1864).

[608] The act (entitled "An Act supplemental to an act entitled 'An act to organize forces to serve during the war'") provided that "That nothing...shall be construed to discharge from military service persons over the age of forty-five or under eighteen years, who are now in the Army of the Confederate States." Charles W. Ramsdell, ed., *Laws and Joint Resolutions of the Last Session of the Confederate Congress (November 7, 1864-March 18, 1865), Together With the Secret Acts of Previous Congresses* (Durham, NC: Duke University Press, 1941), 171; *Official Records of the War of the Rebellion*, Vol. IV, Part III, 488. While the act retained those already conscripted who were eighteen to forty-five years of age, it also expanded the class of conscripts to those ages seventeen to fifty years of age. The new class of conscripts were to be formed into reserve units for the defense of their respective states and for detail duty. Moore, *Conscription and Conflict in the Confederacy*, 308.

took up the issue of whether all the requirements had been met under the Conscription Act of February 17, 1864 and so provided Mitchell with immunity from service in the Confederate Army.[609]

Walker determined that there were the three specific conditions provided for in the February 17th Act for individuals claiming exemption from service as an agriculturalist and concluded that Mitchell did not comply with the regulations provided by the War Department for executing the bond, even though his sureties "were good and sufficient."[610] Since Mitchell did not complete the requisite tasks to exempt him from Confederate service, he was "prima facie" an enrolled conscript in the service of the Confederate States" and therefore "The onus was upon the State to show his exemption from that service. This the State has failed to do, as far as we can discover from the record."[611] In addition to the emphasis on preserving liberty by maintaining a rigid separation of branches and their respective powers and functions, the state supreme courts were also obliged to rule in furtherance of the other constitutional goal for which the separation of powers doctrine had been created, that of establishing and maintaining effective national government, particularly during wartime.

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[609] *Ibid*., 445. The three statutory requirements were "15 able-bodied hands must have been on plantation; There was no white male on plantation liable to military service; Person claiming exemption was, on January 1, 1864 wither owner, manager, or overseer on plantation."

[610] *Ibid*., 445-446. Walker focused on the provisions that spelled out the bond requirements, that the form and security of the bond had to comply with the requirements set forth by the Secretary of War, that the bond had to comply with the condition of the bond, as set forth in the statute, and that the bond also had to require the further taking obligation in reference to the sale of surplus grain and other marketable provisions.

[611] Ibid., 449.

Effective and Energetic Government

One of the chief questions raised by the separation of powers doctrine was how to best preserve individual liberty while also creating and maintaining effective and energetic government. In a nation with identifiable goals and purposes, "the exercise of governmental power, which is essential to the realization of the values of…societies" should be accompanied by the control of governmental power "in order that it should not itself be destructive of the values it was intended to promote."[612] In the Confederate Constitution the system of checks and balances upon government branches was provided for very specifically yet government efficacy and efficiency were also major goals and the separation of powers doctrine was never intended to interfere with or restrict the achievement of these goals.

The separation of powers in Confederate constitutionalism, with its emphasis upon efficiency, a strong executive, and cooperation appeared to be more of a parliamentary form than in the U.S. Constitution. This was an interesting innovation that actually provided for the inclusion rather than separation of the Executive in congressional affairs. The framers had included in the Constitution a provision allowing cabinet members to sit in Congress and debate on issues relevant to their portfolios.[613] This "non-separation of branches" was implemented to promote greater efficiency, cooperation, and "the smooth

[612] Vile, *Constitutionalism and the Separation of Powers*, 2.

[613] Confederate Constitution, Article I, section 6 provided that "Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department."

operation of the system."[614] As Associate Justice Jenkins of the Georgia Supreme Court made clear in *James L. Mims and James D. Burdett v. John K. Wimberly*, the separation of powers was a foundational idea in the Confederate government and the government was not a mixed constitutional system in the British model.[615] Jenkins refuted any analogy to the British system of government (mixed government) or the power of Parliament to interpret statutes. Rather, the judiciary was to be the expositor of constitutional principles; Jenkins stated that "There must be power lodged somewhere to assert lack of authority in the former [Congress], and to enforce restraints upon the latter [state legislatures], and of this power…the judiciary is the depository."[616]

When the first conscription act was passed by the Confederate Congress on April 16, 1862,[617] its preamble referred to the necessity of instituting conscription, stated that the legislation was passed "in view of the exigencies of the country, and the absolute necessity of keeping in the service our gallant army, and of placing in the field a large additional force to meet the advancing columns of the enemy now invading our

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[614] Alexander Stephens to Linton Stephens, February 17 and March 10, 1861, in the Alexander Stephens Papers, op cit. Nieman, "Republicanism, The Confederate Constitution, and the American Constitutional Tradition," 214-215.

[615] 33 Ga. 587 (1863).

[616] *Ibid*., 594. Alexander Stephens referred to this development as more honest and straightforward for the public benefit since "'Our heads of department can speak for themselves and the administration…without resorting to the indirect and highly objectionable medium of a newspaper…It is to be greatly hoped that under our system we shall never have what is known as a Government organ.'" *Milledgeville Southern Federal Union*, April 2, 1861, op cit. *Ibid*., 215.

[617] Chapter XXXI, section 1 in *Public Laws of the Confederate States*, 1 Cong., 1 Sess., 1862 (Richmond: R.M. Smith, 1862).

soil...."[618] The act gave the president the authority to call into the service of the Confederate States for three years all resident white males between the ages of eighteen and thirty-five years at the time the call was made, except for those legally exempted under section 9 of the act. The April act also extended for an additional three years the service of those already serving in Confederate military forces.[619]

In the hands of the state supreme court justices, the vigorous preservation of the separation of powers worked to promote government efficiency by preserving Congressional War Powers and its ability to create a national army. In *Burroughs v. Peyton*,[620] the Virginia court was compelled to consider the extent of national government war powers and the ability of the national government to extend its reach to individual citizens within each state. Here the court looked to the national goals and purposes for which the Confederacy had been created and the intent within the Confederate Constitution. The Virginia high court refused to hold that the exercise of executive war powers specifically entrusted to the president constituted usurpation since his responsibilities included safeguarding the nation from harm or destruction. Here, Virginia's high court, looking to national purposes, held that "no government can have the right to endanger the life of the nation it represents, by contracting that it will not exercise the powers confided to it."[621] Associate Justice Robertson, writing for the court, held that while the conscription acts "delegated no authority to the President to

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[618] *Ibid*.

[619] Mitchell, *Legal Aspects of Conscription and Exemption*, 11.

[620] *Burroughs v. Peyton* 16 Va. (Gratt.) 470 (1864).

[621] 16 Va. 470, 489.

raise an army," the Congress had authorized the President "to call out and place in the field the army raised under and by the laws…as commander in chief, he should be invested with such discretion."[622]

By the fall of 1862 there was tremendous public interest in the passage and implementation of amendatory conscription legislation. As September ended, no new conscription legislation had been passed and the Confederate Congress increasingly was severely criticized for its inaction on behalf of the people. In Richmond, an editor declared that "it is the imperative duty of Congress to act without delay upon the various measures before it for the public defence [sic]...We had hoped that not a week would have be permitted to pass without the extension of the Conscription law…If this were the great age of miracles, the value of a jawbone might be as great as it was in Samson's time."[623] The paper went on to state that "while everybody outside is painfully anxious for the safety of the country and the cause, they seem to be intent on nothing but securing their own popularity at home...Our armies want recruits...They

[622] *Ibid*., 485. In July, the Wilmington *Journal* declared that more Confederate troops must be recruited if the southern cause was to succeed: "The thinned ranks of our gallant regiments must be recruited...The invaded must have them to defend the country against the worst horrors of ruin and subjugation." It went on to add that "cheerful compliance with the Conscription law and a full and complete enforcement of its provisions becomes a necessity of our *national* existence....[emphasis added]." Wilmington *Journal*, July 18, 1862; W. Buck Yearns and John G. Barrett, *North Carolina Civil War Documentary* (Chapel Hill, NC: University of North Carolina Press, 1980), 133-34.

[623] "Congress," Richmond *Daily Dispatch*, September 23, 1862. The Raleigh *North Carolina Whig* contended that the enlistments into Union armies at this time were primarily Irish and Italian immigrants, "the scum of all the earth." Raleigh *North Carolina Whig*, May 27, 1862.

must be recruited."[624] The newspaper warned that "upon the heads of those to whom a confiding people have entrusted the destinies of their country will rest the responsibility of any disaster that may ensue." The newspaper also spoke of the number of civilians who were "so disgusted with the course of Congress upon the Conscription law that they begin to lose faith in the usefulness of representative bodies"[625]

While there was some initial concern over whether the conscription legislation would threaten liberties in the South, but there seemed to be some willingness to surrender some liberty for the sake of maintaining a military capability necessary to meet the needs of modern war. The Salisbury *Carolina Watchman* reported that it feared that the Confederate Constitution had, "by the conscription, been set aside or over-ridden on the *plea of a war necessity*." But, the newspaper did not indicate that North Carolinians reacted negatively or protested the measure. Rather, "the people seemed disposed to yield this *inch*--they will do it because they believe in the *necessity*."[626]

In *Jeffers v. Fair*,[627] the Georgia Supreme Court addressed the degree to which congressional war powers included the power to conscript or whether this was an unconstitutional extension of its powers. Associate Justice Jenkins wrote that the court was "impressed with the importance of the question, and the responsibility involved in

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[624] "Congress and the Army," Richmond *Daily Dispatch*, September 24, 1862.

[625] "Congress and the Conscription Law," Richmond *Daily Dispatch*, September 26, 1862.

[626] Salisbury *Carolina Watchman*, April 28, 1862.

[627] 33 Ga. 347 (1862).

its decision, and have not failed to give it careful and anxious consideration."[628] Jenkins took up the claim that the power provided to the Congress under Article I, Section 8 was vague but stated that the Article I grant, "The *Congress shall have power to raise armies, etc*." [italics in original] was very clear and that "*language* [italics in original] could not express a broader, more general grant of a specific power. We look in vain for the limitation to voluntary enlistment as a means. Is there any difference between a grant of *"power to raise armies?"* We think not." Here, the court held that the grant of power was fully within the legislative powers and functions and expressed "a grant of *power*--of power commensurate with the object" to legislate on behalf of the nation. Because the purposes to be fulfilled were national in scope, the grant also gave the Congress "power over the populations of the several States, entering into and becoming component parts of the Confederate States of America."[629] Jenkins held that "States adopted, *quoad* these powers, the same Constitution. Our conclusion is, that the power of raising armies by compulsory enrollment, was necessary to the attainment of the end, that it was seen by them to be so; that they intended by the terms used to grant it, and consequently that it is no violation of the spirit of the Constitution."[630]

The Georgia court here was prioritizing constitutional powers, balancing several competing interests and duties, and demonstrating the flexibility of the separation of powers doctrine. Here, Congress would not only receive the grant of power provided for under Article I, but there were national interests and purposes, such

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[628] *Ibid*., 348.

[629] 33 Ga. 347, 351.

[630] *Ibid*., 364.

as preserving the nation, that could shape that specific grant. Jenkins conceded that the war powers "claimed by the Congress, and conceded by this Court, 'is incompatible with original unabridged State sovereignty, is a self-evident truth, for it is a very high political power.'"[631] However, to ignore the national interests would result in the loss of the nation and its failure to maintain a republican form of government, and "that act [would] violate the constitutional guaranty [sic]."[632]

In North Carolina, the supreme court's rigid enforcement of the statutory language, as per the constitutional responsibility of the judiciary, eventually began to result in more effective military operations as congressional legislation and War Department regulations became better drafted. Elias Ritter[633] was drafted by North Carolina on February 25, 1862, hired a substitute over 18 years of age, and received a discharge. While under the Conscription Act of April, 1862, he was not liable to conscription, he did become so after the passage of the next Conscription Act in September of 1862, and he was conscripted and held in the Raleigh camp of instruction. Upon review, the court addressed the exercise of a delegated legislative function and took up a detailed question of timing and intent, whether the War Department regulations of October 20, 1861, which allowed substitutes to be received after companies were formed and in service, applied to companies in the process of being formed or organized or

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[631] 33 Ga. 347, 364.

[632] *Ibid*., 368. Jenkins added, "Thus sustained by contemporary and subsequent expositions of the Constitution, we rest upon our conclusions undisturbed by any lingering doubt. And it is a high gratification, that in the crisis of our fate as a nation, when flagitious war is desolating our country, we are enabled, in perfect consistency with the obligations of official duty, to 'stay up the hands' of our Confederate authorities in the wise and timely exercise of a power expressly granted." *Ibid*., 371.

[633] *In Re Ritter*, 60 N.C. 34 (1863).

recruited. The court was trying to determine whether a person who had been drafted and put in a substitute who was accepted, would be held not liable to conscription under the act of September, 1862. The court looked to regulation #3 of the October 20, 1861 Regulations of the War Department which stated that when an NCO or soldier is entitled to discharge, by reason of a substitute, the captain of his company and the commander of his regiment or corps, shall give him a certificate to that effect, and the holder of the certificate is in no wise indebted to the Confederate States. Pearson, writing for the court, initially applied this regulation liberally in his analysis so as to include units in the process of being formed, adding that this was a legitimate reading of the regulation since in an unorganized unit, the administrative considerations of releasing the principal providing the substitute are much less and that by simply providing the able-bodied man as the substitute, the purpose of the War Department regulation is met.[634] Pearson, writing for the court, identified a substantial reason when such a liberal construction might not work—when too many might be exempted from service through substitution as to cause confusion and to disorganize the company. Here he distinguished the act of Ritter's company at the time his substitution was completed as a time when "the companies were in the act of being organized and no considerations of that nature were presented"[635]

Likewise, in *In Re Grantham*[636] and *In Re Dollahite,*[637] the court preserved the specific legislative function of Congress and its intent to exempt only those skilled workers

[634] 60 N.C. 34, 35.

[635] *Ibid*., 36

[636] 60 N.C. 32 (1863).

[637] 60 N.C. 33 (1863).

who could best contribute to the war effort. Barfield Grantham claimed exemption under the conscription act because he was a shoemaker during the fall and winter but farmed during the summer and spring. Although he claimed he made more shoes than previously, he did not make shoes as his exclusive means of income. Associate Justice Battle, writing for the court, took up the issue of whether the Conscription Act required that the trade upon which a statutory exemption was granted was supposed to be the regular occupation and employment of the claimant. Here, the legislation embodied the national goals and purposes of maintaining an effective military operation, including the production of war materials and supplies. The court preserved the public policy intent of the legislation and refused to allow any broad interpretation of the exemption provisions, holding that "the mechanic is excused...for the benefit of the public, whom, it is supposed, he can serve better by working at his trade than in any other way." Because Grantham did not prove he was regularly employed as a shoemaker, his application for discharge was rejected.[638]

Moore W. Dollahite sought exemption as a teacher under the October 11, 1862 Exemption Act, filed his affidavit, and was referred to the Bureau of Conscription in Richmond, where his petition was rejected.[639] Here the court again applied the statute strictly, preserving the legislative function of Congress and its intent from the legislation that the exemptions had reference to the status of the claimant at the time of the passage of the Act. Here, the court stated the public policy concerns which had given rise to the act, that "the object of the law of 11 October, 1862, in defining certain classes to be exempt

[638] 60 N.C. 32.

[639] Exemption Act of October 11, 1862 was: all presidents and teachers of colleges, academies, schools, and theological seminaries who have been regularly engaged as such for two years previous to the passage of this act." 60 N.C. 33.

from the operation of the conscript acts, was not to attach privileges to those classes, but to abstain from breaking up the existing civil and industrial organizations of the country." Battle went on to cite directly from and concur with the decision of the Bureau of Conscription in Dollahite's case and remanded him back to the custody of the Confederate military.[640]

The state courts addressed the constitutionality of the conscription acts primarily as they related to the war powers granted to the central government in the Confederate Constitution.[641] In *Bridgman v. Mallett*,[642] Justice Battle wrote that "in the distribution of the powers of sovereignty it is conceded that the States have conferred upon the Confederate Government the war power" and that "the Constitution declares that Congress shall have power 'to make all laws which shall be necessary and proper' for carrying them into execution."[643]

Justice Battle, construing the Act of February 17, 1864 in *Wood v. Bradshaw*,[644] attempted to ascertain whether Congress could, under the Constitution, conscript a bonded exempt for non-military services. He stated that congressional war powers were

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[640] *Ibid.*

[641] The war powers granted to the Confederate government are contained in Article I, section 8, paragraphs 11-16 of the Permanent Confederate Constitution.

[642] 60 N.C. 321 (1864).

[643] *Ibid*., 324. The "necessary and proper" clause was contained in Article I, section 8, paragraph 18 of the Confederate Constitution.

[644] 60 N.C. 269 (1864). Thomas Wood was an owner and manager of more than 15 able-bodied slaves. He met the statutory qualifications of the Act of February 17, 1864. Wood had also applied for exemption as a farmer employing 10 field hands but his application had not been acted on by the War Department by November when he was ordered to enrollment camp.

"conferred in unlimited terms, except that no appropriation of money to that use shall be for a longer time than two years...The Supremacy of the war power of the Confederate over that of the State Government cannot be disputed."[645] Chief Justice Pearson, in a concurring opinion, stated that "in case of necessity, the power of the Confederate States is unlimited so far as the citizens are concerned. It is my duty to conform to that decision."[646] Pearson's concurring opinion affirmed a commitment to the separation of powers doctrine and discerning that the legislative powers Congress had been granted included those by which it could exercise *direct authority over individual citizens*. Pearson's interpretation of the scope of legislative powers under Article I not only maintained the separation between legislative and executive powers but facilitated the maintenance of government action during wartime.

When southern supreme court justices issued their decisions on the separation of powers doctrine, the pressures under which they rendered were substantial. Because the separation of powers proved to be a meaningful doctrine in Confederate constitutionalism and wartime jurisprudence, these separation of powers cases prove to be important in understanding Confederate political philosophy in a much larger context. While this doctrine could have been shaped by wartime necessity and provided the executive branch, specifically the War Department, with expansive powers, perhaps sanctioned usurpation of the legislative and judicial powers and functions, in actuality, it was the decisions interpreting the Constitution's provisions and enunciating principles, separating powers,

[645] *Ibid*., 271.

[646] *Ibid*., 272.

and explaining boundaries that shaped the Confederate separation of powers.[647] M.J.C. Vile argued that "the doctrine of the separation of powers has, in modern times, been the most significant, both intellectually and in terms of its influence upon institutional structures. It stands alongside the other great pillar of Western political thought—the concept of representative government—as the major support for systems of government which are labelled [sic] 'constitutional,'"[648] The states courts' enunciation of the separation of powers doctrine preserved Congress' legislative powers and functions, even during wartime, maintaining representative government. The preservation by these state supreme court justices of an important normative feature of the Confederate constitutional order is significant for the doctrine prescribes "certain governmental arrangements which should be created or perpetuated in order to achieve certain desirable ends."[649]

The separation of powers was a means to facilitate a more national "ends," that is, national purposes and goals identified in the Confederate Constitution. In order to "secure the blessings of liberty" to the people of the Confederacy and their progeny, the state supreme courts of Virginia, North Carolina, Alabama, Georgia, and Texas ensured

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[647] The opposite has been argued by several historians: see Amlund, *Federalism in the Southern Confederacy* on how wartime exigency displaced Confederate constitutional principles, especially federalism; Bensel, *Yankee Leviathan* on how military mobilization and the centralizing tendencies of modern war and a modern administrative state precluded Confederate constitutional principles; and Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*, who has argued that Confederate constitutionalism was "a myth."

[648] Vile, *Constitutionalism and the Separation of Powers*, 2.

[649] Gwyn, W.B., *The Meaning of the Separation of Powers: An Analysis of the Doctrine From its Origin to the Adoption of the United States Constitution* (New Orleans, LA: Tulane University, 1965), 5.

that political liberty would be preserved by vigorously enforcing the separation of powers doctrine as a bar against usurpation of governmental powers. M.J.C. Vile, in his reading of Montesquieu, stated that to guard against the abuse of power, the people must establish government so that power is opposed by power.[650] This requires the establishment of three strong branches of government and a fidelity to the principle of keeping these branches separate and strong. Montesquieu's ideas and the preservation of political liberty were achieved admirably in a nation that existed only as a nation at war, amidst tremendous pressures to compromise constitutional principles for military exigency.

Yet there were other purposes and goals declared in the Confederate Constitution with respect to the safety and well-being of the people and the nation. The general government was charged in the Confederate Preamble with the duty "to form a permanent federal government" as well as to "insure domestic tranquility," the Confederate Congress had been vested with war powers under Article I, Section 8, clauses 11 through 16, and, under Article II, Section 2, the President was to assume the duties of commander-in-chief of the military. Yet, the doctrine was applied in a flexible manner in order to fulfill national goals for effective and energetic government. The state supreme courts restricted usurpation but their enunciation of the doctrine of the separation of powers was not so rigid as to prevent the kind of flexibility that would allow for more effective and energetic national government to address military operations, conscription, and exemption. The Executive branch maintained its role in regulating, but only when it had been delegated secondary legislative functions by the Congress, preserving separation and political liberty even while allowing for maintenance of purposeful government.

[650] Vile, *Constitutionalism and the Separation of Powers*, 407.

Preserving the separation of powers doctrine in the Confederacy was not an easy task nor the most expedient for justices tied to local politics and interests. However, their fidelity to the principles of the Confederate Constitution and to national goals and purposes underscores their fidelity to the principles of the Confederate political community. Vile wrote that one measure of a "'constitutional regime'" or a "constitutional State" is that "there must be a set of rules which effectively restrains the exercise of governmental power."[651] The state supreme court justices restrained the national government under the separation of powers doctrine, but not to restrict or weaken national government or serve the philosophy of states' rights. Rather, their task seems to have been to assist with the realization of national purposes and goals shared by other citizens of the Confederate nation.

[651] *Ibid*., 8.

Conclusion

"the most trustworthy and authoritative exposition"

Attempting to understand the constitutional order of the Confederacy begins with the study of the Confederate Constitution and its interpretation at the hands of the state supreme courts. Jabez Lamar Monroe Curry, a member of the Confederate Constitutional Convention, said of the Confederate Constitution, "as the instrument of government, [it] is the most certain and decisive expression of the views and principles of those who formed it, and is entitled to credence and acceptance as the most trustworthy and authoritative exposition of the principles and purposes of those who established the Confederate Government."[652] The Permanent Confederate Constitution is an interesting historical artifact, a "significant" document which can "offer insight into the critical events of 1861-1865" and which could be considered as a "milestone in the constitutional development of the United States."[653] But, it was more than that.

When southerners left the Union in 1860-1861, they did so with a specific constitutional agenda and they followed in the American tradition by which a constitution is "a single document that established or reorganized a government, prescribing its structure and endowing it with power, while at the same time restricting that power in the interest of personal liberty."[654] That Permanent Constitution of the Confederate States of America articulated national governmental forms, national goals, and national purposes.

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[652] Curry, *The Southern States of the American Union Considered in their Relations to the Constitution of the United States*, 91.

[653] Lee, The Confederate Constitutions, 150.

[654] Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 1.

But these concepts had to be explained and their principles carefully enunciated. The resulting interpretation of the Confederate Constitution by the southern state supreme courts becomes important to understanding the nature of Confederate constitutionalism and the larger *national goals and purposes* it was intended to serve. This authoritative document received its most extensive explication by state supreme courts that had to overcome several significant challenges and look beyond their local jurisdictions and the many political influences in order to articulate truly *national* concepts. This required state supreme court justices to think much more in terms of the principles that shaped the creation of the Confederacy and of the Constitution as a document of national origination.

The act of national origination in the Confederate Constitution reveals the importance of constitutions and the concept of the nation-state to southerners of that time who saw in it the opportunity to create and structure their society. Fehrenbacher argued that "there is ample evidence that constitutionalism remained a vital force throughout the short life of the Confederacy…it also gave expression to a basic cultural outlook that significantly influenced southern judgment and southern behavior." The predominance of states' rights and localistic politics in 1860-1861 made a distinctly nationally-oriented constitutional order essential for the Confederate nation. "A constitutional system, if working properly, is conducive to orderliness and stability in human affairs. At the same time, it lays salutary restraint upon the will of the majority and "the slaveholding South, a minority section much in need of social stability, was distinctively and emphatically constitutional-minded."[655] Constitutions are also essential to understanding the ideas, vision, and goals of a political community; while constitutions may be "descriptive" and

[655] *Ibid*., 80.

provide for specific "arrangements of the parts and mechanisms of government," on a more substantial level, they become "an important measure of the purposes for which the government was created." In this sense, they are "normative" and they prescribe particular courses of action, "to guide and control political and governmental action—to state what ought to be rather than what is."[656]

In interpreting and applying constitutional provisions to the cases contesting wartime measures, state supreme courts assumed a significant responsibility for sustaining and preserving the normative constitutional principles of the Confederate nation, explaining constitutional forms and functions as well as critical ideas. Fehrenbacher argued that Confederate convention delegates and founders completed two tasks simultaneously: "The innovations in the Confederate Constitution therefore reflect not only the principles of republicanism but the aspirations of nationhood." Fehrenbacher went on to add that these reform efforts "nourish the old republican ideals of civic virtue and chaste government, while discouraging the excesses of partisanship and patronage."[657]

In the process of enunciating and implementing constitutional principles during war, the justices enunciated *national* purposes and the vitality of a distinctly national political community, signifying a momentous break with the states' rights philosophy of the South's past. According to the state supreme courts, the constitutional order in the Confederacy was configured to facilitate the *national* welfare of a Confederate people, not just citizens of individual states, by creating and maintaining *limited* but *effective*

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[656] Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. 1, xix, xx.

[657] See Fehrenbacher, *Constitutions and Constitutionalism in the Slave-Holding South*, 66.

national government. State supreme courts, despite their status as state institutions, articulated a shared collective identification with and commitment to the national "imagined political community" of the Confederacy, explaining that under the Confederate Constitution there was a duty by the courts not only to protect the interests of individual citizens,[658] but also to assert the duties owed by individual Confederate citizens to their national political community and the national government representing these citizens.[659]

State supreme courts, in their judicial review, accomplished three important and related tasks: articulating the Confederacy's national purposes, principles, and constitutional framework established by the national political community; protecting national government authority and powers from usurpation due to states' rights, and preserving the separation of governmental branches and not allowing the blurring of these boundaries because of wartime needs. Especially important for the courts was their interest in preserving the judiciary's role as principal expositor of constitutional law (and thereby their responsibility for judicial review) from influence or usurpation by the executive or legislative branches of the Confederate or state governments.

In accomplishing these tasks, however, they had to overcome several political and jurisprudential challenges. Defining the Confederate constitutional order required that state supreme court justices resist the influence of localistic politics and focus on the text and the spirit of the Confederate Constitution. Constitutional enunciation in the

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[658] See *Ex Parte Turman*, 26 Tex. 708 (1863).

[659] See In *Ex Parte Mayer*, 27 Tex. 715 (1864); *Thomas Barber v. William A. Irwin; E. T. Jones v. Nathaniel F. Mercer; E. T. Jones v. Issac B. Brinson; Issac Dennis, et al. V. Willis B. Scott; E. T. Jones v. William Warren*, 34 Ga. 27 (1864).

Confederacy was made difficult by the war and national circumstances that made support critical for a national government busy with mobilization and the business of a war for existence. Wartime necessity could configure decision-making so that grants of governmental power would be interpreted broadly and expansively, giving the national government sweeping powers over individuals and material. Constitutional boundaries to conscription, exemption, and impressments could have been removed easily under the theory that war for national existence required that limitations and restrictions be removed; desperation could demand the dismantling of Confederate constitutionalism. If the enunciation of constitutional principles was to be purposeful for the Confederacy, the states had to render their decisions with some consistency across jurisdictions. This would require justices to break out of provincial or parochial perspectives and to think in terms of the national goals and purposes for which the Confederate constitutional order had been created. Southern supreme court justices would have to think about the impact of their decisions upon the people of t other states across the Confederacy and the development they would contribute to the constitutional doctrines of the nation. That these *state* jurists were capable of thinking in *national* terms when enunciating provisions and principles highlights their dedication to preserving the normative principles of the Confederate nation.

In the clash between state and national governments, particularly over the constitutionality of the conscription statutes, the state courts played a crucial role as the enunciators of the fundamental law of the Confederate nation and could even facilitate political cooperation on constitutional matters. In October of 1862, when Georgia Governor Joseph E. Brown refused to enforce the Confederate Conscription Act passed

just six months previously, he claimed that the act "utterly destroys all State military organizations, and encroaches upon the reserved rights of the State, but strikes down her sovereignty at a single blow."[660] Brown would not allow Confederate enrollment officers to complete their jobs until after the Georgia General Assembly could meet the following month to determine the constitutionality of the act and the propriety of Georgia's participation in it. President Jefferson Davis, exercising patience and tact, informed Governor Brown that "nothing could be more unfortunate...than any conflict between the authorities of that State [Georgia] and the Confederate Government on this question."

Davis stated that it was to the Supreme Court of Georgia that he looked for a definitive decision on the constitutionality of the act and the resolution of the confrontation, "having full confidence on the constitutionality of the law, I rely on the decision of the supreme court of Georgia to remove the difficulties that at present embarrass the action of the State authorities."[661] Shortly thereafter, during its November 1862 term, the Georgia court, analyzing the language and intent of Article I, Sections 8, 12, 15, and 18 of the Confederate Constitution, held that the acts were constitutional under the war powers afforded the national government. The court held that the Confederate Constitution was fundamental law to be upheld for the good of the nation, and that the specific grants of power in the Constitution, especially the Necessary and Proper clause, were vital, purposeful, and consistent with the constitutive principles of the new nation.[662] This was significant for it underscored the respect (and patience of the

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[660] *Official Records of the War of the Rebellion*, series IV, volume II, 130-131.

[661] *Ibid*., 141.

[662] *Asa O. Jeffers v. Fair*, 32 Ga. 347, 348-366 (1862)

Confederate officials) for process and principle as well as the high regard for the courts and the judicial function.

For the state supreme court justices, constitutional enunciation would be difficult also because of the importance of states' rights as a political theory that had supported secession and disunion as a means of ultimate protest and resistance against the expanding reach and power of the national government. Yet, while the Confederate constitutional order was based upon constitutionalism, that is, limited government, this limited government was never intended to be powerless or weakened to the point that it was incapable of fulfilling the constitutional responsibilities and duties for which it had been formed. Consequently, justices were quick to dismiss the importance of states' rights as a constitutive principle.

Preserving limited government would also be difficult during the war when wartime needs created pressures and tensions that militated towards providing the national government with broad, expansive powers for the purposes of prosecuting modern war effectively. However, the state supreme court justices made very clear that wartime exigencies were insufficient to overcome constitutional principles. With conscription, the states were bypassed so that the national government could operate directly upon the individual citizen, de-emphasizing the importance of the state as the intermediary between national government and the individual. The supremacy of the national government was a constitutional priority, based upon the needs and goals of the national population and the national government's specific charge to provide for the protection and well-being of the national citizenry.

Conscription raised significant challenges for the justices since the experience of national conscription was new and involved articulating national priorities and goals against those of the states and individual citizens. While litigants used the writ of habeas corpus to get their cases before the state supreme courts, the justices refused to allow individual rights to eliminate or mitigate the responsibilities and duties of the national government to protecting the nation or of the individual citizen of the Confederacy to fulfill their responsibilities to the nation. Moreover, the state courts upheld procedural rules regarding the writ, remanded back to lower courts or Confederate custody a significant number of appellants whose interest was really avoiding military service, and sought to preserve the substantive integrity of the writ practice.

The Confederate Constitution was more than a conservative reform document. It also contained innovative forms designed by the Confederate framers to correct what they considered as longstanding defects in the American constitutional order. Their efforts produced a document that emphasized efficacious national government, a stronger executive branch, and greater coordination between the President and the Congress. These innovations were specifically designed to serve the national interests and make national government more effective, limited by specific provisions to enumerated powers but within its sphere and in order to perform the duties and responsibilities it had been authorized to perform, the national government was provided with sufficient powers under the Necessary and Proper clause and assured of minimal interference by the state governments through the vigorous assertion of the Supremacy clause.

One of the most significant challenges that the justices encountered was defining the nature of the federal relationship between the state and national governments and “the

most significant constitutional expression or definition of the South's answer to the enigmatic question on the nature of the Union is embodied in the Confederate Constitutions."[663] As enunciated by the state supreme courts, the Constitution provided for a truly *federal* union in which both national and state governments were charged with specific responsibilities within their respective spheres. Each had to operate and be fully effective within its sphere and, within its respective sphere, it possessed complete authority. The courts were consistent in rejecting states' rights as a configurative political philosophy in the Confederacy. While states possessed important roles and responsibilities, the national government was not made powerless or weakened for their benefit. The national government was never to be the agent of the states, though the state and national governments were to work collaboratively, each within its own sphere, for the improvement of Confederate society and the attainment of national goals and purposes.

Charles Lee argued that "the greatest constitutional question in the United States between 1787 and 1861 was: 'What was the nature of the Union under the Constitution?'" and in response to this, Lee also argued that "Basic to this question was the location of sovereignty in the Federal Union."[664] The state supreme courts denied that sovereignty emanated form the states; sovereignty emanated form the people and it was vested in the national government by the people for specific purposes provided for in the Confederate Constitution. This direct linkage between the people of the nation and the national government suggested a more nationalistic understanding of sovereignty.

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[663] Lee, *The Confederate Constitutions*, 145.

[664] *Ibid*., 141.

In their wartime decisions, state supreme court justices enunciated national constitutive principles and ideas with remarkable consistency, fashioning a vital and vibrant Supremacy Clause, and revealing a dedication to shared values and the assertion of a judicial nationalism that established the primacy of Confederate authority over that of the states. Their assertion of judicial nationalism preserved Confederate constitutional authority and supremacy from state attempts to deny it and the reduction of the Confederate nation into a confederation of states. In any conflict between Confederate law and state law, the Supremacy Clause established that Confederate law "shall be the supreme law of the land" and justices even referred to the opinions of John Marshall in support of this principle's opinions.[665]

In exercising the power of judicial review, the state high courts would adhere to the supremacy of the national government as a matter of constitutional orthodoxy, not expedient emergency government. As North Carolina's Chief Justice Pearson has stated in *In Re Bryan*, the supremacy of national law was foundational in the Confederacy and facilitated national purposes and goals by furthering "the purpose of forming a new and distinct government." The Confederate government was distinctive; Pearson observed that sovereignty was not vested solely with the state and that philosophical principles about federalism had been given specific form: "all these states were compelled to give up a portion of their former respective sovereignties, and to invest the newly created government with them."[666] This assertion of judicial

[665] Many of Marshall's opinions were cited, including his opinions in *McCulloch v. Maryland*, 4 Wheat 316 (1819), *Sturges v. Crowninshield*, 4 Wheat. 122 (1819), and *Osborne, et al. v. U.S. Bank* [sic], 9 Wheat. 738 (1824).

[666] See *In Re Bryan*, 60 N.C. 1, 7, 10 (1863).

nationalism by state supreme courts calls into question the ascendancy of states' rights as the dominant political ideology in the Confederacy. These state supreme court decisions contradict an understanding of the Confederacy as a loose confederation of states, each acting independently, because they articulated these principles as constitutional doctrines, which, presumably, could not have been easily disregarded after the war.

Not only did the state supreme courts draw upon the Supremacy Clause of the Confederate Constitution to preserve the national government's authority, but they also drew upon the common national purpose to create a nation and emphasized that states rights would interfere with rather than facilitate the common purposes of the national citizenry. In places like Georgia, justices pointed out the fallacy inherent in allowing the states to interfere with the exercise of national governmental authority, that such state action would interfere with "the unobstructed operation of the machinery of their common Government, established by [the] consent of all."[667] Confederate supremacy was affirmed, with justices concluding that any assertion that the states were supreme over the national government would be "'absolutely and totally contradictory and repugnant' to the provisions of the constitution referred to, and would render the war-powers granted in the constitution nugatory…[and] paralyze the war-power of the Confederate Government at the discretion of the States.[668]

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[667] In *Thomas W. Cobb v. William B. Stallings & B.A. Baldwin v. John West*, 34 Ga. 72, 76 (1864). Despite the desperate military situation in Georgia and the emergency Georgians faced along the Atlanta front, Associate Justice Jenkins refused to elevate state authority above that of the national government.

[668] *David Simmons v. J.H. Miller, Enrolling Officer*, 40 Miss. 19, 21, 26 (1864).

Orestes Brownson argued that the "mission" of the American republic was "not so much the realization of liberty as the realization of the true idea of the state, which secures at once the authority of the public and the freedom of the individual—the sovereignty of the people without social despotism, and individual freedom without anarchy."[669] Measured against Brownson's standard, Confederate constitutionalism may not be quite the myth for which Mark Neely argued. The Confederate Constitution was fashioned to create a government that would facilitate the "true ends of the Confederacy" but identifying those ends is difficult without some sense of the framers' purposes and goals.[670]

In the wartime decisions of the state supreme courts, the purposes of the Confederacy become much clearer. The constitutional purposes and goals of the Confederacy were national- rather than state-oriented and provided for limited but effective national government, a truly federal union in which states rights was rejected and the state and national governments were to both operate effectively and energetically, and within the national government, the powers of the national government were to be separated to promote efficiency and prevent usurpation.

As ironic as this development may be, the state supreme courts rendered judicial review of the Confederate Constitution and explained the Confederate "constitutional order" in a manner that underscores their adherence and devotion to enunciating provisions and principles accurately and honestly. When state supreme courts

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[669] Oreste Brownson, *The American Republic: Its Constitution, Tendencies, and Destiny*, new ed. (New York, NY: P. O'Shea, 1866), 5; op cit. *Rights and Duties*, xix.

[670] J.L.M. Curry, *Civil History of the Government of the Confederate States*, as cited in Amlund, *Federalism in the Southern Confederacy*, 17.

enunciated and implemented constitutional principles during war, the justices also enunciated *national* purposes and goals. The constitutional order in the Confederacy seems to have been configured to facilitate the *national* welfare of a Confederate people, not just citizens of individual states. The national government was vested with sovereignty to fulfill its responsibilities to the people of the nation, rather than to the states. State jurists understood the Confederate Constitution as something substantive. Operating as a *de facto* supreme court, they considered its text and principles seriously. They upheld the exercise of *constitutional* Confederate war powers, within a system of federalism, to facilitate distinctly national purposes. And, in their decisions on the meaning and significance of the Confederate Constitution, we may have, as Jefferson Davis had described, our light "to reveal its true meaning.

Appendix: Constitution of the Confederate States of America

March 11, 1861

Preamble

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity invoking the favor and guidance of Almighty God do ordain and establish this Constitution for the Confederate States of America.

Article I

Section I. 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.

Sec. 2. (I) The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature; but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal.

(2) No person shall be a Representative who shall not have attained the age of twenty-five years, and be a citizen of the Confederate States, and who shall not when elected, be an inhabitant of that State in which he shall be chosen.

(3) Representatives and direct taxes shall be apportioned among the several States, which may be included within this Confederacy, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all slaves. ,The actual enumeration shall be made within three years after the first meeting of the Congress of the Confederate States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every fifty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of South Carolina shall be entitled to choose six; the State of Georgia ten; the State of Alabama nine; the State of Florida two; the State of Mississippi seven; the State of Louisiana six; and the State of Texas six.

(4) When vacancies happen in the representation from any State the executive authority thereof shall issue writs of election to fill such vacancies.

(5) The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment; except that any judicial or other Federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the Legislature thereof.

Sec. 3. (I) The Senate of the Confederate States shall be composed of two Senators from each State, chosen for six years by the Legislature thereof, at the regular session next immediately preceding the commencement of the term of service; and each Senator shall have one vote.

(2) Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; and of the third class at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or other wise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

(3) No person shall be a Senator who shall not have attained the age of thirty years, and be a citizen of the Confederate States; and who shall not, then elected, be an inhabitant of the State for which he shall be chosen.

(4) The Vice President of the Confederate States shall be president of the Senate, but shall have no vote unless they be equally divided.

(5) The Senate shall choose their other officers; and also a president pro tempore in the absence of the Vice President, or when he shall exercise the office of President of the Confederate states.

(6) The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the Confederate States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

(7) Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit under the Confederate States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

Sec. 4. (I) The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, subject to the provisions of this Constitution; but the Congress may, at any time, by law, make or alter such regulations, except as to the times and places of choosing Senators.

(2) The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

Sec. 5. (I) Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

(2) Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds of the whole number, expel a member.

(3) Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

(4) Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Sec. 6. (I) The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the Confederate States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place. 'o Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the Confederate States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the Confederate States shall be a member of either House during his continuance in office. But Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department.

Sec. 7. (I) All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

(2) Every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the Confederate States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it

shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respective}y. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return; in which case it shall not be a law. 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; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.

(3) Every order, resolution, or vote, to which the concurrence of both Houses may be necessary (except on a question of adjournment) shall be presented to the President of the Confederate States; and before the same shall take effect, shall be approved by him; or, being disapproved by him, shall be repassed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill.

Sec. 8. The Congress shall have power-

(I) To 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; but no bounties shall be granted from the Treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises shall be uniform throughout the Confederate States.

(2) To borrow money on the credit of the Confederate States.

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but 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 improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors and the removing of obstructions in river navigation; in all which cases such duties shall be laid on the navigation facilitated thereby as may be necessary to pay the costs and expenses thereof.

(4) To establish uniform laws of naturalization, and uniform laws on the subject of bankruptcies, throughout the Confederate States; but no law of Congress shall discharge any debt contracted before the passage of the same.

(5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

(6) To provide for the punishment of counterfeiting the securities and current coin of the Confederate States.

(7) To establish post offices and post routes; but the expenses of the Post Office Department, after the 1st day of March in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues.

(8) To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

(9) To constitute tribunals inferior to the Supreme Court.

(10) To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

(11) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

(12) To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

(13) To provide and maintain a navy.

(14) To make rules for the government and regulation of the land and naval forces.

(15) To provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions.

(16) To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

(17) To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of one or more States and the acceptance of Congress, become the seat of the Government of the Confederate States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the . erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

(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 Confederate States, or in any department or officer thereof.

Sec. 9. (I) The importation of negroes of the African race from any foreign country other than the slaveholding States or Territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same.

(2) Congress shall also have power to prohibit the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy.

(3) 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.

(4) No bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed.

(5) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

(6) No tax or duty shall be laid on articles exported from any State, except by a vote of two-thirds of both Houses.

(7) No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

(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.

(9) Congress shall appropriate no money from the Treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments and submitted to Congress by the President; or 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 judicially declared by a tribunal for the investigation of claims against the Government, which it is hereby made the duty of Congress to establish.

(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.

(11) No title of nobility shall be granted by the Confederate States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

(12) Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances.

(13) A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

(14) No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

(15) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

(16) No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

(17) In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

(18) In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact so tried by a jury shall be otherwise reexamined in any court of the Confederacy, than according to the rules of common law.

(19) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(20) Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title.

Sec. 10. (I) No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; make anything but gold and silver coin a tender in

payment of debts; pass any bill of attainder, or ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

(2) No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports, or exports, shall be for the use of the Treasury of the Confederate States; and all such laws shall be subject to the revision and control of Congress.

(3) No State shall, without the consent of Congress, lay any duty on tonnage, except on seagoing vessels, for the improvement of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States with foreign nations; and any surplus revenue thus derived shall, after making such improvement, be paid into the common treasury. Nor shall any State keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. But when any river divides or flows through two or more States they may enter into compacts with each other to improve the navigation thereof.

ARTICLE II

Section I. (I) The executive power shall be vested in a President of the Confederate States of America. He and the Vice President shall hold their offices for the term of six years; but the President shall not be reeligible. The President and Vice President shall be elected as follows:

(2) Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative or person holding an office of trust or profit under the Confederate States shall be appointed an elector.

(3) The electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit, sealed, to the seat of the Government of. the Confederate States, directed to the President of the Senate; the President of the Senate shall,in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not

exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the 4th day of March next following, then the Vice President shall act as President, as in case of the death, or other constitutional disability of the President.

(4) The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

(5) But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the Confederate States.

(6) The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the Confederate States.

(7) No person except a natural-born citizen of the Confederate; States, or a citizen thereof at the time of the adoption of this Constitution, or a citizen thereof born in the United States prior to the 20th of December, 1860, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the limits of the Confederate States, as they may exist at the time of his election.

(8) In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice President; and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President; and such officer shall act accordingly until the disability be removed or a President shall be elected.

(9) The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the Confederate States, or any of them.

(10) Before he enters on the execution of his office he shall take the following oath or affirmation: “ I do solemnly swear (or affirm) that I will faithfully execute the office of

President of the Confederate States, and will, to the best of my ability, preserve, protect, and defend the Constitution thereof."

Sec. 2. (I) The President shall be Commander-in-Chief of the Army and Navy of the Confederate States, and of the militia of the several States, when called into the actual service of the Confederate States; he may require the opinion, in writing, of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the Confederate States, except in cases of impeachment.

(2) He shall have power, by and with the advice and consent of the Senate, to make treaties; provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the Confederate States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

(3) The principal officer in each of the Executive Departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the Executive Departments may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity. inefficiency, misconduct, or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor.

(4) The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session; but no person rejected by the Senate shall be reappointed to the same office during their ensuing recess.

Sec. 3. (I) The President shall, from time to time, give to the Congress information of the state of the Confederacy, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the Confederate States.

Sec. 4. (I) The President, Vice President, and all civil officers of the Confederate States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

Section I. (I) The judicial power of the Confederate States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Sec. 2. (I) 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, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the Confederate States shall be a party; to controversies between two or more States; between a State and citizens of another State, where the State is plaintiff; between citizens claiming lands under grants of different States; and 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.

(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

(3) The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Sec. 3. (I) Treason against the Confederate States shall consist only in levying war against.them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(2) The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV

Section I. (I) Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Sec. 2. (I) The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; and shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.

(2) A person charged in any State with treason, felony, or other crime against the laws of such State, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

(3) No slave or other person held to service or labor in any State or Territory of the Confederate States, under the laws thereof, escaping or lawfully carried into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such slave belongs,. or to whom such service or labor may be due.

Sec. 3. (I) Other States may be admitted into this Confederacy by a vote of two-thirds of the whole House of Representatives and two-thirds of the Senate, the Senate voting by States; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

(2) The Congress shall have power to dispose of and make allneedful rules and regulations concerning the property of the Confederate States, including the lands thereof.

(3) 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 Sates; 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 be 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.

(4) The Confederate States shall guarantee to every State that now is, or hereafter may become, a member of this Confederacy, a republican form of government; and shall protect each of them against invasion; and on application of the Legislature or of the Executive when the Legislature is not in session) against domestic violence.

ARTICLE V

Section I. (I) Upon the demand of any three States, legally assembled in their several conventions, the Congress shall summon a convention of all the States, to take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the Constitution be agreed on by the said convention, voting by States, and the same be ratified by the Legislatures of two- thirds of the several States, or by conventions in two-thirds thereof, as the one or the other mode of ratification may be proposed by the general convention, they shall thenceforward form a part of this Constitution. But no State shall, without its consent, be deprived of its equal representation in the Senate.

ARTICLE VI

I. The Government established by this Constitution is the successor of the Provisional Government of the Confederate States of America, and all the laws passed by the latter shall continue in force until the same shall be repealed or modified; and all the officers appointed by the same shall remain in office until their successors are appointed and qualified, or the offices abolished.

2. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the Confederate States under this Constitution, as under the Provisional Government.

3. This 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; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

4. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the Confederate States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the Confederate States.

5. 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.

6. 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.

ARTICLE VII

I. The ratification of the conventions of five States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

2. When five States shall have ratified this Constitution, in the manner before specified, the Congress under the Provisional Constitution shall prescribe the time for holding the election of President and Vice President; and for the meeting of the Electoral College; and for counting the votes, and inaugurating the President. They shall, also, prescribe the time for holding the first election of members of Congress under this Constitution, and the time for assembling the same. Until the assembling of such Congress, the Congress under the Provisional Constitution shall continue to exercise the legislative powers granted them; not extending beyond the time limited by the Constitution of the Provisional Government.

Adopted unanimously by the Congress of the Confederate States of South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, sitting in convention at the capitol, the city of Montgomery, Ala., on the eleventh day of March, in the year eighteen hundred and Sixty-one.

HOWELL COBB, President of the Congress.

South Carolina: R. Barnwell Rhett, C. G. Memminger, Wm. Porcher Miles, James Chesnut, Jr., R. W. Barnwell, William W. Boyce, Lawrence M. Keitt, T. J. Withers.

Georgia: Francis S. Bartow, Martin J. Crawford, Benjamin H. Hill, Thos. R. R. Cobb.

Florida: Jackson Morton, J. Patton Anderson, Jas. B. Owens.

Alabama: Richard W. Walker, Robt. H. Smith, Colin J. McRae, William P. Chilton, Stephen F. Hale, David P. Lewis, Tho. Fearn, Jno. Gill Shorter, J. L. M. Curry.

Mississippi: Alex. M. Clayton, James T. Harrison, William S. Barry, W. S. Wilson, Walker Brooke, W. P. Harris, J. A. P. Campbell.

Louisiana: Alex. de Clouet, C. M. Conrad, Duncan F. Kenner, Henry Marshall.

Texas: John Hemphill, Thomas N. Waul, John H. Reagan, Williamson S. Oldham, Louis T. Wigfall, John Gregg, William Beck Ochiltree.

Source: Richardson, James D. *A Compilation of the Messages and Papers of the Confederacy Including the Diplomatic Correspondence 1861-1865*. Nashville, TN: United States Publishing Company, 1905.

DISSERTATION BIBLIOGRAPHY

GOVERNMENT DOCUMENTS AND PUBLICATIONS

Confederate States of America. *The Statutes at Large of the Confederate States of America*. Edited by James M. Matthews. Richmond, VA: R.M. Smith, 1864.

____. *Statutes At Large of the Provisional Government of the Confederate States of America,February 8, 1861 to February 18, 1862*. Edited by James M. Matthews. Richmond, VA: R.M. Smith, printer to Congress, 1864.

____. *Statutes At Large of the Confederate States of America, Commencing With the First Session of the First Congress: 1862*. Edited by James M. Matthews. Richmond, VA: R.M. Smith, printer to Congress, 1862.

____. *Statutes at Large of the Confederate States of America, Commencing with the Fourth Session of the First Congress, 1863-1864*. Edited by James M. Matthews. Richmond, VA: R.M. Smith, printer to Congress, 1864.

____. *Statutes at Large of the Confederate States of America, Commencing with the First Session of the Second Congress, 1864*. Edited by James M. Matthews. Richmond, VA: R.M. Smith, printer to Congress, 1864.

____. *Public Laws of the Confederate States of America, Passed at the First Session of the First Congress, 1862*. Edited by James M. Matthews. Richmond, VA: R.M. Smith, 1862.

____. *Laws and Joint Resolutions of the Last Session of the Confederate Congress (November 7, 1864-March 18, 1865) Together with the Secret Acts of the Previous Congress*. Edited by Charles W. Ramsdell. Durham, NC: Duke University Press, 1941.

____. *Opinions of the Confederate Attorney General*. Edited by Rembert W. Patrick. Buffalo, NY: Dennis, 1950.

C.S. Congress. *Report of the Committee on the Judiciary on Senate Bill No. 150*, S. Rep. No. 16, 1st Cong., 4th Sess., 1864.

C.S. Department of Justice. *Report of the Attorney General, January 1, 1863*. Richmond, VA: R.M. Smith, 1863.

____. *Report of the Attorney General, April 25, 1864*. Richmond, VA: R.M. Smith, 1864.

South Carolina, Convention of the People. *From the Journal of the Convention of the*

People of South Carolina, Held in 1860-'61. Charleston, SC: Evans & Cogswell, Printers to the Convention, 1861.

U.S. Congress. Senate. *Journal of the Congress of the Confederate States of America, 1861-1865*. 7 vols. Washington D.C.: Government Printing Office, 1904.

U.S. War Department. *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*. 70 vols. in 128 parts. Washington, D.C.: Government Printing Office, 1880-1901.

STATE COURT CASE REPORTERS

Supreme Court of Alabama. *Reports of Cases Argued and Determined in the Supreme Court of Alabama, during June Term, 1860, and January and June Terms, 1861*. By John W. Shepherd, State Reporter. Vol. XXXVII. Montgomery, AL: Barrett and Brown's Book and Job Office, 1866.

____. *Reports of Cases Argued and Determined in the Supreme Court of Alabama, during June Term, 1861, January and June Terms, 1862, and January Term, 1863*. By John W. Shepherd, State Reporter. Vol. XXXVIII. Montgomery, AL: Barrett and Brown's Book and Job Office, 1867.

____. *Reports of Cases Argued and Determined in the Supreme Court of Alabama during January and June Terms, 1863, January and June Terms, 1864, January Term, 1865 and January Term, 1866*. By John W. Shepherd, State Reporter. Vol. XXXIX. Montgomery, AL: Barrett and Brown's Book and Job Office, 1868.

Supreme Court of Arkansas. *Reports of Cases at Law and in Equity Argued and Determined in the Supreme Court of Arkansas, at the January, May, and December Terms, 1861*. By L.E. Barber, Reporter. Vol. XXIII. Gazette Office, Little Rock, AR: Woodruff and Blocher, Public Printers, 1867.

Supreme Court of Florida. *Reports of Cases Argued and Adjudged in the Supreme Court of Florida, at Terms Held in 1862-1864*. By John B. Galbraith, Reporter. Vol. X. Tallahassee, FL: Office of the Floridian and Journal. Printed by Dyke and Carlisle, 1867.

____. *Reports of Cases Argued and Adjudged in the Supreme Court of Florida, at Terms Held in 1864-1867*. By John B. Galbraith, Reporter. Vol. X. Tallahassee, FL: Office of the Floridian and Journal. Printed by Dyke and Carlisle, 1867.

Supreme Court of Georgia. *Reports of Cases in Law and Equity, Argued and Determined in the Supreme Court of the State of Georgia, Containing the Decisions at Macon,*

June Term, 1861 to Milledgeville, November Term, 1863. George N. Lester, Reporter. Volume XXXIII. Macon, GA: J. W. Burke and Co., 1870.

___. *Reports of Cases in Law and Equity, Argued and Determined in the Supreme Court of the State of Georgia, Containing the Decisions at Macon, March Term, 1864*. George N. Lester, Reporter. Supplement to Volume XXXIII. Macon, GA: J. W. Burke and Co., 1874.

___. *Reports of Cases in Law and Equity, Argued and Determined in the Supreme Court of the State of Georgia, Containing the Decisions at Milledgeville, November Term, 1864; Macon, March Term, 1865; Milledgeville, November Term, 1865; Milledgeville, June Term, 1866*. Logan E. Bleckley, Reporter. Volume XXXIV. Atlanta, GA: Intelligencer Book and Job Office, 1867.

High Court of Errors and Appeals of Mississippi. *Reports of Cases Argued and Determined in the High Court of Errors and Appeals for the State of Mississippi, Containing Cases Determined at February and October Terms, 1860; April and October Terms, 1861; and April Term, 1863*. James Z. George, Reporter to the State. Volume XXXIX. Philadelphia, PA: T. & J.W. Johnson & Co., Law Booksellers and Publishers, 1867.

___. *Reports of Cases Argued and Determined in the High Court of Errors and Appeals for the State of Mississippi, Containing Cases Determined at October Term, 1864; January Special Term, 1866; April Term, 1866; and part of the October Term, 1866*. R.O. Reynolds, Reporter. Volume XL. New York, NY: Banks Brothers, Publishers, 1867.

Supreme Court of North Carolina. *Reports of Cases in Law, Argued and Determined in the Supreme Court of North Carolina, June Term, 1862*. By Hamilton C. Jones, Reporter. Volume LIII. Salisbury, NC: J.J. Bruner, 1862.

___. *Reports of Cases in Equity, Argued and Determined in the Supreme Court of North Carolina, from December Term, 1860 to June Term, 1863*. By Hamilton C. Jones, Reporter. Volume LIX. Salisbury, NC: J.J. Bruner, 1863.

___. *Reports of Cases in Equity, Argued and Determined in the Supreme Court of North Carolina, June Term, 1863 to December (Special) Term, 1864*. By P.H. Winston, Reporter. Volume LX. Salisbury, NC: J.J. Bruner, 1864.

Court of Errors and Court of Appeals of South Carolina. *Reports of Cases at Law and in Equity, Argued and Determined in the Court of Errors and Court of Appeals, of South Carolina, from May, 1860 to May, 1866*. J.S.G. Richardson, State Reporter. Law Volume XIII, Equity Volume XII. Charleston, SC: E.J. Dawson & Co., 1866.

Supreme Court of the State of Texas. *Reports of Cases Argued and Decided in the*

Supreme Court of the State of Texas, during the Austin Session, 1861; Galveston, Tyler, and Austin Session, 1862; Galveston and part of Tyler Sessions, 1863. Charles L. Robards and A.M. Jackson. Vol. XXVI. Austin, TX: Joseph Walker, State Printer, 1867.

___. *Reports of Cases Argued and Decided in the Supreme Court of the State of Texas, during the Tyler Session, 1863; Austin Session, 1863; Galveston, Tyler, and Austin Sessions, 1864; Galveston Session, 1865.* Charles L. Robards and A.M. Jackson. Vol. XXVII. Austin, TX: Joseph Walker, State Printer, 1867.

Supreme Court of Appeals of Virginia. *Reports of Cases Decided in the Supreme Court of Appeals of Virginia, From July 1, 1860 to April 1, 1865*. Peachy R. Grattan. Vol. XVI. Richmond, VA: J.W. Randolph & English, 1867.

PERSONAL PAPERS AND COLLECTIONS

Battle, William H. Papers. Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina.

Brown, Joseph E., Governors' Correspondence. Georgia Department of Archives and History, Atlanta, Georgia.

Cobb, Howell Papers. E. Merton Coulter Collection, University of Georgia Library, Special Collections, Athens, Georgia.

Cobb, Thomas Reade Rootes Papers, University of Georgia Library, Special Collections, Athens, Georgia.

Confederate States of America Papers. William R. Perkins Library, Duke University, Durham, North Carolina.

___. National Archives, Washington, DC.

Curry, Jabez Lamar Monroe. Papers. Library of Congress, Washington, D.C.

Hammond, James Henry. Papers. Library of Congress, Washington, D.C.

Jones, Charles Colcock, Jr. Collection, Special Collections Library, Duke University, Durham, North Carolina.

Mallett, Peter. Papers, 1785-1913. Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina.

Pearson, Richmond Mumford Papers, 1816-1878. Southern Historical Collection,

University of North Carolina, Chapel Hill, North Carolina.

____. Papers, 1816-1878. William R. Perkins Library, Duke University, Durham, North Carolina.

Phelan Family Papers. Alabama Department of Archives, Montgomery, Alabama.

Robards, Charles L. *Synopses of the Decisions of the Supreme Court of the State of Texas*. Austin, TX: Brown and Foster, 1865.

Robins, Marmaduke Papers, 1825-1887. Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina.

Sanford, John W.A. Papers. Alabama Department of Archives, Montgomery, Alabama.

Stephens, Alexander H. Papers. Library of Congress, Washington, D.C.

Stephens, Alexander H. Papers. William R. Perkins Library, Duke University, Durham, North Carolina.

Stone, George Washington Papers. Alabama Department of Archives, Montgomery, Alabama.

Toombs, Robert Papers. University of Georgia Library, Special Collections, Athens, Georgia.

Vance, Zebulon Baird Papers. North Carolina Division of Archives and History, Raleigh, North Carolina.

____. Governors' Papers and Letterbooks. North Carolina Division of Archives and History, Raleigh, North Carolina.

Walker, Richard Wilde Papers. Alabama Department of Archives, Montgomery, Alabama.

Worth, Jonathan Papers. Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina.

Wigfall, Louis T. Papers. Library of Congress, Washington, D.C.

Original Case Files for the Alabama State Supreme Court, 1820-1873. Alabama Department of Archives, Montgomery, Alabama.

Original Case Files for the Florida State Supreme Court. Florida Department of Archives and History, Tallahasee, Florida

Original Case Files for the Georgia State Supreme Court. Georgia Department of Archives and History, Atlanta, Georgia.

Original Case Files for the Mississippi High Court of Errors and Appeals. Mississippi Department of Archives and History, Jackson, Mississippi.

Original Cases Files for the North Carolina State Supreme Court. North Carolina Department of Archives, Raleigh, North Carolina.

Original Case Files for the South Carolina State Supreme Court of Appeals and Errors. South Carolina Department of Archives, Columbia, South Carolina.

The Original Case Files for the Virginia State Special Court of Appeals. Virginia State Archives, Richmond, Virginia.

NEWSPAPERS

Atlanta *The Intelligencer*.
Atlanta *Register*
Augusta [Georgia] *Constitutionalist*
Austin State Gazette
Charlotte, *North Carolina Whig*.
Clarke County (Alabama) *Democrat*
Columbus, *Sun*.
Fayetteville, *Observer*.
Hillsborough, *Hillsborough Recorder*.
Harper's Weekly.
Houston *Tri-Weekly Telegraph*
Jacksonville Republican
Milledgeville [Georgia] *Southern Federal Union*
Milledgeville Southern Recorder
Mobile *Daily Register Print*.
Mobile *Daily Advertiser*.
New Orleans *The Daily Picayune*.
New York *Herald*.
Raleigh, *The Daily Confederate*.
Raleigh, *The North Carolina Evening Standard*.
Raleigh, *Register* (Semi-Weekly).
Raleigh, *Spirit of the Age*.
Raleigh, *Standard* (Semi-Weekly).
Richmond, *Daily Dispatch*.
Richmond, *Richmond Daily Enquirer*.
Richmond, *The Daily Sentinel*.
Salisbury [North Carolina], *The Carolina Watchman*.

Savannah *Republican*
Vicksburg, *Whig*.
Wilmington, *Journal*.
Southern Confederacy

DISSERTATIONS

Bass, James H., "Georgia in the Confederacy, 1861-1866." Ph.D. dissertation, University of Texas, 1932.

Bowen, Nancy H., "A Political Labyrinth: Texas in the Civil War—Questions of Continuity." Ph.D. dissertation, Rice University, 1974.

Robbins, John Brawner. "Confederate Nationalism: Politics and Government in the Confederate South, 1861-1865." Ph.D. dissertation, Rice University, 1964.

BOOKS

Adams, John *The Works of John Adams, Second President of the United States: with a life of the author, notes and illustrations, by his grandson Charles Francis Adams.* Volume 4. Boston, MA: Little, Brown and Company, 1850-1856.

Alexander, Thomas B. and Richard E. Beringer. *The Anatomy of the Confederate Congress: A Study of the Influence of Member Characteristics on Legislative Voting Behavior, 1861-1865*. Nashville, TN: Vanderbilt University Press, 1972.

Amlund, Curtis Arthur. *Federalism in the Southern Confederacy*. Washington, D.C.: Public Affairs Press, 1966.

Anastaplo, George. *The Amendments to the Constitution: A Commentary*. Baltimore, MD: John Hopkins University Press, 1995.

Armisted, Robert H. *Soldiers of Our Army.* Williamsburg, VA: Macfarlane & Fergusson, Printers, March 1862.

Ash, Stephen V. *Middle Tennessee Society Transformed, 1860-1870: War and Peace in the Upper South*. Baton Rouge, LA: Louisiana State University Press, 1988.

Bagehot, Walter. *The English Constitution and Other Political Essays*. New York, NY: D. Appleton & Co., 1877.

Ballard, Michael B. *A Long Shadow: Jefferson Davis and the Final Days of the Confederacy*. Jackson, MS: University Press of Mississippi, 1986.

Barney, William. *The Road to Secession*. New York, NY: Praeger, 1972.

____. *The Secessionist Impulse: Alabama and Mississippi*. Princeton, NJ: Princeton University Press, 1974.

Barrett, John G. *The Civil War in North Carolina*. Chapel Hill, NC: University of North Carolina Press, 1963.

Beer, Samuel H. *To Make A Nation: The Rediscovery of American Federalism*. Cambridge, MA: The Belknap Press of Harvard University Press, 1993.

Belz, Herman. *Reconstructing the Union; Theory and Policy During the Civil War*. Ithaca, NY: Cornell University Press, 1969.

Bennett, Walter Hartwell. *American Theories of Federalism*. Tuscaloosa, AL: University of Alabama Press, 1964.

Bensel, Richard F. *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*. New York, NY: Cambridge University Press, 1990.

Beringer, Richard E., Herman Hattaway, Archer Jones, William N. Still, Jr. *Why The South Lost The Civil War*. Athens, GA: University of Georgia Press, 1986.

Bettersworth, John K. and James W. Silver, eds. *Mississippi in the Confederacy*. 2 vols. Baton Rouge, LA: Louisiana State University Press, 1961.

Bloomfield, Maxwell. *American Lawyers in a Changing Society, 1776-1876*. Cambridge, MA: Harvard University Press, 1976.

Boatner, Mark H. *The Civil War Dictionary*. New York, NY: David McKay Company, Inc., 1959.

Bodenhamer, David J. and Ely, James W., Jr., eds. *Ambivalent Legacy: A Legal History of the South*. Jackson, MS: University Press of Mississippi, 1984.

Boney, F.N. *John Letcher of Virginia: The Story of Virginia's Civil War Governor*. University, AL: University of Alabama Press, 1966.

Borritt, Gabor S., ed. *Why the Confederacy Lost*. New York, NY: Oxford University Press, 1992.

Boyd, William K., ed. *Memoirs of W.W. Holden*. Durham, NC: Seeman Printery, 1911.

Brownson, Oreste. *The American Republic: Its Constitution, Tendencies, and Destiny*, new ed. New York, NY: P. O'Shea, 1866.

Bryan, T. Conn. *Confederate Georgia*. Athens, GA: University of Georgia Press, 1953.

Buenger, Walter L. *Secession and the Union in Texas*. Austin, TX: University of Texas Press, 1984.

Burton, Orville Vernon. *In My Father's House Are Many Mansions: Family and Community In Edgefield, South Carolina*. Chapel Hill, NC: University of North Carolina Press, 1985.

Carpenter, Jesse T. *The South As A Conscious Minority: A Study in Political Thought*. New York, NY: New York University Press, 1930.

Carr, Robert K. *American Democracy in Theory and Practice* (rev. ed.; New York, NY: Rinehart and Co., 1955.

Carson, James Petigru. *Life, Letters and Speeches of James Louis Petigru, the Union Man of South Carolina*. Washington, DC: W.H. Lowdermilk, 1920.

Cauthen, Charles Edward. *South Carolina Goes To War, 1860-1865*. Chapel Hill, NC: University of North Carolina Press, 1950.

Chandler, Allen D., ed. *The Confederate Records of the State of Georgia*, 6 vols. Atlanta, GA: C.P. Byrd, state printer, 1909-1911.

Channing, Steven. *Crisis of Fear: Secession in South Carolina*. New York, NY: Simon and Schuster, 1970.

Chestnut, Mary Boykin. *Mary Chestnut's Civil War*. Ed. by C. Vann Woodward. New Haven, CN: Yale University Press, 1981.

Choper, Jesse H. *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1982).

Cleveland, Henry. *Alexander H. Stephens, in Public and Private*. Philadelphia, PA: National Publishing Company, 1866.

Cobb, Howell. *Letter of Hon. Howell Cobb to the People of Georgia on The Present Condition of the Country*. Washington, DC: M'Gill and Witherow, Printers, 1860.

Cobb, Thomas Reade Rootes. *Substance of An Address of T.R.R. Cobb, To His Constituents of Clark County,* April 6th, 1861.

Commager, Henry S., William E. Leuchtenberg, and Samuel E. Morison. *The Growth*

of the American Republic. New York, NY: Oxford University Press, 1980.

Connelly, Thomas Lawrence and Archer Jones. *The Politics of Command: Factions and Ideas in Confederate Strategy*. Baton Rouge, LA: Louisiana State University Press, 1973.

Cooke, Jacob E., ed. *The Federalist*. Middletown, CT: Wesleyan University Press, 1961.

Cooper, William J., Jr. *Liberty and Slavery: Southern Politics to 1860*. New York, NY: Knopf, 1983.

____. and Thomas E. Terrill. *The American South: A History* 2nd edition. New York, NY: The McGraw-Hill Companies, Inc., 1996.

____, et al. *A Master's Due: Essays in Honor of David Herbert Donald*. Baton Rouge, LA: Louisiana State University Press, 1985.

Cornell, Saul. *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*. Chapel Hill, NC: University of North Carolina Press, 1999.

Corwin, Edward S. *The Twilight of the Supreme Court: A History of Our Constitutional Theory*. New Haven, CN: Yale University Press, 1934.

____. *The Constitution and What It Means Today*. Revised by Harold W. Chase and Craig R. Ducat, 13th edition. Princeton, NJ: Princeton University Press, 1973.

Coulter, E. Merton. *The Confederate States of America, 1861-1865*. Baton Rouge, LA: Louisiana State University Press, 1950.

____. *Travels in the Confederate States: A Bibliography*. Norman, OK: University of Oklahoma Press, 1948.

Crandall, Majorie L., ed. *Confederate Imprints: A Check List Based Principally on the Collections of the Boston Athenaeum*. 2 vols. Boston, MA: Boston Athenaeum, 1955.

Crawford, Samuel Wylie. *The Genesis of the Civil War*. New York, NY: Charles L. Webster and Company, 1887.

Crenshaw, Ollinger. *The Slave States in the Presidential Election of 1860*. Baltimore, MD: Johns Hopkins University Press, 1945.

Crist, Lynda Lasswell and Mary Seaton Dix, eds. *The Papers of Jefferson Davis*. 7 vols.

Baton Rouge, LA: Louisiana State University Press, 1971-.

Crofts, Daniel W. *Reluctant Confederates: Upper South Unionists in the Secession Crisis*. Chapel Hill, NC: University of North Carolina Press, 1989.

Curry, Jabez Lamar Monroe. *Civil History of the Government of the Confederate States, With Some Personal Reminiscences*. Richmond, VA: B.F. Johnson Publishing Company, 1901.

____. *The Southern States of the American Union Considered in their Relations to the Constitution of the United States and to the Resulting Union*. New York, NY: G.P. Putnam's Sons, 1894.

Curry, Leonard P. *Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress*. Nashville, TN: Vanderbilt University Press, 1968.

Dalzell, Robert F. *Daniel Webster and the Trial of American Nationalism*. Boston, MA: Houghton Mifflin, 1973.

Daniel, John M. *The Richmond Examiner during the War*. New York, NY: Printed for the Author, 1868.

Davis, Jefferson. *The Rise and Fall of the Confederate Government*. 2 vols. New York, NY: D. Appleton and Co., 1881.

____. *Private Letters (of Jefferson Davis), 1823-1889*. Ed. by Hudson Strode. New York, NY: Harcourt, Brace, and World, 1966.

Davis, Reuben. *Recollections of Mississippi and Mississippians*. Boston, MA: Houghton Mifflin, 1889.

Davis, William C. *Jefferson Davis: The Man and His Hour*. New York, NY: HarperCollins, 1991.

____. *"A Government Of Our Own:" The Making of the Confederacy*. New York, NY: The Free Press, 1994.

DeCredico, Mary A. *Patriotism for Profit: Georgia's Urban Entrepreneurs and the Confederate War Effort*. Chapel Hill, NC: University of North Carolina Press, 1990.

Degler, Carl N. *The Other South: Southern Dissenters in the Nineteenth Century*. New York: Harper and Row, 1974.

____. *Place Over Time: The Continuity of Southern Distinctiveness*. Baton Rouge, LA:

Louisiana State University Press, 1977.

DeRenne, Wymberly Jones. *A Short History of the Confederate Constitutions of the Confederate States of America, 1861-1899*. Savannah, GA: Morning News Press, 1909.

DeRosa, Marshall L. *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism*. Columbia, MO: University of Missouri Press, 1991.

Donald, David, ed. *Why The North Won the Civil War*. Baton Rouge, LA: Louisiana State University Press, 1960.

Dougan, Michael B. *Confederate Arkansas: The People and Policies of a Frontier State in Wartime*. University, AL: University of Alabama Press, 1976.

Dowd, Clement. *Life of Zebulon B. Vance*. Charlotte, NC: Observer Printing, 1897.

Dowdey, Clifford and Louis H. Manarin, eds. *The Wartime Papers of R.E. Lee*. New York, NY: Bramhall House, 1961.

Drez, J. Robert. *The United States and Confederate Constitutions: A Textual Comparison*. Brookfield, WI: The Brookfield Academy, 1970.

DuBose, John W. *The Life and Times of William Lowndes Yancey*. 1892. Reprint. New York, NY: Peter Smith, 1942.

Durden, Robert F. *The Self-Inflicted Wound: Southern Politics in the Nineteenth Century*. Lexington, KY: University Press of Kentucky,1985.

____. *The Gray and the Black: The Confederate Debate on Emancipation*. Baton Rouge, LA: Louisiana State University Press, 1972.

Eaton, Clement. *A History of the Southern Confederacy*. New York, NY: The MacMillan Company, 1959.

____. *Jefferson Davis*. New York, NY: Free Press, 1977.

Edelman, Murray. *Politics as Symbolic Action*. Chicago, IL: Markham Publishing Company, 1971.

____. *The Symbolic Uses of Politics*. Urbana, IL: University of Illinois Press, 1964.

Edmunds, John B., Jr. *Francis W. Pickins and the Politics of Destruction*. Chapel Hill, NC: University of North Carolina Press, 1986.

Eggleston, George C. *A Rebel's Recollections*. Bloomington, IN: Indiana University Press, 1959.

Elazar, Daniel J. *American Federalism: A View from the States*. 2nd ed. New York, NY: Harper and Row, 1972.

Ellis, Richard B. *The Union At Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis*. New York, NY: Oxford University Press, 1987.

Escott, Paul D. *After Secession: Jefferson Davis and the Failure of Confederate Nationalism*. Baton Rouge, LA: Louisiana State University Press, 1978.

____. *Many Excellent People: Power and Privilege in North Carolina, 1850-1900*. Chapel Hill, NC: University of North Carolina Press, 1985.

Evans, Eli N. *Judah P. Benjamin: The Jewish Confederate*. New York, NY: The Free Press, 1988.

Faust, Drew Gilpin. *The Creation of Confederate Nationalism: Ideology and Identity in the Civil War South*. Baton Rouge, LA: Louisiana State University Press, 1988.

Fehrenbacher, Don E. *Constitutions and Constitutionalism in the Slave-Holding South*. Athens, GA: University of Georgia Press, 1989.

Fleming, Walter L. *Civil War and Reconstruction in Alabama*. New York, NY: Columbia University Press, 1905.

Flippin, Percy S. *Herschel V. Johnson of Georgia: States Rights Unionist*. Richmond, VA: Dietz Printing Company, 1931.

Flournoy, H. W., ed. *Calendar of Virginia State Papers*. 11 vols. New York, NY: Kraus Reprint, 1893.

Ford, Lacy K., Jr. *Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860*. New York, NY: Oxford University Press, 1988.

Freehling, William W. *The Road to Disunion: Secessionists at Bay, 1776-1854*. New York, NY: Oxford University Press, 1990.

Freeman, Douglas Southall. *A Calendar of Confederate Papers*. Richmond, VA: Confederate Museum, 1908.

____. *R. E. Lee: A Biography*. 4 vols. New York, NY: Charles Scribner's Sons, 1934-36.

Friedman, Jean E. *The Enclosed Garden: Women and Community in the Evangelical*

South, 1830-1900. Chapel Hill, NC: University of North Carolina Press, 1985.

Friedman, Lawrence M. *A History of American Law*, 2nd ed. New York, NY: Simon and Schuster, Touchstone, 1985.

Gibson, Ronald. *Jefferson Davis and the Confederacy and Treaties Concluded by the Confederate States with Indian Tribes*. Dobbs Ferry: Oceana Publications, Inc., 1977.

Green, Fletcher M. *Constitutional Development in the South Atlantic States, 1776-1860*. Chapel Hill, NC: University of North Carolina Press, 1930.

____, ed. *Essays in Southern History Presented to James Gregoire de Rouhac Hamilton*. Chapel Hill, NC: University of North Carolina Press, 1949.

Greene, Jack P. *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788*. New York, NY: W.W. Norton & Co., 1986.

Grodzins, Morton. *The American System*. Chicago, IL: Rand-McNally, 1966.

Gwyn, W.B. *The Meaning of the Separation of Powers: An Analysis of the Doctrine From its Origin to the Adoption of the United States Constitution*. New Orleans, LA: Tulane University, 1965.

Hall, Kermit., ed. *Federalism: A Nation of States--Major Interpretations*. New York, NY: Garland Publishing, 1987.

____, and Ely, James W., Jr., eds. *An Uncertain Tradition: Constitutionalism and the History of the South*. Athens, GA: University of Georgia Press, 1989.

____, Wiecek, William M., and Finkelman, Paul. *American Legal History: Cases and Materials*. New York, NY: Oxford University Press, 1991.

____, *Oxford Companion to the Supreme Court of the United States*. New York, NY: Oxford University Press, 1992.

Hamilton, James G. de Roulhac, ed. *The Correspondence of Jonathan Worth*. 2 vols. Raleigh, NC: State Department of Archives and History, 1909.

____, ed. *The Papers of Thomas Ruffin*. 4 vols. Raleigh, NC: State Department of Archives and History, 1918-1920.

Harris, William C. *Leroy Pope Walker: Confederate Secretary of War*. Tuscaloosa, AL: Confederate Publishing Company, 1962.

____. *William Woods Holden: Firebrand of North Carolina Politics*. Baton Rouge, LA: Louisiana State University Press, 1987.

Harwell, Richard B., ed. *More Confederate Imprints*. 2 vols. Richmond, VA: Virginia State Library, 1957.

Hendrick, Burton J. *Statesman of the Lost Cause: Jefferson Davis and His Cabinet*. New York, NY: Literary Guild, 1939.

Hill, Benjamin H., Jr. *Senator Benjamin H. Hill of Georgia, His Life Speeches and Writings*. Atlanta, GA: H.C. Hudgins, 1891.

_____. *Speech on the Means of Success, the Sources of Danger, and the Consequences of Failure in the Confederate Struggle for Independence. Delivered in Sterling Hall, LaGrange, Georgia on the 11th day of March, 1865*. Atlanta, GA: Economical Book and Job Printing House, 1874.

Hill, Louise Biles. *State Socialism in the Confederate States of America*. Charlottesville, VA: Historical Publishing, 1936.

____. *Joseph E. Brown and the Confederacy*. Chapel Hill, NC: University of North Carolina Press, 1939.

Hofstadter, Richard. *Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840*. Berkeley, CA: University of California Press, 1969.

Holloway, William V. and Ader, Emile B. *American Government.* New York, NY: The Ronald Press Co., 1959.

Hyman, Harold M. and Levy, Leonard W., eds. *Freedom and Reform; Essays in Honor of Henry Steele Commager*. New York, NY: Harper and Row, Publishers, 1967.

____. *A More Perfect Union: The Impact of the Civil War and Reconstruction upon the Constitution*. 1973.

____ and Wiecek, William M. *Equal Justice Under Law: Constitutional Development, 1835-1875*. New York, NY: Harper and Row, Publishers, 1982.

Inscoe, John. *Mountain Masters, Slavery and the Sectional Crisis in Western North Carolina*. Knoxville, TN: University of Tennessee Press, 1989.

Jeffrey, Thomas E. *State Parties and National Politics: North Carolina, 1815-1861*. Athens, GA: The University of Georgia Press, 1989.

Johns, John E. *Florida During the Civil War*. Gainesville, FL: University of Florida Press, 1963.

Johnson, Guion G. *Ante-bellum North Carolina*. Chapel Hill, NC: University of North Carolina Press, 1937.

Johnson, Michael P. *Toward A Patriarchal Republic: The Secession of Georgia*. Baton Rouge, LA: Louisiana State University Press, 1977.

Johnston, Alexander, ed. *Masterpieces of American Eloquence*. New York, NY: G.P. Putnam's Sons, 1890.

Johnston, Frontis W., ed. *The Papers of Zebulon Baird Vance*. Raleigh, NC: North Carolina Department of Archives and History, 1963.

Johnston, Richard M. and William H. Browne. *Life of Alexander H. Stephens*. Philadelphia, PA: J.B. Lippencott, 1878.

Jones, John B. *A Rebel War Clerk's Diary*. Ed. by Earl Schenck Miers. New York, NY: Sagamon Press, Inc., 1958.

Kean, Robert Garlick Hill. *Inside the Confederate Government*. Ed. by Edward Younger. New York, NY: Oxford University Press, 1957.

Kenzer, Robert C. *Kinship and Neighborhood in a Southern Community: Orange County, North Carolina, 1849-1881*. Knoxville: University of Tennessee Press, 1987.

Kirk, Russell. *Rights and Duties: Reflections on Our Conservative Constitution*. Dallas, TX: Spence Publishing Company, 1997.

Kruman, Marc W. *Parties and Politics in North Carolina, 1836-1865*. Baton Rouge, LA: Louisiana State University Press, 1983.

Lee, Charles Robert, Jr. *The Confederate Constitutions*. Chapel Hill, NC: University of North Carolina Press, 1963.

Lonn, Ella. *Desertion during the Civil War*. New York, NY: Century Company, 1928.

Luraghi, Raimondo. *The Rise and Fall of the Plantation South*. New York, NY: Franklin Watts, 1978.

Lynch, James D. *The Bench and Bar of Texas*. St. Louis, MO: Nixon-Jones Printing Co., 1885.

Maizlich, Stephen E. and John J. Kushma, eds. *Essays on American Antebellum Politics,*

1840-1860. College Station, TX: Texas A & M University Press, 1982.

Marten, James. *Texas Divided: Loyalty and Dissent in the Lone Star State, 1865-1874*. Lexington, KY: University Press of Kentucky, 1990.

Martin, Bessie. *Desertion of Alabama Troops during the Civil War*. New York, NY: Columbia University Press, 1932.

Mason, Alpheus T. and Leach, Richard H. *In Quest of Freedom: American Political Thought and Practice*. Englewood Cliffs, NJ: Prentice Hall, 1959.

McCardell, John. *The Idea of a Southern Nation: Southern Nationalists and Southern Nationalism, 1830-1860*. New York, NY: Norton, 1979.

McCash, William B. *Thomas R. R. Cobb, 1823-1862: The Making of a Southern Nationalist*. Macon, GA: Mercer University Press, 1983.

McMilan, Malcom C. *The Disintegration of a Confederate State: Three Governors and Alabama's Wartime Home Front, 1861-1865*. Macon, GA: Mercer University Press, 1986.

____, ed. *The Alabama Confederate Reader*. University, AL: University of Alabama Press, 1963.

McPherson, James M. *Battle Cry of Freedom: The Civil War Era*. New York, NY: Oxford University Press, 1988.

____. *Ordeal By Fire: Volume II, The Civil War*. New York, NY: McGraw-Hill, Inc., 1993.

Mitchell, Memory. *Legal Aspects of Conscription and Exemption in North Carolina, 1861-1865*. Chapel Hill, NC: The University of North Carolina Press, 1965.

Moore, Albert Burton. *Conscription and Conflict in the Confederacy*. New York, NY: Hillary House Publishers Ltd., 1963.

Moore, John Henry. *A Study in State Rights*. New York, NY: Neale Publishing Co., 1911.

Newmyer, R. Kent. *The Supreme Court Under Marshall and Taney* (Wheeling, IL: Harlan Davidson, Inc., 1968.

Norton, Clarence Clifford. *The Democratic Party in Ante-Bellum North Carolina, 1835 -1861*. Chapel Hill, NC: University of North Carolina Press, 1930.

O'Brien, Gail Williams. *The Legal Fraternity and the Making of a New South Community*.

Athens, GA: University of Georgia Press, 1986.

Owens, Harry P. and Cooke, James J., eds., *The Old South in the Crucible of War*. Jackson, MS: University Press of Mississippi, 1983.

Owsley, Frank L. *State Rights in The Confederacy*. Chicago, IL: The University of Chicago Press, 1925.

Paludan, Phillip Shaw. *"Victims" A True Story of the Civil War*. Knoxville, TN: University of Tennessee Press, 1981.

Parrish, T. Michael and Robert M. Willingham, Jr. *Confederate Imprints: A Bibliography of Southern Publications from Secession to Surrender*. Austin, TX: Jenkins and Foster, 1987.

Patrick, Rembert W. *Jefferson Davis and His Cabinet*. Baton Rouge, LA: Louisiana State University Press, 1944.

____. *The Opinions of the Confederate Attorneys General, 1861-1865*. Buffalo, NY: Dennis and Co., 1950.

Perman, Michael. *The Coming of the Civil War*, 3rd ed. Lexington, MA: D.C. Heath and Company, 1993.

Phillips, Ulrich B. *The Life of Robert Toombs*. New York, NY: Macmillan, 1913.

____, ed. *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*. Washington, D.C.: American Historical Association, 1913. Reprint, New York, NY: Da Capo Press, 1970.

Plan of a Provisional Government for the Southern Confederacy. Charleston, SC: Steam-Power Presses of Evans and Cogswell, 1861.

Pollard, Edward A. *Southern History of the War*. 2 vols. New York, NY: Fairfax Press, 1866.

____. *Life of Jefferson Davis*. Philadelphia, PA: National Publishing Co., 1869.

Posner, Richard A. *The Problems of Jurisprudence*. Cambridge, MA: Harvard University Press, 1990.

Potter, David M. *The South and the Sectional Conflict*. Baton Rouge, LA: Louisiana State University Press, 1968.

____. *The South and the Concurrent Majority*. Baton Rouge, LA: Louisiana State

University Press, 1972.

____. *The Impending Crisis, 1848-1861*. New York, NY: Harper and Row, 1976.

Putnam, Sallie. *Richmond during the War: Four Years of Personal Observation*. New York, NY: G.W. Carleton, 1867.

Rable, George C. *The Confederate Republic: A Revolution Against Politics*. Chapel Hill, NC: University of North Carolina Press, 1994.

Ramsdell, Charles W. *Laws and Joint Resolutions of the Last Session of the Confederate Congress (November 7, 1864-March 18, 1865), Together With the Secret Acts of Previous Congresses*. Durham, NC: Duke University Press, 1941.

____. *Behind the Lines in the Southern Confederacy*. Baton Rouge, LA: Louisiana State University Press, 1944.

Raper, Horace W. *William W. Holden: North Carolina's Political Enigma*. Chapel Hill, NC: University of North Carolina Press, 1985.

Reagan, John H. *Memoirs, With Special Reference to Secession and the Civil War*. New York, NY: The Neale Publishing Company, 1906.

Reid, John Phillip. *Constitutional History of the American Revolution: The Authority to Legislate*. Madison, WI: University of Wisconsin Press, 1991.

Richardson, James Daniel, ed. *A Compilation of Messages and Papers of the Confederacy, including Diplomatic Correspondence, 1861-1865*, 2 vols. New York, NY: Chelsea House--R. Hector, 1966.

Riker, William H., *Federalism: Origin, Operation, Significance*. Boston, MA: Little, Brown & Co., 1964.

Ringold, May Spencer. *The Roles of the State Legislatures in the Confederacy*. Athens, GA: University of Georgia Press, 1966.

Robinson, William M., Jr. *Justice in Grey, A History of the Judicial System of the Confederate States of America*. New York, NY: Russell and Russell, 1941; reprint ed., Philadelphia, PA: National Publishing Company, 1968.

Roland, Charles. *The Confederacy*. Chicago, IL: University of Chicago Press, 1960.

Rowland, Dunbar, ed. *Jefferson Davis, Constitutionalist: His Letters, Papers, and Speeches*. 10 vols. Jackson, MI: Mississippi Department of Archives and History, 1923.

Russell, William Howard. *My Diary North and South*. Edited by Eugene H. Berwanger. New York, NY: Knopf, 1991.

Scarborough, William Kauffman, ed. *The Diary of Edmund Ruffin*. 3 vols. Baton Rouge, LA: Louisiana State University Press, 1972-1989.

Scheiber, Harry N. and Malcom M. Feeley, eds. *Power Divided: Essays on the Theory and Practice of Federalism*. Berkeley, CA: Institute of Governmental Studies, 1989.

Schott, Thomas E. *Alexander H. Stephens of Georgia: A Biography*. Baton Rouge, LA: Louisiana State University Press, 1988.

Schwab, John Christopher, *Confederate States of America: 1861-1865*. New York, NY: Burt Franklin, 1968.

Schwartz, Bernard. *From Confederation to Nation: The American Constitution, 1837 1877*. Baltimore, MD: Johns Hopkins University Press, 1973.

Sitterson, Joseph Carlyle. *The Secession Movement in North Carolina*. Chapel Hill, NC: University of North Carolina Press, 1939.

Smith, Robert Hardy. *An Address to the Citizens of Alabama on the Constitution and Law of the Confederate States of America, At Temperance Hall, on the 30th of March, 1861*. Mobile, AL: *Mobile Daily Register* Print, 1861.

Spratt, L.W. The Philosophy of Secession; A Southern View. Presented in a Letter addressed to the Hon. Mr. Perkins of Louisiana, in criticism on the Provisional Constitution adopted by the Southern Congress at Montgomery, Alabama. 1861.

Sterling, Ada, ed. *A Belle of the Fifties: Memoirs of Mrs. Clay of Alabama, Covering Social and Political Life in Washington and the South, 1853-1866*. New York, NY: Doubleday, Page, 1904.

Stampp, Kenneth M. *The Imperiled Union: Essays on the Background of the Civil War*. New York, NY: Oxford University Press, 1980.

Stephens, Alexander H. *A Constitutional View of the War Between the States*. 2 vols. Philadelphia, PA: National Publishing Company, 1868.

____. *Recollections of Alexander H. Stephens*. 1910. Reprint, New York, NY: Da Capo, 1971.

Storing, Herbert J. ed. *The Anti-Federalist: Writings By the Opponents of the Constitution*. Chicago, IL: The University of Chicago Press, 1985.

Story, Joseph. *Commentaries on the Constitution*. Cambridge, MA, 1833.

Strode, Hudson, ed. *Jefferson Davis: Private Letters, 1823-1889*. New York, NY: Harcourt, Brace and World, 1966.

Sydnor, Charles S. *The Development of Southern Sectionalism, 1819-1848*. Baton Rouge, LA: Louisiana State University Press, 1948.

Tatum, Georgia L. *Disloyalty in the Confederacy*. Chapel Hill, NC: University of North Carolina Press, 1934.

Thomas, Emory M. *The Confederacy as a Revolutionary Experience*. Englewood Cliffs, NJ: Prentice-Hall, 1971.

____. *The Confederate Nation: 1861-1865*. New York, NY: Harper Torchbooks, 1979.

____. *The Confederate State of Richmond.* Austin, TX: University of Texas Press, 1971.

Thornton, J. Mills, III. *Politics and Power in a Slave Society: Alabama, 1800-1860*. Baton Rouge, LA: Louisiana State University Press, 1978.

Tolbert, Noble J., ed. *The Papers of John Willis Ellis*. 2 vols. Raleigh, NC: State Department of Archives and History, 1964.

Tucker, Glenn. *Zeb Vance: Champion of Personal Freedom*. Indianapolis, IN: Bobbs-Merrill, 1965.

Vanderbilt, Arthur T. The *Doctrine of the Separation of Powers and Its Present-Day Significance*. Lincoln, NE: University of Nebraska Press, 1963.

Vandiver, Frank E. *Jefferson Davis and the Confederate State; an Inaugural Lecture at the University of Oxford*. Oxford, NY: Clarendon Press, 1964.

____. *Their Tattered Flags: The Epic of the Confederacy*. New York, NY: Harper's Magazine Press, 1970.

Vile, M.J.C. *Constitutionalism and the Separation of Powers*, 2nd edition. Indianapolis, IN: Liberty Fund, Inc., 1998.

Wallenstein, Peter. *From Slave South to New South: Public Policy in Nineteenth-Century Georgia*. Chapel Hill, NC: University of North Carolina Press, 1987.

Walther, Eric. *The Fire-Eaters*. Baton Rouge, LA: Louisiana State University Press, 19.

Warner, Ezra J. and W. Buck Yearns. *Biographical Register of the Confederate Congress*.

Baton Rouge, LA: Louisiana State University Press, 1975.

White, Edward G. *The American Judicial Tradition*. New York, NY: Oxford University Press, 1976.

____. *The Marshall Court and Cultural Change, 1815-1835*. Abridged Edition. New York, NY: Oxford University Press, 1991.

Weidner, Edward W. "Decision-Making in a Federal System." In Elazar, *Politics of American Federalism*. Lexington, MA: D.C. Heath and Company, 1969.

Wiley, Bell I., ed. *Letters of Warren Akin, Confederate Congressman*. Athens, GA: University of Georgia Press, 1959.

Woodward, C. Vann, ed. *Mary Chestnut's Civil War*. New Haven, CN: Yale University Press, 1981.

Wooster, Ralph. *The People in Power: Courthouse and Statehouse in the Lower South, 1850-1860*. Knoxville, TN: University of Tennessee Press, 1969.

____. *Politicians, Planters, and Plain Folk: Courthouse and Statehouse in the Upper South, 1850-1860*. Knoxville, TN: University of Tennessee Press, 1975.

____. *The Secession Conventions of the South*. Princeton, NJ: Princeton University Press, 1962.

Wyatt-Brown, Bertram. *Southern Honor: Ethics and Behavior in the Old South*. New York, NY: Oxford University Press, 1982.

Yates, Richard S. *The Confederacy and Zeb Vance*. Tuscaloosa, AL: Confederate Publishing Company, 1958.

Yearns, Wilfred Buck. *The Confederate Congress*. Athens, GA: University of Georgia Press, 1960.

____, ed. *The Confederate Governors*. Athens, GA: University of Georgia Press, 1985.

Yearns, W. Buck and John G. Barrett. *North Carolina Civil War Documentary*. Chapel Hill, NC: University of North Carolina Press, 1980.

Younger, Edward, ed. *Inside the Confederate Government: The Diary of Robert Garlick Hill Kean*. New York, NY: Oxford University Press, 1957.

Zainaldin, Jamil. *Law in Antebellum Society: Legal Change and Economic Expansion*. New York, NY: Alfred A. Knopf, Inc., 1983.

ARTICLES

Amar, Akhil Reed. "Of Sovereignty and Federalism." *Yale Law Journal* 96, no. 7 (June 1987):1425-1520.

Beard, Charles A. "The Constitution and States' Rights." *Virginia Quarterly Review* 11 (1935): 481-495.

Bell, Spurgeon, E. "Evolution of the Supreme Court." Texas Bar Journal, vol. 45, no. 5 (May 1982):594-598.

Bensel, Richard. "Southern Leviathan: The Development of Central State Authority in the Confederate States of America." in Karen Orren and Stephen Skowronek, eds., *Studies in American Political Development*, Vol. 2. New Haven, CN: Yale University Press, 1987, 68-136.

Bestor, Arthur. "State Sovereignty and Slavery: A Reinterpretation of Pro-Slavery Constitutional Doctrine, 1846-1860." *Journal of the Illinois State Historical Society*, vol. 54 (1961): 117-180.

____. "The American Civil War As a Constitutional Crisis." *American Historical Review* 69 (January 1964): 327-352.

Brummer, Sidney D. "The Judicial Interpretation of the Confederate Constitution." In *Studies in Southern History and Politics*. Port Washington: Kennikat Press, Inc., 1914.

Channing, Steven A. "Slavery and Confederate Nationalism." In Walter J. Fraser, Jr., and Winifred B. Moore, Jr., eds., *From the Old South to the New: Essays on the Transitional South*. Westport, CN: Greenwood Press, 1981, 219-226.

Cole, Arthur C. "The South and the Right of Secession in the Early Fifties." *Mississippi Valley Historical Review* 1 (1914): 376-399.

Curry, J.L.M. "The Struggle of the Confederacy: a Review," *Publications of the Southern History Association*, volume 5, 1901: 504-511.

Diamond, Martin. "The Ends of Federalism: The Federal Polity." *Publius* 3, no. 2 (Fall 1973):129-152.

____. "What the Framers Meant by Federalism." In Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System*. Chicago: Rand McNally & Company, 1961, 1963.

Dyson, B. Patricia. "Contract Stability in Wartime: The Example of the Confederacy."

American Journal of Legal History 19 (1975): 216-231.

Ericson, David F. "The Nullification Crisis, American Republicanism, and the Force Bill Debate." *The Journal of Southern History*, vol. 61, No. 2 (May, 1995):249-270.

Escott, Paul D. "The Failure of Confederate Nationalism: The Old South's Class System in the Crucible of War." In Harry P. Owens and James J. Cooke, eds., *The Old South in the Crucible of War*. Jackson, MS: University Press of Mississippi, 1983, 15-28.

Finkelman, Paul. "States' Rights North and South in Antebellum America." In Hall and Ely, *An Uncertain Tradition: Constitutionalism and the History of the South.* Athens, GA: University of Georgia Press, 1989.

Fitts, Albert N. "The Confederate Convention: The Constitutional Debate." *Alabama Review* 2 (1949):189-210.

____. "The Confederate Convention: The Provisional Constitution." *Alabama Review* 2 (1949): 83-101.

George, Charles E. "The Supreme Court of the Confederate States of America." *6 Virginia Law Register, N.S.* (December, 1920):592-599.

Grodzins, Morton. "The Federal System." In *Goals for Americans: The Report of the President's Commission on National Goals*. Englewood Cliffs, NJ: Prentice-Hall, 1965.

____. "The Sharing of Functions." In *The Politics of Federalism*, edited by Daniel J. Elazar. Lexington, MA:DC Heath and Company, 1969.

Hall, Kermit. "West H. Humphreys and the Crisis of the Union." *Tennessee Historical Quarterly* 34 (1975):48-69.

Hamilton, J.G. DeRoulhac. "The State Courts and the Confederate Constitution." *The Journal of Southern History* 4 (November 1938):425-448.

____. "The North Carolina Courts and the Confederacy." *North Carolina Historical Review*, vol. 4, No. 4 (October 1927):366-403.

Hardaway, Roger D. "The Confederate Constitution: A Legal and Historical Examination." *The Alabama Historical Quarterly*, Vol. 44, Nos. 1 & 2 (Spring & Summer 1982):18-31.

Hull, A.L. "The Making of the Confederate Constitution." *Southern Historical Society Papers* 28 (1900): 291- .

Huitt, Ralph K. “Congress: Retrospect and Prospect.” *The Journal of Politics*, vol. 38, Issue 3, (August 1976): 209-227.

Humphrey, David C. “A ‘Very Muddy and Conflicting’ View: The Civil War as Seen from Austin, Texas,” *Southwestern Historical Quarterly*, vol. 94, No. 3 (January 1991):369-414.

Jaffa, Harry V. “’Partly Federal, Partly National’: On the Political Theory of the Civil War.” In *A Nation of States* edited by Robert A. Goldwin, 2nd ed. (1973): 109-137.

Killpatrick, James Jason. “The Case for States’ Rights.” In Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System*, 3rd printing, (Chicago, IL: Rand McNally & Company, 1965.

Leslie, William T. “The Confederate Constitution.” *Michigan Quarterly Review* 2 (Summer 1963):153-165.

Luraghi, Raimondo. “The Civil War and the Modernization of American Society,” *Civil War History* 18 (September 1972):230-250.

Nieman, Donald. “Republicanism, The Confederate Constitution, and the American Constitutional Tradition,” in Kermit L. Hall and James W. Ely, Jr., eds. *An Uncertain Tradition: Constitutionalism and the History of the South.* Athens, GA: University of Georgia Press, 1989, 201-224.

Paludan, Phillip S. “The American Civil War Considered as a Crisis in Law and Order.” A*merican Historical Review* (1972):1013-1034.

Pargellis, Stanley. “The Theory of Balanced Government.” In Conyers Read, ed., *The Constitution Reconsidered*. New York, NY: Columbia University Press, 1938, 37-49.

Rhett, R. Barnwell. “The Confederate Constitution.” *DeBow’s Review*, 2d ser. 7 (November 1869): 930.

Riker, William H. “Sidney George Fisher and the Separation of Powers During the Civil War.” *Journal of the History of Ideas*, vol. 15, Issue 3 (June, 1954):397-412.

Robinson, William M., Jr. “Legal System of the Confederate States.” Baton Rouge, LA: Southern Historical Association, 1936.

____. “A New Deal in Constitutions.” *The Journal of Southern History, vol.* 4 (November 1938).

Scarboro, David D. "North Carolina and the Confederacy: The Weakness of States' Rights during the Civil War." *North Carolina Historical Review*, vol. 56 (April 1979):133-149.

Scheiber, Harry N. "American Federalism and the Diffusion of Power." *University of Toledo Law Review* 9 (1978):619-680.

____. "Federalism and Legal Process: Historical and Contemporary Analysis of the American System." *Law and Society Review* 10 (1980):663-672.

____. "Dual Federalism." In Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States*. New York, NY: Oxford University Press, 1992.

Schiller, Reuel E. "Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court." *Virginia Law Review* 78 (August 1992): 1207-1251.

Smith, David P. "Conscription and Conflict on the Texas Frontier." *Civil War History* 36 (1990): 250-261.

Stampp, Kenneth. "The Concept of Perpetual Union." *Journal of American History* 65 (June 1978): 5-33.

Van Zant, Jennifer. "Confederate Conscription and the North Carolina Supreme Court." *North Carolina Historical Review*, 72 (January 1995): 54-75.

White, Edward L. "The Constitution of the Confederate States of America: Innovation or Duplication?" *The Southern Historian*, Vol. 12 (1991):5-28.

Yates, Richard E. "Zebulon B. Vance as a War Governor of North Carolina, 1862-1865." *The Journal of Southern History* 3 (1937): 50-63.

Yearns, Wilfred B. "North Carolina in the Confederate Congress." *North Carolina Historical Review* 29 (July 1952): 359-378.

"The Supreme Court of North Carolina." *The Green Bag*. Boston: Boston Book Co., 1891.