

THROUGH THE LOOKING-GLASS:
THE CONFEDERATE CONSTITUTION IN CONGRESS,
1861–1865

*David P. Currie**

I.	THE CONSTITUTION.....	1266
II.	THE WAR.....	1271
III.	THE ARMY	1273
IV.	THE DRAFT	1277
V.	ARMING THE SLAVES	1295
VI.	PROCUREMENT	1306
VII.	INDIVIDUAL RIGHTS	1316
	A. <i>The Right to Travel</i>	1316
	B. <i>Church and State</i>	1317
	C. <i>Freedom of Expression</i>	1321
	D. <i>Habeas Corpus</i>	1326
	E. <i>Military Justice and Martial Law</i>	1333
VIII.	SEPARATION OF POWERS AND THE VETO.....	1344
IX.	MONEY	1358
X.	STAMPS	1365
XI.	THE MISSING SUPREME COURT	1366
XII.	MOPPING UP	1377
	A. <i>Claims</i>	1377
	B. <i>Glancing Toward Parliament</i>	1380
	C. <i>Snippets</i>	1384
	D. <i>Symbols</i>	1393
	E. <i>The End</i>	1396

* Edward H. Levi Distinguished Service Professor of Law, The University of Chicago. This Article is based upon the McCorkle Lecture delivered October 21, 2002, at the University of Virginia School of Law, to which I am deeply grateful. Many thanks also to the Southern History Collection at the University of North Carolina at Chapel Hill and the Center for American History of the University of Texas at Austin, where I was privileged to undertake a modicum of archival research; to Julius N. Richardson and Ryan M. Sandrock for seminar papers that stimulated my thinking and (with Geoffrey R. Stone and numerous other colleagues) for informed comments on this Article; to Emily E. Kadens for expert assistance in tracking down the often elusive materials on which this Article is based; to Lovetta Holmes for a thousand cheerful and efficient contributions of a secretarial nature; and to Greg Nimmo, the indefatigable Book Page of the D'Angelo Law Library, for keeping me supplied with the exorbitant number of ponderous and dusty books that this study required.

SOUTH Carolina, as always, led the way.¹ No sooner was it known that the “Black Republican” Abraham Lincoln would be the next President of the United States than an elected convention unanimously enacted a secession ordinance purporting to withdraw the Palmetto State from the Union.² The Gulf states and Georgia quickly followed suit.³ Six of them met in Montgomery in February 1861 to establish “a government of [their] own,” the Confederate States of America—a looking-glass variant of the United States without the North and without Northern ideas.⁴

The first thing the delegates in Montgomery did was to adopt a Provisional Constitution to provide a temporary framework pending the establishment of a permanent government.⁵ Pursuant to the

¹“South Carolina had occupied an advanced position in the state-sovereignty concept of thinking since the nullification controversy of 1832.” Ralph A. Wooster, *The Secession Conventions of the South* 11 (1962). For constitutional aspects of the road from nullification to secession, see David P. Currie, *The Constitution in Congress, 1829–1845: Democrats and Whigs* 110–41 (forthcoming 2005) [hereinafter Currie, *Democrats and Whigs*]; David P. Currie, *The Constitution in Congress, 1845–1861: Descent into the Maelstrom, Prologue and chs. 7–10* (forthcoming 2005) [hereinafter Currie, *Descent into the Maelstrom*].

²Wooster, *supra* note 1, at 13–22.

³*Id.* at 26–135.

⁴“Now that secession is a fact,” an unidentified delegate was reported as saying, “all we have got to do is to go on and form a government of our own.” William C. Davis, “A Government of Our Own”: *The Making of the Confederacy* 24 (1994) (quoting the unpublished memoirs of William Culver, a Vermont photographer who was in Montgomery at the time of the Convention).

⁵Provisional Conf. Const. of Feb. 1861, *reprinted in* *The Statutes at Large of the Provisional Government of the Confederate States of America* 1, 1–8 (J. Matthews ed., Williams, Hein, & Co. 1988) (1864) [hereinafter *Statutes at Large*]. Some delegates, it is said, objected to the establishment of a provisional government, arguing that the Convention’s sole charge was to propose a permanent constitution and go home, as the Philadelphia Convention had done in 1787. Unlike their 1787 counterparts, however, the confederating states had no preexisting government to rely on in the interim, and their agents adopted what one commentator termed a “boldfaced interpretation” of their instructions to fill the void. See Wilfred B. Years, *The Confederate Congress* 22–24 (1960). That this interpretation was so “boldfaced,” however, may be doubted. South Carolina in urging other states to attend a convention had said one of its tasks should be to establish a provisional government, Alabama’s formal invitation was along the same lines, and state instructions to the delegates spoke of provisional as well as permanent institutions. See 1 *Journal of the Congress of the Confederate States of America, 1861–1865* [hereinafter *Journal of the Confederate Congress*], *reprinted in* S. Doc. No. 58-234, at 8–10 (1904); Charles Robert Lee, Jr., *The Confederate Constitutions* 16, 55 (1963); Wooster, *supra* note 1, at 23. Occasional

2004]

Through the Looking-Glass

1259

provisions of that constitution, the Provisional Convention then resolved itself into a Provisional Congress,⁶ chose Jefferson Davis and Alexander H. Stephens as Provisional President and Vice-President,⁷ and (in the afternoons, when it was not legislating) debated and proposed a permanent constitution, which it sent to the states for approval.⁸ Ratification was quick and largely noncontroversial.⁹

Texas had been admitted to the Confederacy in early March.¹⁰ Virginia and other states of the Upper South, which had been willing to give President Lincoln a chance, clambered aboard when he called out the militia to coerce the Confederate states back into the

delegates opposed establishment of a provisional government until additional states had seceded to avoid confronting them with a *fait accompli*; others argued the Convention had authority only to set up an *executive* authority (“Government”?) or that the legislature had to be bicameral (based on the U.S. model?), but the Confederacy needed a government pronto, and all objections were shunted aside. See Lee, *supra*, at 56–57; Robert H. Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America* [hereinafter Smith, *Address to the Citizens of Alabama*], in *Southern Pamphlets on Secession*, November 1860–April 1861, at 195, 196–98 (Jon L. Wakelyn ed., Univ. of North Carolina 1996) (1861).

⁶ 1 Journal of the Confederate Congress, *supra* note 5, *reprinted in* S. Doc. No. 58-234, at 7 (1904).

⁷ *Id.* at 40 (1904). Stephens was sworn in February 11, Davis February 18. *Id.* at 43, 63. Stephens, who had fought hard to prevent Georgia from seceding, was selected to “conciliate the union men, . . . despite the implausibility of selecting as a leader of a revolution a person known to be opposed to it.” Yearns, *supra* note 5, at 32 (quoting Letter from Georgia Delegate Thomas R.R. Cobb to his wife (Feb. 9, 1861), in A.L. Hull, *Correspondence of Thomas Reade Rootes Cobb, 1860–1862*, in 11 *Pub. S. Hist. Ass’n* 147, 168–69 (1907), and in John H. Reagan, *Memoirs, with Special Reference to Secession and the Civil War* 109 (1906)).

⁸ 1 Journal of the Confederate Congress, *supra* note 5, *reprinted in* S. Doc. No. 58-234, at 92, 103 (1904); see Lee, *supra* note 5, at 87. For the permanent Constitution, see *Constitution of the Confederate States of America*, *reprinted in* *Statutes at Large*, *supra* note 5, at 11, 11–23.

⁹ Mississippi, the fifth state to ratify, made the Constitution official on March 29, only eighteen days after the Convention had approved it; Florida, the last of the original states, followed suit on April 22. South Carolina, however, had ratified with the admonition that it meant to seek a number of amendments, including full representation for slaves (rather than the three-fifths rule copied from the U.S. Constitution Article I, § 2) and even rescission of the power to borrow money, except to finance the war. See Lee, *supra* note 5, at 135–37; Yearns, *supra* note 5, at 29–30.

¹⁰ Act of Mar. 2, 1861, ch. 24, *Pub. Laws, Provisional Cong., 1st Sess.*, *reprinted in* *Statutes at Large*, *supra* note 5, at 44, 44. Following U.S. precedent, Texas was admitted on an “equal footing” with the original states. *Id.*

Union.¹¹ Elections were held. The new Congress, together with Davis and Stephens (who had been reelected by the same creaky process that was followed in the United States¹²), took office under the permanent Constitution in February 1862.¹³

Little more than three years later the Confederacy was dead. So were some six-hundred-thousand Americans, Northern and Southern, in one of the greatest man-made catastrophes of all time. The Constitution of the Confederate States died with them. In the meantime, however, it had served (de facto, if not de jure) as fundamental law for the Southern states. Based on the U.S. Constitution, with alterations designed to reflect the Southern point of view, it provides a tailor-made subject of comparative study: a source of alternative interpretation of often identical terms and a trove of changes in phrasing that cast light on the provisions they were meant to replace or define.

From the standpoint of the United States, the entire enterprise was pretty clearly unconstitutional. Apart from suggestive textual evidence (the Articles of Confederation established a “league” of

¹¹ Act of May 7, 1861, ch. 6, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 104, 104 (Virginia); Act of May 17, 1861, chs. 25–26, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 118, 118–19 (North Carolina and Tennessee); Act of May 21, 1861, ch. 30, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 120, 120 (Arkansas); see Letter from James M. Mason to Jefferson Davis (April 21, 1861), *in* 7 *The Papers of Jefferson Davis* 113, 113 (Lynda L. Crist et al. eds., 1992) (“The cannon of fort Sumter, sundered the Union for Virginia.”). Admission of North Carolina and Tennessee was conditioned on their ratification of the permanent Constitution, which followed during the ensuing Congressional recess. Act of May 17, 1861, chs. 25–26, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 118–19. For the interesting cases of Missouri and Kentucky see *infra* note 86.

¹² Compare Conf. Const. of Mar. 1861, art. II, § 1, *reprinted in* Statutes at Large, supra note 5, at 17, 17, with U.S. Const. art. II, § 1 and amend. XII. There was widespread agreement in the Confederate Convention that this procedure was less than optimal, but the delegates could not agree on a better one. See J.L.M. Curry, *Civil History of the Government of the Confederate States* 70–74 (1901); Lee, supra note 5, at 103–04; see also Smith, Address to the Citizens of Alabama, supra note 5, at 205 (“[T]he chief defect of the Constitution of the Confederate States is, in my opinion, the retention of the old mode of electing the President.”).

¹³ The Provisional Constitution specified that it would continue in force “one year from the inauguration of the President, or until a permanent Constitution or Confederation between the said States shall be put in operation, whichever shall first occur.” Provisional Conf. Const. of Feb. 1861, pmb., *reprinted in* Statutes at Large, supra note 5, at 1.

2004]

Through the Looking-Glass

1261

“sovereign[]” states,¹⁴ the Constitution “the supreme Law of the Land”¹⁵), the record of the Philadelphia Convention is well-nigh overwhelming. At James Madison’s urging, the U.S. Constitution provided for ratification by state conventions rather than legislatures in order, he said, that it not (like the Articles) be a mere compact subject to dissolution in case of material breach.¹⁶ If secession was, as Madison suggested, unconstitutional, so was the Confederacy; for Article I, Section 10 flatly forbade any of the United States to enter into “any Treaty, Alliance, or Confederation.”¹⁷

That, however, is another story, and I have told it elsewhere.¹⁸ By the time of secession, most Southerners, including those like Alexander Stephens who argued against it, believed the Confederacy to be constitutional.¹⁹ They claimed for the Confederacy both the revolutionary legitimacy that the original states had claimed when they asserted their right of self-government against Great Britain and the legal legitimacy that the Constitutional Convention had claimed in abandoning the Articles of Confederation.²⁰ My present aim is to examine the Confederate Constitution from the

¹⁴ Articles of Confederation arts. 2, 3, *reprinted in* 1 Stat. 4 (1845).

¹⁵ U.S. Const. art. VI.

¹⁶ 2 The Records of the Federal Convention of 1787, at 88–93 (Max Farrand ed., Yale Univ. Press 1966) (1911).

¹⁷ U.S. Const. art. I, § 10.

¹⁸ See Currie, *Descent into the Maelstrom*, *supra* note 1, at 270–79.

¹⁹ See, e.g., 1 Alexander H. Stephens, *A Constitutional View of the Late War Between the States; Its Causes, Character, Conduct and Results* 20 (Nat’l Publ’g Co. 1868) (suggesting that sovereignty remained with the people of the state). For Stephens’s great speech against secession before the Georgia legislature in November 1860, see Henry Cleveland, *Alexander H. Stephens, in Public and Private with Letters and Speeches Before, During and Since the War* 694 (Nat’l Publ’g Co. 1866). Cleveland’s collection, Stephens later wrote, contained “nearly all [speeches] of importance I ever made.” 2 Stephens, *supra*, at 53.

²⁰ See, e.g., Speech of Louisiana Senator Judah P. Benjamin in the U.S. Senate, *Cong. Globe*, 36th Cong., 2d Sess. 212–13 (1860). President Davis, like many of his compatriots, attempted to have it both ways, invoking the Declaration of Independence while insisting that secession had not been “revolutionary” in either the legal or the social sense. Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy* 32, 32–33 (James D. Richardson ed., Chelsea House-Robert Hector Publishers 1966) (1906); see also Emory M. Thomas, *The Confederate Nation, 1861–1865*, at 62 (1979) (stating that Davis “began by drawing the common parallel between what Southerners had done and what their grandfathers had done in the American Revolution”).

Confederate point of view as one more little-known chapter in the continuing saga of constitutional interpretation in North America.

Materials for this study largely parallel those available in the case of the United States, with one important exception: No Confederate Supreme Court ever sat. There were Confederate district courts, but virtually none of their opinions appear to have survived.²¹ There are a number of reported decisions of state supreme courts, and others have written about them.²² In the present study I shall focus largely on congressional and executive materials as part of my ongoing project on extrajudicial interpretation.²³

Legislative sources include the statutes themselves, both of the Provisional Congress and of the two elected Congresses that sat between February 1862 and March 1865.²⁴ Both the Provisional and

²¹ See Sidney D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, in *Studies in Southern History and Politics* 107, 131 n.1 (1914) (internal citation omitted):

Almost all that we apparently have . . . are brief, scattered newspaper accounts. The recently acquired records in the Congressional Library are mere dockets. On the basis of newspapers, Schwab narrates that Judge Magrath in the Confederate district court for South Carolina upheld the constitutionality of the sequestration and conscription acts; also that he decided that Congress could not tax money invested in state bonds.

See also William M. Robinson, Jr., *Justice in Grey: A History of the Judicial System of the Confederate States of America 169–70* (1941) (noting that with one exception, “the federal cases in ante-bellum South were not reported” and “the decisions of the Confederate State district courts were published only in newspapers, save for the occasional cases in pamphlet form”).

²² See, e.g., Brummer, *supra* note 21, at 107–27; J.G. de Roulhac Hamilton, *The State Courts and the Confederate Constitution*, 4 *J. S. Hist.* 425 (1938); see also Robinson, *supra* note 21, at 70–121 (describing the structure and business of the state supreme courts).

²³ For earlier installments in this series see David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (1997) [hereinafter Currie, *The Federalist Period*]; David P. Currie, *The Constitution in Congress, 1801–1829: The Jeffersonians* (2001) [hereinafter Currie, *The Jeffersonians*]; Currie, *Democrats and Whigs*, *supra* note 1; Currie, *Descent into the Maelstrom*, *supra* note 1.

²⁴ Most of the statutes were printed by Congress at the end of each Session under the title *Public Acts of the Confederate States of America* (1862–64). They are reproduced in the latter half of the 1988 edition of the *Statutes at Large of the Provisional Government of the Confederate States of America*, *supra* note 5, at 27. The statutes of the last Congressional Session were not published until 1941, for in the disorderly evacuation of Richmond at the end of the war they disappeared. They are collected in *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 3 (Charles W. Ramsdell ed., 1941) [hereinafter *Laws of the Last Session*]. For

permanent Congresses published journals containing motions, votes, and sometimes the text of bills and committee reports.²⁵ The debates were not officially reported; the Provisional Congress operated largely behind closed doors,²⁶ and the permanent Congress never managed to hire official reporters.²⁷ The Richmond newspapers, however, printed partial accounts of legislative debates beginning in early 1862, as their northern counterparts had done since 1789.²⁸ A veterans' organization called the Southern Historical Society later collected and published them over a difficult thirty-six-year period,²⁹ and they provide much of the raw material for this study.

Presidential messages were another major repository of constitutional thinking in the Confederate States, as they have been in the

the remarkable story of their recovery and publication (with a single exception) see the editor's Introduction, *id.* at ix–xv.

²⁵ See *supra* note 5.

²⁶ For a defense of the closed-door policy of the Constitutional Convention, see Smith, Address to the Citizens of Alabama, *supra* note 5, at 198–99.

²⁷ A House committee in late 1864 reported that it had proved “extremely difficult to procure reporters at what would be regarded as a reasonable salary,” assured the House it had “every confidence that full and *verbatim* reports of its proceedings can be obtained through the Bureau of Public Printing,” and closed with the argument that publication of the debates “would further the interests of the Government, and lead to strengthen the harmony between it and the people.” House Proceedings (Nov. 19, 1864) (report of Rep. Perkins), *reprinted in* 51 Southern Historical Society Papers: Proceedings of the Second Confederate Congress, First Session, Second Session in Part 328, 328–29 (Frank E. Vandiver ed., Broadfoot Publ'g Co. Morningside Bookshop 1992) (1958). This report was tabled and never heard from again. *Id.* For a brief summary of efforts in this direction see Yearns, *supra* note 5, at 33–34.

²⁸ See Currie, The Federalist Period, *supra* note 23, at 10–11 & n.31.

²⁹ 44–52 Southern Historical Society Papers (1923–59). (The war diary of my mother's great-uncle appears in earlier volumes of the same series. Diary of Robert E. Park, Macon, Georgia, late Captain Twelfth Alabama Regiment, Confederate States Army, 1 Southern Historical Society Papers 370, 430 (Broadfoot Publ'g Co. Morningside Bookshop 1990) (1876); 2 *Id.* at 25, 78, 172, 232, 306 (Broadfoot Publ'g Co. Morningside Bookshop 1990) (1876); 3 *Id.* at 43, 55, 123, 183, 244 (Broadfoot Publ'g Co. Morningside Bookshop 1990) (1877); 26 *Id.* at 1 (R.A. Brock ed., Broadfoot Publ'g Co. Morningside Bookshop 1991) (1898).) We have been warned, however, against taking this “splendid collection” as definitive. The Papers draw essentially from the Richmond *Examiner*; other periodicals covered the debates, too, and often reported information not found in that newspaper. Ezra J. Warner & W. Buck Yearns, Biographical Register of the Confederate Congress 307–08 (1975). The last-cited publication, a priceless store of information about individual members of Congress, is unless otherwise indicated the source of biographical statements in the present study.

United States. James D. Richardson, who published the existing U.S. messages around 1900, went on to collect those of the Confederacy, and the U.S. Congress published them in 1906.³⁰ As in the United States, opinions of the Attorneys General are another critical source. There is a whole book of them, many of which deal with constitutional questions.³¹ They acquired special significance in the Confederate States because they served to some degree as a substitute for decisions of the missing Supreme Court.³² A voluminous compendium of official records of the Union and Confederate armies and navies contains a wealth of military orders, correspondence, and so on, regarding such matters as the raising and supporting of troops and the operation of martial law and is thus another central source of constitutional information about the Confederate States.³³

In addition we have the usual letters, speeches, and memoirs of principal actors like Jefferson Davis, Alexander Stephens, and Robert Toombs,³⁴ as well as the usual plethora of secondary

³⁰ See 1 & 2 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20.

³¹ *Opinions of the Confederate Attorneys General, 1861–1865* (Rembert W. Patrick ed., 1950).

³² See Rembert W. Patrick, *Jefferson Davis and His Cabinet* 308 (1944) (“In the absence of a court of last resort, the Attorneys General of the Confederacy on occasion passed on the constitutionality of laws, and their decisions were accepted as final by the administration . . .”); see also Letter from President Davis to Secretary of War George W. Randolph (Aug. 9, 1862), in 5 *Jefferson Davis, Constitutionalist: His Letters, Papers and Speeches* 316, 316–17 (Dunbar Rowland ed., 1923) [hereinafter *Jefferson Davis, Constitutionalist*] (urging Randolph as a matter of “[c]omity between the different Depts.” to accept an Attorney General’s opinion with which he disagreed). For the same reason, it has been said, “the decisions of the highest tribunals of the several states on constitutional questions had an importance in the South which they could not have had in the North.” Brummer, supra note 21, at 108–09 (summarizing the cases). State authorities, on the other hand, were known to ignore opinions of the Attorneys General, which obviously did not bind them. See Patrick, supra, at 315 n.48.

³³ *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* vols. 1–129 (Gov’t Printing Office 1880–1900) [hereinafter *Official Army Records*]; *Official Records of the Union and Confederate Navies in the War of the Rebellion* vols. 1–31 (Gov’t Printing Office 1894–1922) [hereinafter *Official Navy Records*]. Frank L. Owsley’s revealing book *State Rights in the Confederacy* (1925), for example, is based in substantial part on these official records.

³⁴ Memoirs include 1 & 2 *Jefferson Davis, The Rise and Fall of the Confederate Government* (D. Appleton and Co. 1958) (1881); Henry S. Foote, *Casket of Reminiscences* (1874) [hereinafter *Foote, Casket of Reminiscences*]; Henry S. Foote, *War*

2004]

Through the Looking-Glass

1265

sources.³⁵ In sum, while there are unfortunate and frustrating gaps in the record, there is no dearth of material on which to base a study of the Confederate Constitution.

of the Rebellion: or, Scylla and Charybdis (1866) [hereinafter Foote, *War of the Rebellion*]; Reagan, *supra* note 7; 1 & 2 Stephens, *supra* note 19. These recollections are uniformly disappointing. Davis, for example, devoted his energies to vindication of the Southern cause and condemnation of Northern barbarity during the war; Stephens and Foote set out largely to defend their own arguably equivocal conduct. None tells us anything of importance about the operations of the Confederate Government.

More revealing are the collections of letters and speeches. See, e.g., 1–10 Jefferson Davis, *Constitutionalist*, *supra* note 32; 1–11 *The Papers of Jefferson Davis* (1974–2003); see also Cleveland, *supra* note 19; 2 *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb* (Ulrich B. Phillips ed., 1970). Judah Benjamin, the talented Louisiana lawyer and former U.S. Senator who served the Confederacy as Attorney General, Secretary of War, and Secretary of State and became President Davis's most trusted adviser, unfortunately burned most of his papers. See Eli N. Evans, *Judah P. Benjamin: The Jewish Confederate* xii (1988). Of the two collections of President Davis's papers cited in this note, the later one (still unfinished at the time of this writing) includes references to many more documents as well as valuable annotations such as we have come to expect from modern scholarship, but it has the disadvantage of reducing to brief notes a number of the communications most important for the present study, such as Davis's extended exchange with Georgia Governor Joseph E. Brown over the constitutionality of conscription—which fortunately is available in other printed sources. See Letter from Joseph E. Brown to Jefferson Davis (Apr. 22, 1862), *in* 8 *The Papers of Jefferson Davis* 150, 150–51 (Lynda Lasswell Cristal et al. eds., 1995); Letter from Joseph E. Brown to Jefferson Davis (May 8, 1862), *in* 8 *The Papers of Jefferson Davis*, *supra*, at 167, 167; Letter from Jefferson Davis to Joseph E. Brown (May 29, 1862), *in* 8 *The Papers of Jefferson Davis*, *supra*, at 201, 201; Letter from Joseph E. Brown to Jefferson Davis (June 21, 1862), *in* 8 *The Papers of Jefferson Davis*, *supra*, at 262, 262–63; Letter from Jefferson Davis to Joseph E. Brown (July 10, 1862), *in* 8 *The Papers of Jefferson Davis*, *supra*, at 284, 284–85; Letter to Jefferson Davis from Joseph E. Brown (Oct. 18, 1862), *in* 8 *The Papers of Jefferson Davis*, *supra*, at 451. This correspondence is discussed in notes 100–35 and accompanying text.

³⁵ In addition to studies of particular topics and individuals cited throughout this Article, I have found especially helpful Patrick, *supra* note 32; Robinson, *supra* note 21; Thomas, *supra* note 20; and Yearns, *supra* note 5. E. Merton Coulter, *The Confederate States of America, 1861–1865* (1950) is a useful source of background information.

Biographies of leading Confederate statesmen abound. They are not all of equal utility. The relevant portions of Hudson Strode's three-volume biography of Davis, for example, are mostly about battles. Hudson Strode, *Jefferson Davis, Confederate President* (1959); Hudson Strode, *Jefferson Davis, Tragic Hero* (1964). The focus of Professor Evans's recent study of Judah Benjamin, Evans, *supra* note 34, is largely ethnic and personal; the reader will find more about Benjamin's many contributions to the Southern cause in the more traditional Robert D. Meade, *Judah P. Benjamin, Confederate Statesman* (1943), and in Patrick, *supra* note 32, at 155–202. There are thick modern biographies of both Davis and Stephens, such as William J. Cooper, Jr.,

My plan is to begin with a description of the Constitution itself. There follows a detailed examination of issues directly pertaining to the Civil War, including the raising and support of armies, with particular emphasis on a remarkable proposal near the end of the war to arm and free slaves. We then proceed to a survey of questions of individual rights, focusing among other things, on military justice, the suspension of habeas corpus, and the imposition of martial law. Next comes an investigation of separation of powers questions, seen largely through the lens of President Davis's vigorous use of the veto power. Financial and judicial matters then occupy our attention as we consider, inter alia, the strange case of the missing Supreme Court. A collection of odds and ends completes our constitutional portrait, and we close with a trenchant opinion of the Attorney General on the dissolution of the Confederacy itself.

I. THE CONSTITUTION

When I first took a gander at the Confederate Constitution some twenty years ago, I could hardly believe my eyes: In most respects it appeared to be a carbon copy of the Constitution of the United States. I thought it passing strange that, driven to the extremity of breaking up the Union, the Southern states would elect to embrace the very system they had so eagerly left behind. I was tempted to conclude that Southern statesmen had no objection to a strong central government after all; they only wanted to run it themselves.

Those who have written about the Confederate Constitution assure us that this is not so.³⁶ As President Davis said in his first Inau-

Jefferson Davis, American (2000) and Thomas E. Schott, *Alexander H. Stephens of Georgia* (1988).

³⁶ See Curry, *supra* note 12, at 28, 50, 64; Lee, *supra* note 5, at 62, 149; see also Marshall L. DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* 121 (1991). Because there is no record of the secret debates that preceded adoption of the Provisional and permanent Constitutions, Lee's study is largely a summary of the Convention Journal, and DeRosa's study is a paraphrase of the provisions themselves. Lee adds useful references to the few tantalizing informal scraps of extramural evidence from memoirs, letters, and speeches by members of the Convention, such as Curry, *supra* note 12; Hull, *supra* note 7; Smith, *Address to the Citizens of Alabama*, *supra* note 5; and Stephens, *supra* note 19. Neither Lee nor DeRosa purports to discuss the interpretation of the Provisional or permanent Constitutions in any detail.

2004]

Through the Looking-Glass

1267

gural Address, the South objected not to the U.S. Constitution but to the way its provisions had been perverted, as they saw it, by Northern interpretation.³⁷ The aim of the Confederate Convention, Davis explained, was to adopt the U.S. Constitution as the South had always understood it—to return to the original intentions of its Framers.³⁸

This goal was accomplished in part by explicit textual alterations made mostly at retail, in response to familiar controversies that had arisen in the United States: The Confederate Congress was expressly denied authority to impose protective tariffs, to grant bounties for the encouragement of industry, to build roads or canals for the promotion of commerce, or to interfere with slavery either in the territories or (a fortiori) in the states.³⁹

³⁷ See Inaugural Address of the President of the Provisional Government, *supra* note 20, at 35–36; see also Letter from Alexander Stephens to Alexander J. Marshall (Nov. 4, 1864), *in* Cleveland, *supra* note 19, at 796, 799 (“So far as our troubles in their origin can be traced to the constitution, I think, without doubt, they are attributed to the *consolidating tendency* with which it was *administered*.”).

³⁸ The Confederate Constitution, said Davis, differed from the work of the Framers in Philadelphia only “in so far as it is explanatory of their well-known intent.” Inaugural Address of the President of the Provisional Government, *supra* note 20, at 35; see also Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* 142 (1995) (stating that “Antebellum southerners had rarely expressed anything but reverence for the Constitution of 1787, properly construed”); 2 Stephens, *supra* note 19, at 339 (insisting that a “leading object” of the Confederate Convention “was to sustain, uphold, and perpetuate the fundamental principles of the Constitution of the United States”).

³⁹ Conf. Const. of Mar. 1861, art. I, § 8, cl. 1, 3; art. IV, § 3, cl. 3; art I, § 9, cl. 4, *reprinted in* Statutes at Large, *supra* note 5, at 11–23. Along the same lines it was proposed that the new Constitution explicitly recognize the right of secession, but the idea was dropped after others suggested that “its inclusion would discredit the claim that the right had been inherent under the old government.” Yearn, *supra* note 5, at 29; see also Lee, *supra* note 5, at 101–02 (citing the relevant portions of the Journal and arguing that the right to secede was “implied in the specific phraseology of the Preamble,” which in what seems to me a less than conclusive manner declared that the Constitution was the work of “the people of the Confederate States, each State acting in its sovereign and independent character,” Conf. Const. of Mar. 1861, *pmbl.*, *reprinted in* Statutes at Large, *supra* note 5, at 11). The ban on commercial improvements was qualified by the proviso that Congress might appropriate funds

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.

This was all very well from the Confederate point of view, but it had its limitations. Each of the additions I have noted (except the last) clarified the meaning of a central but imprecise provision whose meaning had been the subject of bitter dispute in the United States, wrote the standard Southern interpretation into the Constitutional text, and significantly restricted central government powers that had been claimed (though not always sustained) in the United States. As I have said, however, these provisions operated largely at retail; they dealt with symptoms, not with the underlying disease.

More promising for the states' rights cause in the long run were two more general limitations written into the first clause of Article I, Section 8. First, Congress was given power to tax only in order to raise revenue, not for ulterior purposes. Second, that revenue was to be used only to pay the debts of the Confederacy, to provide for the common defense, and to support the Confederate Government—not, as in the United States, for the arguably broader purpose of promoting the general welfare. The first of these changes generalized from the tariff experience to preclude *all* pretextual uses of the tax power;⁴⁰ the second made clear that (as Madison had argued) the central Government could spend money only when

Conf. Const. of Mar. 1861, art. I, § 8, cl. 3, *reprinted in* Statutes at Large, *supra* note 5, at 14. In furtherance of the same goal, Article I, §10, Clause 3 authorized any state, without Congressional consent, to lay tonnage duties “on seagoing vessels, for the improvement of its rivers and harbors navigated by the said vessels.” *Id.* at 17. For earlier suggestions that this was how such improvements should be financed in the United States, see Currie, *Democrats and Whigs*, *supra* note 1, at 31–58.

While we are on the subject of slavery, the permanent Confederate Constitution guaranteed citizens of each state not only “all the privileges and immunities of citizens” in other states (as the U.S. Constitution had done) but also “the right of transit and sojourn in any State of this Confederacy, with their slaves and other property.” Conf. Const. of Mar. 1861, art. IV, § 2, cl. 1, *reprinted in* Statutes at Large, *supra* note 5, at 20. Thus, although Stephens and others had beaten back efforts in the Constitutional Convention to prohibit the admission of free states to the Confederacy, it appeared that Mr. Lincoln’s worst fears after the *Dred Scott* decision were to be realized in the South: The Constitution forbade states as well as territories to opt entirely for freedom. See Lee, *supra* note 5, at 113–16 (citing the relevant portions of the *Journal*); see also Currie, *Descent into the Maelstrom*, *supra* note 1, at 244–65. But see DeRosa, *supra* note 36, at 70 (taking the language in question to confirm the possibility of free states in the Confederacy, which to a certain degree it does).

⁴⁰ See *Child Labor Tax Case*, 259 U.S. 20 (1922); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (vowing to strike down any law enacted as a “pretext . . . for the accomplishment of objects not intrusted to the government”).

2004]

Through the Looking-Glass

1269

necessary and proper to the execution of its other powers,⁴¹ not (as President Monroe had been seduced into believing) for whatever was good for the country as a whole.⁴²

The Necessary and Proper Clause itself was unaccountably untouched, though it had been a principal source of Southern dissatisfaction with the U.S. Constitution. It was this clause that had enabled “consolidationists” in the United States to conclude, for example, that Congress had authority to build internal improvements and to establish a national bank.⁴³ Chief Justice Marshall’s opinion in *McCulloch v. Maryland* had raised storms of protest in the South less because it upheld the Bank itself (which the Confederate Constitution did not explicitly forbid) than because of its broad interpretation of the Necessary and Proper Clause in the abstract.⁴⁴ It was that clause that had raised fears, however far-fetched, that Congress might one day seek to abolish slavery in the states. The government that can build roads, John Randolph had warned the Senate in 1824, can free the slaves.⁴⁵

More restrictive formulas like “directly” or “immediately” necessary were readily available and had been suggested before,⁴⁶ yet the Framers of the Confederate Constitution ignored them.⁴⁷ Though such terms were scarcely more precise than those of the original Constitution, they indicated a more restrictive interpretation on their face. More important, the very fact of a change in phrasing, in light of the announced philosophy of restoring the supposed original states’ rights understanding of the Constitution,

⁴¹ 2 Annals of Cong. 1947–48 (1791).

⁴² Veto Message (May 4, 1882), in 2 A Compilation of the Messages and Papers of the Presidents 142, 164–73 (James D. Richardson ed., 1900).

⁴³ See, e.g., David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 161–65 (1985) [hereinafter Currie, *The First Hundred Years*].

⁴⁴ See *McCulloch*, 17 U.S. at 411–21; see, e.g., Judge Spencer Roane’s “Hampden” Letters, reprinted in John Marshall’s *Defense of McCulloch v. Maryland* 106, 106 (Gerald Gunther ed., 1969).

⁴⁵ 41 Annals of Cong. 1308 (1824); see also Yearns, *supra* note 5, at 29 (“[T]he expandable ‘necessary and proper’ clause was retained with heroic disregard of the fact that it had been a storehouse of implied powers.”).

⁴⁶ See, e.g., 30 Annals of Cong. 897 (1817) (statement of Virginia Rep. Philip Barbour); Currie, *The Jeffersonians*, *supra* note 23, at 263.

⁴⁷ Indeed, wrote one commentator, the provision “went uncontested during debate.” Yearns, *supra* note 5, at 29.

would have signaled an intention to define the Confederate Congress's incidental powers narrowly and avoided numerous problems that later arose.⁴⁸

Indeed the fact that other provisions were changed and the Necessary and Proper Clause was not strongly suggests that no alteration was intended: When the Convention meant to depart from the U.S. model, it said so. As President Davis said in his first Inaugural Address and repeated elsewhere, when the Framers adopted the terms of the old Constitution it was reasonable to believe they had adopted the precedents construing them as well.⁴⁹

⁴⁸ Similarly, the Confederate Convention failed to reinstate the Articles of Confederation formula reserving to the states all powers not *expressly* delegated to the central government. Compare Provisional Conf. Const. of Feb. 1861 art. 1, § 7, cl. 18, *reprinted in* Statutes at Large, supra note 5, at 4, with Articles of Confederation art. 2, *reprinted in* 1 Stat. 4 (1845). Whether this happened because the delegates knew it was too restrictive or simply overlooked it remains unclear. See Fehrenbacher, supra note 38, at 143 (arguing that “the truly striking feature” of the Confederate Constitution was not how much but how little it did to protect states’ rights). On the conservatism of the Constitutional Convention, see, e.g., Thomas, supra note 20, at 44, 56–57. No one in the Convention seems even to have suggested going back to the Articles themselves. *Id.* at 63.

⁴⁹ “In their exposition of it, and in the judicial construction it has received, we have a light which reveals its true meaning.” Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), supra note 20, at 36. Attorney General Thomas H. Watts confirmed this understanding in an 1863 opinion:

Such clauses of the United States Constitution, as are incorporated, without alteration or change, into the Confederate Constitution, must have been adopted with full knowledge of the established and uniform construction given them in the United States: and such construction thus became a part of our Constitution, and may well guide us in ascertaining the true meaning of its framers.

Appointment During Recess of Senate (May 8, 1863), *reprinted in* Opinions of the Confederate Attorneys General, supra note 31, at 261, 264–65; see also President Davis’s postwar apology, 1 Davis, *The Rise and Fall of the Confederate Government*, supra note 34, at 498 (explaining his understanding of the powers of the U.S. Congress). Similarly, “Confederate judges—even state judges—cited the decisions of John Marshall with surprising frequency.” Fehrenbacher, supra note 38, at 153.

One later observer, without supporting citation, averred that the dangerous Necessary and Proper provision was retained “in the belief that Southern judges would look closely when considering any legislation based on implied powers.” Lee, supra note 5, at 95. Especially in light of the statements just quoted one might be tempted to characterize this perception, if it existed, as Samuel Johnson characterized second marriage—a triumph of hope over experience. Yet President Davis himself, faced with the acid test of what he viewed as a Congressional attempt to create an entity with corporate powers, would take the conservative approach Lee would later say the

2004]

Through the Looking-Glass

1271

There were a few other changes of significance from the United States prototype; we shall have occasion to notice some of them as we proceed. Let us move on to the question of how the Confederate authorities undertook to interpret their new constitution.

II. THE WAR

Within two months after its establishment the Confederacy found itself at war with a powerful adversary that denied its very existence and was determined to wipe it off the map. It is thus not surprising that the common defense was the first priority of both Congress and the President and formed the context of most of the constitutional questions raised, debated, and decided by Confederate authorities.⁵⁰

We begin with the confrontation itself. The North called it the War of the Rebellion; in the South it became known as the War Between the States.⁵¹ This contrast in nomenclature reflected fundamental philosophical differences regarding the nature of the conflict. President Lincoln called out the militia to execute the laws and suppress insurrection;⁵² the Confederate Congress declared war on the United States.⁵³

Framers had anticipated, notwithstanding his earlier and later professions. See notes 405–09 and accompanying text.

⁵⁰ “[A]ll considerations in the Confederacy were secondary to winning the war.” Yearnis, *supra* note 5, at vii; see also Curry, *supra* note 12, at 108 (“The energies of the Confederacy were absorbed in the effort to preserve its life and protect its territory from hostile aggression.”).

⁵¹ See Coulter, *supra* note 35, at 61 (noting that the latter term, popularized by Alexander Stephens in his memoirs, was not widely used until after the war).

⁵² Lincoln’s initial proclamation mentioned only enforcement of the laws. See Proclamation by the President of the United States (Apr. 15, 1861), *reprinted in* 6 A Compilation of the Messages and Papers of the Presidents, *supra* note 42, at 13, 13. The word “insurrection” first appeared in his announcement of a blockade a few days later. See Proclamation by the President of the United States (Apr. 19, 1861), *reprinted in* 6 A Compilation of the Messages and Papers of the Presidents, *supra* note 42, at 14, 14.

⁵³ See Act of May 6, 1861, ch. 3, § 1, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 100, 100 (authorizing the President to employ the armed forces to carry on the war). Congress had earlier authorized the President to use the Army, Navy, and militia to repel invasion, though not (as the Constitution also permitted) to suppress insurrection and execute the laws. Act of Mar. 6, 1861, ch. 26, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 45, 45; see also Conf. Const. of Mar. 1861, art. I, § 8, cl. 15, *reprinted in* Statutes at Large, *supra* note 5, at 14.

Hostilities had started before this declaration of war. While protesting that he sought only peace,⁵⁴ President Davis had ordered the famous attack on Fort Sumter.⁵⁵ Presidential warmaking? A flagrant violation of the Confederate Constitution, which like that of the United States gave Congress, not the President, power to declare (and thus to initiate) war?⁵⁶ The Southern equivalent of the debacle in Vietnam? No. Although the Statutes at Large do not reveal it, the Provisional Congress in February 1861 had secretly directed the President to secure possession of Fort Sumter (and of Fort Pickens in Florida) by negotiation if possible, and, if necessary, by force.⁵⁷

Thus while the Fort Sumter assault may well have been foolish and suicidal, as Tennessee Representative Henry Foote later argued,⁵⁸ while it may have made it pretty questionable for the Confederate Congress to blame the United States, as it did, for starting the war;⁵⁹ and while it may well have constituted treason against the

⁵⁴ Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), *supra* note 20, at 32–33.

⁵⁵ See Jefferson Davis's Message to the Second Session of the Provisional Congress (Apr. 29, 1861), *reprinted in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 63, 72–73. Before the attack the President had gone so far as to plead with the Governor of South Carolina not to permit anyone other than the duly constituted (that is, Confederate) authorities to preempt the choice between war and peace. Letter from Jefferson Davis to Francis W. Pickens (Feb. 22, 1861), *in* 7 *The Papers of Jefferson Davis*, *supra* note 11, at 55, 57. The Governor replied on February 27 that he hoped not to involve the Confederate States in war “by any separate act of ours, unless it *shall be necessary in self-defense or to prevent re-inforcements.*” See 7 *The Papers of Jefferson Davis*, *supra* note 11, at 63.

⁵⁶ Conf. Const. of Mar. 1861, art I, § 8, cl. 11, *reprinted in* *Statutes at Large*, *supra* note 5, at 14.

⁵⁷ Resolution of Feb. 15, 1861, 1st Cong., 1st Sess., *reprinted in* *Laws of the Last Session*, *supra* note 24, at 156, 156.

⁵⁸ See Foote, *War of the Rebellion*, *supra* note 34, at 335–40; see also Robert S. Henry, *The Story of the Confederacy* 19, 33 (1936) (describing the assault as “a political blunder almost incredible” that “solidified the wavering and divided spirit of the North”). It served, however, the important purpose of forcing Virginia and other states of the upper South to secede. See *supra* note 11.

⁵⁹ Just as President Polk may have been wrong in blaming Mexico in 1848. See Currie, *Descent into the Maelstrom*, *supra* note 1, at 92–93. Even before Georgia seceded, indeed, Governor Joseph E. Brown had ordered state troops to occupy Fort Pulaski, which like Fort Sumter had been ceded to the United States under the U.S. Constitution, art. I, § 8, cl. 17, prompting former Governor Herschel Johnson, who had run for Vice-President on Senator Douglas's ticket in 1860, to protest that he could not see “how they expect secession to be peaceable, when they make war

2004]

Through the Looking-Glass

1273

United States,⁶⁰ for which President Davis himself was later indicted and imprisoned;⁶¹ it was in full accord with the Confederate Constitution.⁶²

III. THE ARMY

Unlike many of his associates, Jefferson Davis had foreseen the war from the start.⁶³ With the world so new and all, however, the Confederacy had no army; Congress's first task was to create one. Even before Fort Sumter, therefore, the President was authorized

against the Govt of the U[nited] States, in advance of the act of secession." Schott, *supra* note 35, at 318 (quoting an unpublished letter from Johnson to Stephens dated Jan. 9, 1860). Nor was Georgia alone in taking such action. See Letter from William Porcher Miles to Howell Cobb (Jan. 14, 1861), *in* 2 *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howard Cobb*, *supra* note 34, at 528, 528–29 (discounting the risk of a confrontation at Fort Sumter in light of the fact that "the fortifications along the entire Southern coast" had already been seized by state authorities without provoking a response).

Vice-President Stephens, admitting that the Confederacy had fired the first shot, argued that the North had begun the war by dispatching a "hostile fleet" to reinforce Fort Sumter—which according to Confederate theory no longer belonged to the United States. 2 Stephens, *supra* note 19, at 35, 35–44; see also 1 Davis, *Rise and Fall of the Confederate Government*, *supra* note 34, at 292.

⁶⁰ "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3, cl. 1.

⁶¹ See, e.g., Cooper, *supra* note 35, at 560–67.

⁶² In November 1861 President Davis reported that he had sent Confederate troops into Kentucky, which federal forces had "invaded . . . for the purpose of attacking the Confederate States." Jefferson Davis's Message to the Congress of the Confederate States (Nov. 18, 1861), *reprinted in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 136, 137–38. One is reminded of the extension of the Vietnam conflict into Cambodia, for the Congressional declaration had expressly specified that the Confederacy was not at war with "the States of Maryland, North Carolina, Tennessee, Kentucky, Arkansas, Missouri and Delaware" or with "the territories of Arizona and New Mexico, and the Indian territory south of Kansas." Act of May 6, 1862, ch. 3, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* *Statutes at Large*, *supra* note 5, at 100, 100. Once again, however, records suppressed at the time dispel any suspicions of executive usurpation: Another secret law had authorized the President to defend Kentucky, and there was no doubt that the Congressional war power included the right to fight for one's friends. Act of Aug. 30, 1861, No. 274, Provisional Cong., *in* *Laws of the Last Session*, *supra* note 24, at 159, 159–60.

⁶³ See Jefferson Davis, *A Short History of the Confederate States of America* 40 (New York, Bedford Co. Publishers 1890) (adding that this expectation, coupled with his knowledge of the South's "entire lack of preparation for war," had made him "slower and more reluctant" to embrace secession).

to buy or to manufacture arms and munitions⁶⁴ and to accept both arms and troops from the states.⁶⁵ For the states had not only their traditional militias but also little armies of their own, raised before secession in violation of Article I, Section 10 of the U.S. Constitution⁶⁶ or thereafter, when they deemed themselves independent sovereign states.⁶⁷ The state forces assembled in this manner were to constitute a “Provisional Army”⁶⁸ while the Confederacy went about raising troops of its own.⁶⁹ All these measures were clearly necessary and proper analogues of Congress’s explicit power to raise and support armies, as they would have been in the United States.⁷⁰

The states, however, were reluctant to surrender resources they thought necessary for their own defense. Even when they did provide men or weapons, moreover, they often did their best to keep

⁶⁴ Act of Feb. 20, 1861, ch. 4, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 28, 28.

⁶⁵ Act of Feb. 28, 1861, ch. 22, §§ 2–3, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 43, 43.

⁶⁶ “No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace.” U.S. Const. art. I, § 10, cl. 3; see, e.g., Letter from Robert Toombs to E.B. Pullin et al. (Dec. 13, 1860), *in* 2 *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*, *supra* note 34, at 519, 519 (noting that at the same time it called a convention to *consider* secession the Georgia legislature “also unanimously voted a million of dollars to arm the people of Georgia”). South Carolina had done the same thing in the Nullification Crisis of 1832–1833. See Currie, *Democrats and Whigs*, *supra* note 1, at 110–40.

⁶⁷ The Provisional Constitution conspicuously omitted the limitation on state troops. See Provisional Conf. Const. of Feb. 1861 art. I, § 8, cl. 2, *reprinted in* Statutes at Large, *supra* note 5, at 4. The permanent Constitution reinstated it but by the time it took effect the country was at war, and (like its U.S. model) the prohibition applied only “in time of peace.” Conf. Const. of Mar. 1861, art. I, § 10, cl. 3, *reprinted in* Statutes at Large, *supra* note 5, at 17.

⁶⁸ Act of Feb. 28, 1861, ch. 22, § 4, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 43, 43.

⁶⁹ Congress provided for organization of the regular Army on March 6. Act of Mar. 6, 1861, ch. 29, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 47, 47.

⁷⁰ Conf. Const. of Mar. 1861, art. I, § 8, cl. 12, *reprinted in* Statutes at Large, *supra* note 5, at 14. The U.S. provision is identical. U.S. Const. art. I, § 8, cl. 12. The First U.S. Congress had asked the states to volunteer jails for the keeping of federal prisoners, and President Wilson would request state assistance in drafting soldiers during World War I; no compulsion was involved, and thus no constitutional question was raised. See *Printz v. United States*, 521 U.S. 898, 909–10, 916–17 (1997) (discussing this history).

them within their borders.⁷¹ In not-so-flattering contrast with the Three Musketeers, the motto of the Confederate states might well have been every state for itself. In vain did Secretary of War Judah Benjamin protest that the selfishness of individual states would enable the enemy to pick them off one by one.⁷² The war effort suffered grievously; the entire experience serves as a grim reminder why the central government was given power to raise and support armies.⁷³

Individual states further insisted on the right to appoint officers whenever they raised troops for the common effort. Judah Benjamin, the first Attorney General, said they were wrong: Only if the troops belonged to the militia did the Constitution reserve the ap-

⁷¹ When the arms in question actually belonged to the state, President Davis acknowledged the state's right to keep them at home. See Letter from Joseph E. Brown to Jefferson Davis (June 7, 1861), *in* 7 *The Papers of Jefferson Davis*, supra note 11, at 193, 193; Letter from Jefferson Davis to Joseph E. Brown (June 8, 1861), *in* 7 *The Papers of Jefferson Davis*, supra note 11, at 195, 195 (sustaining Brown's position on arms); Letter from Joseph E. Brown to Jefferson Davis (June 27, 1861), *in* 7 *The Papers of Jefferson Davis*, supra note 11, at 214, 214–15 (demanding the return of weapons already taken out of state in violation of state orders). For a thorough examination of Governor Brown's obstructionist antics throughout the war, see Louise B. Hill, *Joseph E. Brown and the Confederacy* (1939). Hill marvels at the disjunction between Brown's "intense desire for political and economic freedom for the South, and his unrelenting hostility to the means necessary to achieve that freedom." *Id.* at 74.

⁷² Report by J.P. Benjamin, Secretary of War, to the President (Dec. 1861), *in* 1 *Official Army Records No. 4*, supra note 33, at 790, 795; see also *Senate Proceedings* (Oct. 4, 1862) (statement of Sen. Wigfall), *reprinted in* 47 *Southern Historical Society Papers* 46, 51 (Broadfoot Publ'g Co. Morningside Bookshop 1992) (1930). Compare Madison's 1788 defense of the proposed right of the U.S. Congress to authorize the President to call out the militia: If the matter were left to the individual states, they would keep the militia for their own defense, and "the states would fall successively." Debate before the Convention of the Commonwealth of Virginia (June 15, 1788), *in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 410, 424 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*].

⁷³ "[I]f such was to be the course of the States towards the [Government]," the exasperated President was reported as saying in 1862, "the carrying on the war was an impossibility." 1 *Diary of Thomas Bragg* (1861–62) 115 (unpublished transcription in the Southern History Collection, the University of North Carolina at Chapel Hill) (on file with the Virginia Law Review Association). For the whole sorry tale of state obstruction of the effort to raise and support Confederate armies see Owsley, supra note 33, passim. Owsley concludes starkly that state rights killed the Confederacy. *Id.* at vii, 1; accord Burton J. Hendrick, *Statesmen of the Lost Cause* 430, 432 (1939). But see Fehrenbacher, supra note 38, at 160–61 (conceding that resistance to administration policies "had some negative effect on the prosecution of the war" but adding that historians were "no longer disposed to accept" Owsley's more dramatic conclusion).

pointment of officers to the states; if the troops were in the Army, they were Confederate officers and were to be appointed by the President with congressional (later Senate) consent.⁷⁴

The challenge was thus to determine who was a militiaman and who was a soldier. This problem went back to the 1790s and to the War of 1812, as on both occasions the U.S. Congress had vigorously debated the status of “volunteers”⁷⁵—a category undefined, as Benjamin would later observe, by either constitution.⁷⁶ For if the troops in question were in the militia, not only did the states reserve the right to appoint their officers, but the central government could employ them only to execute the laws, suppress insurrections, and repel invasions.⁷⁷ Some U.S. lawmakers had suggested the distinction was whether their service was voluntary or compulsory, others that it was whether or not they served full time.⁷⁸ Benjamin offered a third distinction that was simple and straightforward: If the state turned troops over to the central government of its own free will, they were in the Army; if requisitioned, they were a militia—for the Confederacy had no right to demand anything else from the states.⁷⁹

⁷⁴ Appointment of Commissioned Officers (July 8, 1861), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 17, 18; see Conf. Const. of Mar. 1861, art. I, § 8, cl. 16; art. II, § 2, *reprinted in* Statutes at Large, *supra* note 5, at 15, 18. These provisions, too, (and those of the Provisional Constitution, which Benjamin was construing) were in material respects copied verbatim from the Constitution of the United States.

⁷⁵ See Currie, *The Federalist Period*, *supra* note 23, at 248–50; Currie, *The Jeffersonians*, *supra* note 23, at 167–72.

⁷⁶ Appointment of Commissioned Officers (July 8, 1861), *supra* note 74, at 19.

⁷⁷ U.S. Const. art. I, § 8, cl. 15. The Confederate provisions were identical. Conf. Const. of Mar. 1861, art. I, § 8, cl. 15–16, *reprinted in* Statutes at Large, *supra* note 5, at 15.

⁷⁸ See Currie, *The Federalist Period*, *supra* note 23, at 249.

⁷⁹ Appointment of Commissioned Officers (July 8, 1861), *supra* note 74, at 19; Appointment of Militia Officers (Aug. 20, 1861), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 26, 27–29. Rembert Patrick wrote that Attorney General Watts later reversed Benjamin’s ruling and concluded that “all troops received into the service of the Confederacy were under the direction of the President.” Patrick, *supra* note 32, at 306. As I read Watts’s opinions, however, he ultimately reaffirmed Benjamin’s distinction. Appointment of Officers (July 25, 1862), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 122, 123 (declaring initially that, under the statutes, state law governed the appointment of officers even for troops raised by Congress); State and Confederate Troops (Aug. 14, 1862), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 136, 141–42 (concluding

2004]

Through the Looking-Glass

1277

Under pressure from the states, Congress continued to permit them to regulate the appointment of officers for troops they provided to the Confederate cause without regard to Benjamin's distinction,⁸⁰ but I think he got it right; his sensible dichotomy was a great improvement on the inconclusive U.S. debates of fifty years before.⁸¹

IV. THE DRAFT

Frustrated by state foot-dragging in providing troops for the Confederacy, Congress empowered the President, as it had every right to do, to enroll more and more volunteers without asking the states to raise them.⁸² The results remained unsatisfactory,⁸³ and on March 28, 1862, President Davis asked Congress to authorize con-

that "when such troops are received into the service of the Confederate States, . . . the mode for the appointment of Officers declared in the Constitution must prevail").

⁸⁰ E.g., Act of May 11, 1861, ch. 8, §§ 1, 2, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 106, 106 (authorizing the President to accept "companies, battalions or regiments . . . without the delay of a formal call upon the respective States"). But this grant of authority was subject to an earlier statute providing that the officers of volunteer units "shall be appointed in the manner prescribed by law in the several States to which they shall respectively belong." Act of Mar. 6, 1861, ch. 26, § 5, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 45, 45; see also Alexander Stephens, Speech on the State of the Confederacy, Delivered Before the Georgia Legislature at Milledgeville, Georgia (Mar. 16, 1864), *in* Cleveland, *supra* note 19, at 761, 765 (attacking the constitutionality of an 1864 act extending the draft: "The men are to be raised as conscripts for the regular forces, while their officers are to be appointed as if they were militia.").

⁸¹ In some cases Congress even permitted troops to elect their own officers, as some state laws apparently provided. See, e.g., Act of Apr. 16, 1862, ch. 31, § 1, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 29, 29–30. Not only was this practice loudly criticized on the plausible ground that it was hardly conducive to military discipline, see, for example, Senate Proceedings (Mar. 29, 1862) (statement of Sen. Wigfall), *in* 45 Southern Historical Society Papers 24, 27 (Broadfoot Publ'g Co. Morningside Bookshop 1992) (1925), it was also unclear whether it was embraced by Article I's specification that the appointment of militia officers was "reserv[ed] to the States." See Conf. Const. of Mar. 1861, art. I, § 8, cl. 16, *reprinted in* Statutes at Large, *supra* note 5, at 15.

⁸² Act of May 11, 1861, ch. 8, § 1, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 106, 106.

⁸³ A number of states did everything they could to frustrate these efforts as well, and "[o]n April 15, 1862, Confederate General Order No. 23 revoked all authority to raise independent commands." Owsley, *supra* note 33, at 85; see also *id.* at 77–85; General Order No. 23 (Apr. 15, 1862), *in* 1 Official Army Records No. 4, *supra* note 33, at 1059, 1059.

scription. Its power to do so, he thought, was plain. “The right of the State to demand, and the duty of the citizen to render, military service,” he wrote, “need only to be stated to be admitted.”⁸⁴ Unsurprisingly, not everyone agreed.⁸⁵

Congressional debate began the very next day. Missouri Senator John B. Clark⁸⁶ expressed impatience with the constitutional ques-

⁸⁴ Letter from Jefferson Davis to the Senate and House of Representatives of the Confederate States (Mar. 28, 1862), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 205, 206.

⁸⁵ See Henry, supra note 58, at 125 (calling conscription “a curious, almost ironic, negation of the whole doctrine of state’s rights on which the Confederacy was founded”). For the excruciating details of the controversy, see Albert B. Moore, *Conscription and Conflict in the Confederacy* (1924).

⁸⁶ You did not know Missouri was a member of the Confederacy? There were rival state governments in Missouri and in Kentucky; each state was represented in both the U.S. and the Confederate Congress. That is why there were not eleven but thirteen stars in the Confederate flag. See Act of Aug. 20, 1861, ch. 24, § 2, Pub. Laws, Provisional Cong., 3d Sess., reprinted in *Statutes at Large*, supra note 5, at 184, 184 (admitting Missouri to the Confederate States of America on condition it ratify the permanent Constitution); Act of Nov. 28, 1861, ch. 1, Pub. Laws, Provisional Cong., 5th Sess., reprinted in *Statutes at Large*, supra note 5, at 221, 221 (making Missouri’s admission final); Act of Dec. 10, 1861, ch. 5, Pub. Laws, Provisional Cong., 5th Sess., reprinted in *Statutes at Large*, supra note 5, at 222, 222 (admitting Kentucky); see also Coulter, supra note 35, at 55 (noting that occasionally “the Confederacy did not act as if it recognized the flimsy claims of the make-believe states of Kentucky and Missouri”); James M. McPherson, *Battle Cry of Freedom: The Civil War Era 291–97* (1988); Thomas, supra note 20, at 94–95. With the secessionist legislatures of Kentucky and Missouri proving unable to meet, their Governors appointed Senators to sit in the Confederate Congress, and the Senate seated them—although U.S. practice taught that, because their offices had never been filled, no “vacancy” had occurred during a legislative recess and the Governor accordingly had no right to appoint them. See Conf. Const. of Mar. 1861, art. I, § 3, cl. 2, reprinted in *Statutes at Large*, supra note 5, at 12; Currie, *The Federalist Period*, supra note 23, at 154 n.168 (discussing the case of Kensey Johns). “[T]he whole thing was admitted to be irregular,” Attorney General Bragg noted at the time of Kentucky’s admission, “but it was deemed a necessity.” 1 *Diary of Thomas Bragg*, supra note 73, at 80.

For a brief interval preceding the arrival of the U.S. Army, the Confederate States were proud possessors of one territory as well. Clarifying a silence in the U.S. Constitution, the Confederate charter expressly authorized the acquisition of new territory; resolving an ambiguity that had given rise to no little intersectional shouting, it empowered Congress not only to make “all needful rules and regulations concerning the property of the Confederate States” but also “to legislate and provide governments for the inhabitants” of Confederate territories—provided, of course, that slavery was affirmatively protected. Compare Conf. Const. of Mar. 1861, art. IV, § 3, cl. 2–3, reprinted in *Statutes at Large*, supra note 5, at 21 with U.S. Const. art. IV, § 3. In January 1862, before the permanent Constitution took effect, the Provisional Congress passed a statute organizing the Territory of Arizona, which had purported to secede

tion. He respected state sovereignty, he insisted, as much as anyone. “[I]n times like these,” however, “the sovereignty of the States must be secondary to the sovereignty of the people.”⁸⁷ Congress’s first responsibility was to secure the rights of individuals (presumably by expelling the invader); only then might it properly concern itself with those of the states.

Translation: In the present emergency Congress should pay no heed to constitutional limitations. South Carolina Representative William Porcher Miles took the same position when conscription was extended a few months later: The states were obliged to submit, he argued, to “any measure which was designed to serve the country.”⁸⁸ The people of Texas, added one Representative, “had never stopped to enquire whether the act was unconstitutional or not. They saw its necessity, and cheerfully assented to its provisions.”⁸⁹ South Carolina authorities, said another, had gone even further: They had agreed to conscription “with the *belief* it was unconstitutional.”⁹⁰ Ethelbert Barksdale of Mississippi, Administration Leader in the House, thought the draft was constitutional; but

from the U.S. Territory of New Mexico, in accordance with the terms of the new Article IV. Act of Jan. 18, 1862, ch. 44, Pub. Laws, Provisional Cong., 5th Sess., *reprinted in* Statutes at Large, supra note 5, at 242, 242; Yearn, supra note 5, at 40. At the same time, following U.S. practice, Congress seated Granville H. Oury as a nonvoting delegate from the new territory. 1 Journal of the Confederate Congress, supra note 5, *reprinted in* S. Doc. No. 58-234, at 701 (1904). For U.S. discussions of Congressional power over the territories, see Currie, *Descent into the Maelstrom*, supra note 1, at 167–243. For debate on territorial delegates to the U.S. Congress see Currie, *The Federalist Period*, supra note 23, at 200–03.

⁸⁷ Senate Proceedings (Mar. 29, 1862) (statement of Sen. Clark), *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 24, 26.

⁸⁸ House Proceedings (Aug. 22, 1862) (statement of Rep. Miles), *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 202, 208.

⁸⁹ House Proceedings (Aug. 23, 1862) (statement of Rep. Graham) *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 212, 214.

⁹⁰ House Proceedings (Aug. 22, 1862) (statement of Rep. Bonham) *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 202, 210 (emphasis added). By January 1863 Representative Foote, who had earlier opposed conscription tooth and nail, argued that it ought no longer even be discussed: “We were all now practically conscriptionists. Some did not believe it constitutional, but all acknowledged the necessity of enforcing it to save the country.” House Proceedings (Feb. 17, 1863) (statement of Rep. Foote), *reprinted in* 48 Southern Historical Society Papers 140, 142 (Broadfoot Publ’g Co. Morningside Bookshop 1992) (1941).

if it was not, he said, he was prepared to “throw aside” the Constitution to ensure the triumph of the Southern cause.⁹¹

For those who take their constitutions seriously, that was all pretty scary; Louisiana Representative John Perkins pointedly asked Barksdale whether he recalled his oath of office.⁹² It is of course conceivable that there may be occasions on which fidelity to the Constitution should not be the statesman’s highest goal. Edmund Randolph said as much in the Philadelphia Convention;⁹³ President Jefferson seemed to act on that assumption at the time of the Louisiana Purchase.⁹⁴ We cannot categorically dismiss the legitimacy of revolution without denying our own birthright. But that is not a *legal* argument for conscription.

Texas Senator Louis Wigfall, who had been a virulent states’ righter in the U.S. Senate before secession, put the constitutional case for the President’s proposal. Congress, he observed, had ex-

⁹¹ House Proceedings (Sept. 11, 1862) (statement of Barksdale), *reprinted in* 46 Southern Historical Society Papers 105, 108 (Broadfoot Publ’g Co. Morningside Bookshop 1992) (1928). In debate on an unsuccessful 1863 bill to make Treasury notes legal tender, Texas Representative Franklin Sexton recorded in his diary that Edmund Dargan of Alabama “made a very strange speech—wants the Treasury notes made a legal tender yet says he cannot vote for it because he believes it unconstitutional. Is willing that Congress shall do it but thinks it a violation of the Constitution. Strange position for a Legislator.” *Diary of a Confederate Congressman, 1862–1863*, 38 S.W. Hist. Q. 270, 298 (1935).

⁹² House Proceedings (Sept. 11, 1862) (statement of Perkins), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 105, 108; see Conf. Const. of Mar. 1861, art. VI, cl. 4, *reprinted in* Statutes at Large, *supra* note 5, at 22 (“[T]he Senators and Representatives . . . shall be bound by oath or affirmation to support this Constitution.”); cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) (“Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority.”); *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866) (“[T]he Constitution . . . is a law for rulers and people, equally in war and in peace.”). See also the indignant letter of Vice President Stephens, August 29, 1863, to an unidentified correspondent who had suggested that the President be made “dictator.” Even the great goal of Southern independence, Stephens insisted, must be “ever held subordinate to the maintenance of the constitution[:].” “Nothing could be more unwise than for any free people, at any time, under any circumstances, to give up their rights under the vain hope and miserable delusion that they might thereby be enabled to defend them.” Cleveland, *supra* note 19, at 173–74; see also Schott, *supra* note 35, at 383 (identifying the unidentified correspondent as Howell Cobb).

⁹³ See 1 *The Records of the Federal Convention of 1787*, *supra* note 16, at 262 (“There are great seasons when persons with limited powers are justified in exceeding them.”).

⁹⁴ See Currie, *The Jeffersonians*, *supra* note 23, at 95–107.

2004]

Through the Looking-Glass

1281

press authority to raise armies. “There was no limitation upon the power,” said Wigfall; “[i]t was full, plenary and ample.” The volunteer system had been tried and found wanting; “by relying upon it, the country is without an adequate army.”⁹⁵ Nothing less than a draft, he concluded, would suffice.⁹⁶

Attorney General Thomas H. Watts, to whom President Davis referred the question of the constitutionality of conscription, added explicitly what Wigfall had only implied: In carrying out its responsibility for raising troops, Congress had a choice of means.

The manner in which Congress is “to raise armies,” is not specified, or in any wise defined It is therefore left to the wise discretion of Congress to adopt any *mode* of raising and supporting armies, subject to the just qualification, that no other clause of the Constitution shall be violated in the exercise of this power.⁹⁷

Moreover, Watts added in a subsequent opinion, Article I, Section 10 of the Confederate Constitution expressly forbade the states to raise armies in peacetime; it would be absurd to think the Framers had intended that *no one* could effectively prepare for war.⁹⁸

In all of this, perhaps, the reader may detect more than occasional reminders of the arguments Chief Justice John Marshall had made in upholding the Bank of the United States in *McCulloch v.*

⁹⁵ Senate Proceedings (Mar. 29, 1862) (statement of Sen. Wigfall), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 24, 27.

⁹⁶ *Id.* at 27–28. For similar arguments see Benjamin Hill’s Speech at Milledgeville, Georgia (Dec. 11, 1862) [hereinafter Hill’s Speech at Milledgeville], *in* Benjamin H. Hill, Jr., Senator Benjamin H. Hill of Georgia: His Life, Speeches and Writings 251, 259–66 (1893) [hereinafter Hill of Georgia]. Wigfall’s further argument that if Congress could conscript money, it could conscript men was less convincing, as the power to tax was expressly granted.

⁹⁷ Powers of Confederate Government (May 16, 1862), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 94, 95; see also House Proceedings (Sept. 10, 1862) (statement of Rep. Gartrell), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 92, 95–96 (“The Constitution gave Congress power to raise and support armies, but did not prescribe the manner in which they should be raised. That was left exclusively to the judgment of Congress.”).

⁹⁸ Pardon for Deserter (Mar. 4, 1863), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 231, 235–36; see also Senate Proceedings (Mar. 29, 1862) (statement of Sen. Wigfall), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 24, 27.

*Maryland.*⁹⁹ It was President Davis himself, however, in a long and powerful letter to Georgia Governor Joseph E. Brown, who most thumpingly endorsed Marshall's expansive understanding of congressional authority. Echoing Wigfall's insistence that the clause authorizing Congress to raise armies contained "no restriction as to the modes of procuring troops," Davis took issue with Brown's contention that conscription was unnecessary and therefore unconstitutional.¹⁰⁰ To begin with, he argued, Brown was wrong on the facts: A great many twelve-month soldiers were about to leave the Army, and they could not safely be replaced by raw recruits.¹⁰¹ But the President had a more fundamental objection, and it was so striking that I shall quote it in full:

I hold that when a specific power is granted by the Constitution, like that now in question, "to raise armies," Congress is the judge whether the law passed for the purpose of executing that power is "necessary and proper." It is not enough to say that armies might be raised in other ways, and that therefore this particular way is not "necessary." The same argument might be used against every mode of raising armies. To each successive mode suggested the objection would be that other modes were practicable, and that therefore the particular mode used was not "necessary."

The true and only test is to inquire whether the law is intended and calculated to carry out the object; whether it devises and creates an instrumentality for executing the specific power granted, and if the answer be in the affirmative the law is constitutional. None can doubt that the conscription law is calculated and intended to "raise armies." It is, therefore, "necessary and proper" for the execution of that power, and is constitutional,

⁹⁹ 17 U.S. (4 Wheat.) 316 (1819).

¹⁰⁰ Letter from Jefferson Davis to Joseph E. Brown (May 29, 1862), in 1 Official Army Records No. 4, supra note 33, at 1133, 1134, and reprinted in 5 Jefferson Davis, Constitutionalist, supra note 32, at 254, 256–57. Davis was responding to Brown's letter of May 8, 1862, see Letter from Joseph E. Brown to Jefferson Davis (May 8, 1862), in 1 Official Army Records No. 4, supra note 33, at 1116, 1116.

¹⁰¹ Among other things, the conscription law extended the term of service of persons already in the army to "three years from the date of their original enlistment, unless the war shall have been sooner ended." Act of Apr. 16, 1862, ch. 31, § 1, Pub. Laws, 1st Cong., 1st Sess., reprinted in Statutes at Large, supra note 5, at 29, 30.

2004]

Through the Looking-Glass

1283

unless it comes into conflict with some other provision of our Confederate compact.¹⁰²

President Davis did not expressly cite *McCulloch v. Maryland*. He did not have to; everyone knew where his argument came from.¹⁰³

The principal argument in Congress against the constitutionality of conscription was made by Texas's other Senator, Williamson S. Oldham. It was an amalgam of three elements: tradition, states' rights, and individual liberty.¹⁰⁴ First, said Oldham, armies had traditionally consisted of volunteers; the English, from whom our ideas of military service were derived, had never resorted to a

¹⁰² Letter from Jefferson Davis to Joseph E. Brown (May 29, 1862), supra note 100, at 1134–35, and reprinted in 5 Jefferson Davis, Constitutionalist, supra note 32, at 256–57.

¹⁰³ Davis did not even add Marshall's important qualification that measures designed to execute express powers must be consistent with the "spirit" of the Constitution, which in context can only refer to the limited nature of Congressional authority. See *McCulloch*, 17 U.S. (4 Wheat.) at 421; Currie, *The First Hundred Years*, supra note 43, at 162–64; Letter from Joseph E. Brown to Jefferson Davis (June 21, 1862), in 1 Official Army Records No. 4, supra note 33, at 1156, 1160 ("I am not aware that the proposition was ever stated more broadly in favor of unrestrained Congressional power by Webster, Story, or any other statesman or jurist of the Federal school."). Marshall had used the draft case in 1819 to illustrate the principle that Congress must have a choice of means. Letter from Marshall to the *Philadelphia Union* (Apr. 28, 1819), reprinted in John Marshall's Defense of *McCulloch v. Maryland*, supra note 44, at 91, 95; see also *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805).

Challenged by Brown on his assertion that Congress was "the judge" of whether a law was "necessary and proper," President Davis promptly backtracked: He did not mean to deny the ultimate right either of the courts or of individual states to determine the constitutionality of Confederate laws. See Letter from Joseph E. Brown to Jefferson Davis (June 21, 1862), supra, at 1160 (citing the Virginia and Kentucky Resolutions); Letter from Jefferson Davis to Joseph E. Brown (July 10, 1862), in 2 Official Army Records No. 4, supra note 33, at 2, 2–3.

¹⁰⁴ Senator Oldham, in the words of Ezra Warner and W. Buck Yearns, "labored under a constant fear that the 'battering ram of executive influence' and the claim of 'military necessity' would destroy the fundamental principles of the Confederacy." Warner and Yearns, supra note 29, at 187. His unpublished memoirs bristle with accusations respecting the prostration of liberty and states' rights. *Memoirs of Williamson Simpson Oldham, Confederate Senator 1861–65* (transcription in the Center for American History at the University of Texas, Austin) [hereinafter *Oldham Memoirs*]. Executive and military officers, in his view, had been given "absolute despotic power." *Id.* at 144. Courts and laws had been "practically suspended." *Id.* The Government had been "centralized and solidified" and "practically every federating feature" destroyed. *Id.* at 147. Military leaders had "usurped and exercised the government of the country," *id.* at 166, to the point where many Southerners perceived the war as "a contest between two despotisms for supremacy," *id.* at 193.

draft.¹⁰⁵ Although he did not say so, neither had the United States—although General Washington had urged Congress to do so during the Revolution, and both Houses (after heated debate) had passed bills to that end during the War of 1812.¹⁰⁶ When the North finally turned to conscription in 1863, Chief Justice Roger Taney (in a draft opinion he never had the opportunity to use) would brand it unconstitutional on the same ground of tradition, among others: “[W]hen the power to raise and support armies was delegated to Congress, the words of the grant necessarily implied that they were to be raised in the usual manner.”¹⁰⁷

Arguments based on tradition had a long and respectable pedigree in constitutional interpretation,¹⁰⁸ but they were less than conclusive in the draft case. Attorney General Watts cited the eminent Vattel to establish that under the law of nations a state had the power to conscript and a citizen the duty to serve;¹⁰⁹ Miles added that France had conscripted soldiers in the past—though he did not say it had done so before the U.S. Constitution was adopted.¹¹⁰

¹⁰⁵ Senate Proceedings (Mar. 29, 1862) (statement of Sen. Oldham), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 24, 28. Governor Brown would repeat this argument in a letter to President Davis (June 21, 1862), *supra* note 103, at 1156, 1158.

¹⁰⁶ See Washington’s Letter to the Committee of Congress with the Army (Jan. 29, 1778), *in* 10 The Writings of George Washington 362, 366 (John C. Fitzpatrick ed., 1939); Currie, *The Jeffersonians*, *supra* note 23, at 172–75.

¹⁰⁷ A Great Justice on State and Federal Power: Being the Thoughts of Chief Justice Taney on the Federal Conscription Act, 18 Tyler’s Q. Hist. & Genealogical Mag. 72, 81 (1936). A dissenting judge in the Texas Supreme Court argued on the same basis that conscription was not “necessary and proper” to the raising of armies: “The government of the United States has always kept an army on foot, maintained an honorable contest with Great Britain in 1812, and planted her banners on the walls of the capital of Mexico in 1847, but has never raised troops by conscription.” *Ex parte Coupland*, 26 Tex. 386, 419 (1862).

¹⁰⁸ See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (reading the tradition of sovereign immunity into the facially unrestricted grant of judicial power over cases arising under federal law); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391–92 (1798) (opinion of Justice Chase) (construing the Ex Post Facto Clause of Article I, § 10); *id.* at 395, 396–97 (Paterson, J., concurring) (same).

¹⁰⁹ *Pardon for Deserter* (Mar. 4, 1863), *supra* note 98, at 234 (quoting M.D. Vattel, *The Law of Nations* bk. III, § 8 (Nicklin & Johnson eds., 1829)).

¹¹⁰ House Proceedings (Aug. 22, 1862) (statement of Miles), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 202, 208. The U.S. Supreme Court, in upholding a later draft, would add that various states had resorted to conscription to meet Congressional requisitions of troops during the Revolution. *Selective Draft Law Cases*, 245 U.S. 366, 380 (1918).

2004]

Through the Looking-Glass

1285

Oldham's next argument was that Congress had no power to coerce citizens into the army "except through the intervention of the States";¹¹¹ his last was that to require a man to serve without the consent of his state "would be destructive of the liberties of the people."¹¹² The first of these contentions sounds in federalism and the second in human rights, but the latter seems confused. If the problem was one of individual liberty, it was not obvious why state consent made it any more acceptable; Oldham himself had just said conscription was despotic whether Confederate or state.¹¹³

Oldham neglected to say so, but his concession that the states could compel their inhabitants to perform military duties appears to have been based on the indisputable fact that militia service was traditionally compulsory.¹¹⁴ That suggested that the question was not one of liberty at all; if a citizen could be required to serve in the militia, why not also in the Army?¹¹⁵ The answer had to be states' rights; but as Wigfall, Watts, and Davis argued, the Confederacy had express authority to raise armies, and it had found it impossible to do so effectively without compulsion. Since Article I plainly empowered Congress to commandeer the militia for most purposes for which an army could be used, the states' rights argument reduces itself to a quibble over the right to employ troops for offensive purposes and to appoint their officers.¹¹⁶

Governor Brown would argue that members of the militia could be taken into Confederate service only as militiamen, not as regular soldiers.¹¹⁷ As President Davis said in his response to Brown,

¹¹¹ Senate Proceedings (Mar. 29, 1862) (statement of Sen. Oldham), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 24, 26.

¹¹² *Id.* at 28–29.

¹¹³ *Id.* at 28.

¹¹⁴ See 1 William Blackstone, *Commentaries* *370–71.

¹¹⁵ "Conscription," one commentator on the Confederacy has written, "rest[ed] on the familiar Anglo-Saxon principle that every man between 16 and 60 must defend his country." Years, *supra* note 5, at 64.

¹¹⁶ See Conf. Const. of Mar. 1861, art. I, § 8, cls. 15–16, *reprinted in* Statutes at Large, *supra* note 5, at 15.

¹¹⁷ Letter from Joseph E. Brown to Jefferson Davis (May 8, 1862), *supra* note 100, at 1117–19. Senator Oldham would echo this contention in Congress a few months later, arguing that conscription offended the militia provisions by placing "every man who composes the militia of the States . . . under officers not appointed by the States." Speech of W.S. Oldham, of Texas, upon the Bill to Amend the Conscript Law, made in the Senate, Sept. 4, 1862, at 5, *microformed on Confederate Imprints, 1861–1865*, reel 91, No. 2799 [hereinafter *Speech of Senator Oldham*]; see also Senate Proceed-

however, there was no reason to believe that the militia clauses were meant to limit the distinct grant of authority to raise armies; on their face they conferred separate and complementary powers.¹¹⁸ Indeed, Attorney General Watts added, the power to raise armies had been given to the U.S. Congress (and later to the Confederacy) in reaction to the frustrations of having to rely on the states for militiamen during the Revolution; it could not fairly be read as limited by the very clauses it was designed to transcend.¹¹⁹

Thus Senator Oldham's arguments of federalism, liberty, and tradition seem to me to fall short of overcoming the broad language of Article I authorizing the Confederate Congress to take all measures necessary to raise an effective Army. In urging the House to refer the "novel" and "startling" conscription proposal to a special committee, however, Virginia Representative Charles W. Russell suggested yet another constitutional argument that requires consideration. For in addition to its other difficulties, Russell said, a draft would abolish the militia system itself, and that alone was cause for grave constitutional concern.¹²⁰

Russell did not expand on this suggestion, but others did in the next session of Congress when the draft was extended to include additional men. The U.S. Congress, in 1792, had defined the militia to include every able-bodied white male,¹²¹ and the Confederate Congress had adopted existing U.S. statutes pending their amendment or repeal.¹²² The initial conscription bill authorized the President to place all white men between the ages of eighteen and

ings (Sept. 4, 1862) (statement of Sen. Oldham), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 29, 35 (noting the fact, but not reproducing the substance, of Sen. Oldham's speech).

¹¹⁸ Letter from Jefferson Davis to Joseph E. Brown (May 29, 1862), *supra* note 100, at 1135–36.

¹¹⁹ Powers of Confederate Government (May 16, 1862), *supra* note 97, at 96–98; see The Federalist Nos. 22, 23 (Alexander Hamilton); Debate before the Convention of the Commonwealth of Virginia (June 9, 1788) (statement of Patrick Henry), *in* 3 Elliot's Debates, *supra* note 72, at 178; see also Hill's Speech at Milledgeville, *supra* note 96, *in* Hill of Georgia, *supra* note 96, at 265.

¹²⁰ House Proceedings (Mar. 29, 1862) (statement of Russell), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 29, 32.

¹²¹ Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (1961).

¹²² Act of Feb. 9, 1861, ch. 1, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 27, 27.

2004]

Through the Looking-Glass

1287

thirty-five in the Army unless exempted by law;¹²³ the later bill included men up to the age of forty-five.¹²⁴ The net result was to transfer most eligible men from the militia to the Army.

If the Confederacy could take men from the states, asked Henry Foote in the House, how was state sovereignty to be maintained?¹²⁵ To draft militiamen as soldiers, Oldham added, would leave the states powerless to defend themselves against insurrection or invasion.¹²⁶ Governor Brown had spelled out this argument back in June, in one of his lengthy epistles protesting the original conscription law:

I apprehend it was never imagined that the time would come when the agent of the sovereign[] [States] would claim the power to take from each sovereign every man . . . able to bear arms and leave them with no power t[o] execute their own laws, suppress insurrections in their midst, or repel invasions.¹²⁷

Chief Justice Taney would adopt this argument too when the United States copied the Confederate draft a year later. “There is no longer any militia,” Taney wrote, “it is absorbed in the Army.”¹²⁸ Conscription, Taney concluded, thus enabled Congress to annul the militia provisions of Article I to circumvent express limitations on the use of state troops and to offend the Second

¹²³ Act of Apr. 16, 1862, ch. 31, § 1, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 29, 30.

¹²⁴ Act of Sept. 27, 1862, ch. 15, § 1, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 61, 61–62.

¹²⁵ See House Proceedings (Aug. 22, 1862) (statement of Rep. Foote), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 202, 205, 206–07.

¹²⁶ Senate Proceedings (Sept. 4, 1862) (statement of Sen. Oldham), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 29, 35. For the text of Senator Oldham’s entire speech, see Speech of Senator Oldham, *supra* note 117, at 5–6.

¹²⁷ Letter from Joseph E. Brown to Jefferson Davis (June 21, 1862), *supra* note 103, at 1157; see also *id.* at 1164 (continuing the argument against conscription); Letter from Joseph E. Brown to Jefferson Davis (Oct. 18, 1862), *in* 2 Official Army Records No. 4, *supra* note 33, at 128, 128–29 (objecting that by extending the draft to include older men Congress had left the states altogether without defense).

¹²⁸ A Great Justice on State and Federal Power: Being the Thoughts of Chief Justice Taney on the Federal Conscription Act, *supra* note 107, at 80. Vice President Stephens had made the same argument on the Confederate side in 1862. See Schott, *supra* note 35, at 354.

Amendment in its narrowest sense by depriving the states of the right of self-defense.¹²⁹

This argument, however, proved too much. The states were equally deprived of troops when militiamen were called into federal service, as the Constitution expressly contemplated, or when they volunteered to join the Army. As President Davis wrote, “to deny to Congress the power to draft a citizen into the army or to receive his voluntary offer of services because he is a member of the State militia is to deny the power to raise an army at all.”¹³⁰ Thus in my opinion there was not much to the argument that militiamen could not be drafted, though it was to be emphasized again in the U.S. Congress the following year.¹³¹

There was not much to it, that is, unless one applied to militiamen a related argument that opponents in the Confederate Congress (and Chief Justice Taney) would later invoke against the conscription of state officers in general: States could not function without officers, and the Constitution guaranteed the existence of the states.¹³² It was Governor Brown who said it first, in his usual pugnacious fashion: “The conscription act gives the President the power . . . at his pleasure to cripple or destroy

¹²⁹ A Great Justice on State and Federal Power: Being the Thoughts of Chief Justice Taney on the Federal Conscription Act, *supra* note 107, at 80–81; see U.S. Const. amend. II (“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.”). The Confederate provision, Conf. Const. of Mar. 1861, art I. § 9, cl. 13, *reprinted in* Statutes at Large, *supra* note 5, at 16, was identical. Senator Oldham had made this argument, too, in the Confederate Senate in 1862. Speech of Senator Oldham, *supra* note 117, at 5.

¹³⁰ Letter from Jefferson Davis to Joseph E. Brown (May 29, 1862), *supra* note 100, at 1136.

¹³¹ See, e.g., Cong. Globe, 37th Cong., 3d Sess. 1258–59 (1863) (statement of Wickliffe) (arguing that conscription takes away from the militia of the States).

¹³² For Taney, see A Great Justice on State and Federal Power: Being the Thoughts of Chief Justice Taney on the Federal Conscription Act, *supra* note 107, at 83–85. As Louisiana Senator Thomas J. Semmes pointed out, the Constitution also guaranteed the states a republican form of government. Senate Proceedings (Sept. 10, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 73, 75; see Conf. Const. of Mar. 1861, cl. 4, *reprinted in* Statutes at Large, *supra* note 5, at 21. The Georgia Supreme Court added a third possible source of immunity: The reservation of state powers in the Confederate version of what had been the Tenth Amendment implied the existence of officers capable of executing them. See *Jeffers v. Fair*, 33 Ga. 347, 364–65 (1862). The U.S. statute Taney was attacking exempted only the Governor. Act of Mar. 3, 1863, ch. 75, § 2, 12 Stat. 731, 731 (1961).

2004]

Through the Looking-Glass

1289

the civil government of each State by arresting and carrying into the Confederate service the officers charged by the State constitution with the administration of the State government.”¹³³ Thus it was Brown’s turn to paraphrase the dreaded *McCulloch v. Maryland*: The power to conscript was the power to destroy.¹³⁴

The exemption of state officers from the draft was a constant bone of contention both inside and outside the Confederate Congress. Many defenders of conscription seemed to concede the principle;¹³⁵ most of the arguments concerned how many offi-

¹³³ Letter from Joseph E. Brown to Jefferson Davis (Apr. 22, 1862), in 1 Official Army Records No. 4, supra note 33, at 1082, 1085; see also id. at 1083–84 (adding that he would not permit Confederate authorities to deprive Georgia of its legislature, its judges, or its other officers, civilian or military); Letter from Joseph E. Brown to Jefferson Davis (May 8, 1862), supra note 100, at 1120 (reiterating the latter warning); Letter from Joseph E. Brown to Jefferson Davis (June 21, 1862), supra note 103, at 1162 (arguing that Davis’s view of conscription “places the very existence of the State governments subject to the will of Congress”).

¹³⁴ See *McCulloch*, 17 U.S. (4 Wheat.) 316, 431 (1819). Virginia’s highest court, in upholding the constitutionality of conscription, just as firmly asserted the immunity of state officers:

It is absurd to suppose that the government of the Confederate States can rightfully destroy the governments of the states which created it; and all the powers conferred on it must be understood to have been given with the limitation that, in executing them, nothing shall be done to interfere with the independent exercise of its sovereign powers by each state. Congress can have no right therefore to deprive a state of the services of any officer necessary to the action of its government.

Burroughs v. Peyton, 16 Va. 470, 484 (1864).

¹³⁵ When Governor Brown complained that the Confederate Army was enrolling militia officers under the conscription law, Secretary of War George Randolph ordered that it be directed to stop—whether on constitutional grounds or simply to avoid trouble he did not say. Letter from G.W. Randolph to Major Dunwody (June 21, 1862), in Official Army Records No. 4, supra note 33, at 1169, 1169. For the Senate committee report in response to President Davis’s message of March 13, 1865, see also 4 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 726, 728 (1904) (“Officers of the State governments are not properly included among the exempted classes, because it is conceded that Congress has no constitutional power to conscribe them as soldiers.”).

Some Senators, however, denied there was a problem. See Senate Proceedings (Sept. 5, 1862) (statement of Sen. Hill), reprinted in 46 Southern Historical Society Papers, supra note 91, at 40, 44; Senate Proceedings (Sept. 10, 1862) (statement of Sen. Wigfall), reprinted in 46 Southern Historical Society Papers, supra note 91, at 73, 77; Senate Proceedings (Sept. 10, 1862) (statement of Sen. Simms), reprinted in 46 Southern Historical Society Papers, supra note 91, at 73, 78; Hon. James Phelan, Speech Before the Senate of the Confederate States on the Motion to Conscript “Justices of the Peace,” and Involving the Power of Congress to Exact Military Service of a State Officer (Sept. 6, 1862), microformed on Confederate Imprints 1861–1865, Reel

cers ought to be exempted. The statutes exempted a great number of them, arguably to the point of frustrating the entire program.¹³⁶ Militiamen, however, (except for their officers) were not

91, No. 2812, at 4. If Congress could draft the sovereign people, said Louisiana Senator Edward Sparrow, it could draft their servants as well. Senate Proceedings (Sept. 15, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 136, 139. This argument was cute but not convincing, for there was a substantial basis for the contention that the Confederacy had no authority to destroy state governments. Senator Phelan suggested that there was no difficulty because to draft an officer was not to destroy the office. Senate Proceedings (Sept. 8, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 59, 63. Senator Semmes rightly replied that if Congress could draft the incumbent it might draft his successors too. Senate Proceedings (Sept. 10, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 73, 74–75. Senator Wigfall was reported, perhaps inaccurately, as taking both sides of this question. Compare Senate Proceedings (Sept. 10, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 40, 45 (denying that state officers could be drafted), with Senate Proceedings (Sept. 10, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 73, 77 (suggesting that they could be).

¹³⁶ Congress initially exempted “all judicial and executive officers of Confederate or State Governments,” as well as “the members of both Houses of the Congress and of the Legislatures of the several States and their respective officers.” Act of Apr. 21, 1862, ch. 74, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 51, 51. A few months later, however, Congress cleverly removed from the exemption list “such State officers as the several States may have declared . . . by law to be liable to militia duty” (and thus treated as expendable) as well as those whose exemption the states voluntarily disclaimed. Act of Oct. 11, 1862, ch. 45, 1st Cong., 1st Sess., *in* Statutes at Large, *supra* note 5, at 77, 77. Senator Hill argued that it was improper to let the states decide who would serve in the Confederate Army. Senate Proceedings (Sept. 20, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 187, 191. But I think his objection was misplaced; the state was the right party to waive its own immunities from Confederate law. See Senate Proceedings (Sept. 16, 1862) (statement of Hunter), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 152, 156 (“The Confederate Government had the power to call into the military service all the citizens of the States except such as were necessary to conduct the State Governments If the States should say that certain officers were not necessary, then the Confederate Government would have the power to enroll them.”). In early 1864, Congress reversed the presumption, exempting only the Vice-President, Confederate and state legislators, and “such other Confederate and State officers as the President or the Governors of the respective States may certify to be necessary for the proper administration of the Confederate or State Governments.” Act of Feb. 17, 1864, ch. 45, § 10, cl. 2, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, *supra* note 5, at 211, 213.

North Carolina Senator George Davis proposed in 1862 that Congress leave it to the Secretary of War to determine whom the public interest required to be exempted. See Senate Proceedings (Sept. 16, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 152, 156. President Davis repeated this suggestion in 1864. See Senate Proceedings (Nov. 7, 1864) (speech of President Davis), *reprinted in* 51

2004]

Through the Looking-Glass

1291

among those exempted, though as we have seen they were arguably essential to the existence of the states.¹³⁷ For as noted, the central government had express authority to call up the militia for its own purposes, and the argument against immunity was stronger than in recent cases in which the Supreme Court has held the United States without authority to co-opt state officers:¹³⁸ The government always has the option of enforcing its

Southern Historical Society Papers, *supra* note 27, at 265, 266; Message to the Second Session of the Congress of the Confederate States of America (Nov. 7, 1864), *in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 482, 491. Congressional opponents objected that the legislature could not delegate its authority to the Secretary. See, e.g., House Proceedings (Jan. 21, 1863) (statement of Collier), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 166, 173 (arguing that certain obligations of the legislature could not be delegated); Senate Proceedings (Jan. 8, 1864) (statement of Staples), *reprinted in* 50 Southern Historical Society Papers: Proceedings of the First Confederate Congress, Fourth Session 202, 204–05 (Frank E. Vandiver ed., Broadfoot Publ'g Co. Morningside Bookshop 1992) (1953) (same). Despite these objections, Congress invested so much time on trivial details respecting exemptions that it might have made more sense for it to lay down a general standard for the Secretary to apply in executing the legislative will. See Currie, *The Federalist Period*, *supra* note 23, at 146–49, for a discussion of the early squabbles over individual post routes in the United States.

Constitutional questions might also have been raised with respect to proposed or adopted exemptions for clergymen, Quakers, and newspapermen, but apparently they were not. Georgia Senator Herschel Johnson came closest to doing so in February 1863 when he argued that to draft essential newspaper personnel would cripple the press. Senate Proceedings (Feb. 23, 1863) (statement of Sen. Johnson), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 176, 182–83. This argument was parallel to that which was used to support the exemption of state officers; it had an arguable constitutional basis in the old First Amendment, which the Confederate Constitution had incorporated into Article I, § 9, cl. 12, *in* Statutes at Large, *supra* note 5, at 16; see also Senate Proceedings (Mar. 13, 1865) (report on President Davis's message), *in* 4 Journal of the Confederate Congress, *supra* note 5, at 726, 728 (arguing that repeal of existing exemptions for ministers, editors, and printers “would shock the religious sentiment of the country” and “destroy the independence of the press”).

¹³⁷ See the argument of Alabama Senator William L. Yancey that the Confederacy had no right to draft troops the states had raised for their own defense. Senate Proceedings (Sept. 10, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 85, 91. Representative Collier argued that militiamen were not part of the government, but neither was the Bank in *McCulloch v. Maryland*. See House Proceedings (Sept. 11, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 9, at 105, 110; see also Letter from Jefferson Davis to North Carolina Governor Zebulon B. Vance (July 14, 1863), *in* 5 Jefferson Davis, Constitutionalist, *supra* note 32, at 545, 546 (noting that “[t]he Government has asserted no claim to conscribe the militia officers of the States in actual commission” (emphasis added)).

¹³⁸ Compare *Printz v. United States*, 521 U.S. 898 (1997) (holding Congress without power to require state officers to enforce federal law), with *Garcia v. San Antonio*

own laws against third parties, but it cannot raise troops if the states make everybody an officer, as North Carolina was accused of doing.¹³⁹

The militia aside, the Confederate Government was generally receptive to the argument for implicit intergovernmental immunities. Opinions of the Attorneys General, for example, consistently concluded that no state could prevent the Confederate Government from distilling liquor for military consumption or forbid private citizens to sell intoxicating beverages to the

Metro. Transit Auth., 469 U.S. 528 (1985) (holding substantive provisions of Fair Labor Standards Act could constitutionally apply to state employees).

¹³⁹ According to Kentucky Senator William Simms, there were 5000 Justices of the Peace and perhaps as many constables in North Carolina. Senate Proceedings (Sept. 10, 1862) (statement of Sen. Simms), *reprinted in* 46 Southern Historical Society Papers, supra note 91, at 73, 78; see also Fehrenbacher, supra note 38, at 158 (noting that Governor Brown of Georgia exempted “an absurdly large number of public officials . . . , including, it was said, more than two thousand justices of the peace, many of whom never held a court, and about three thousand militia officers, most of whom had no men to command”). There were also objections to the proposed drafting of *Confederate* workers, on separation of powers grounds. See, e.g., Senate Proceedings (Feb. 17, 1863) (Statement of Sen. Simms), *reprinted in* 48 Southern Historical Society Papers, supra note 90, at 135, 137 (arguing that clerks of government departments could not be removed by members of the legislative branch). Drawing a lesson from the Jacksonian spoils system, the Confederate States had written civil service into their Constitution: Apart from those of Cabinet rank, officers could be discharged only for cause. Conf. Const. of Mar. 1861, cl. 3, *reprinted in* Statutes at Large, supra note 5, at 19; see Smith, Address to the Citizens of Alabama, supra note 5, at 204 (“[T]he patronage of the Executive is almost cut off by the tenure of good behavior, attached to the vast number of offices which before were the mere spoils of a victorious party . . .”). Moreover, since the executive power was vested in the President, short of impeachment Congress could not fire executive officers at all. Cf. *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that the Comptroller General, because removable by Congress, could not be given executive duties). None of this, however, seems designed to protect civil officers against a military draft, though an imaginative Congress might find that a possible means of destroying the independence of the Executive—or for that matter of the courts, whose judges were expressly granted tenure during good behavior. Conf. Const. of Mar. 1861, art III, § 1, *reprinted in* Statutes at Large, supra note 5, at 19 (declaring that the judges of the Confederate courts “shall hold their offices during good behavior”); Currie, *The Jeffersonians*, supra note 23, at 11–22 (discussing the successful Republican effort in 1802 to remove Federalist judges by abolishing the courts on which they sat); see also Senate Proceedings (Feb. 17, 1863) (statement of Sen. Oldham), *reprinted in* 48 Southern Historical Society Papers, supra note 90, at 135, 138 (arguing that departmental clerks were mere “employees” and not “officers” protected by the constitutional tenure provision); cf. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (drawing a similar distinction for purposes of appointments under U.S. Const. art. II, § 2).

Army.¹⁴⁰ That was the easy part; it was a simple matter of the supremacy of federal statutes under Article VI, which had arguably been the case in *McCulloch* itself.¹⁴¹

In the first of these opinions, however, Acting Attorney General Wade Keyes added that, as the U.S. Supreme Court would soon hold in *Collector v. Day*,¹⁴² immunity ran in both directions: The central government could not destroy the states either, for their existence was recognized by the Constitution itself.¹⁴³ Thus, he reasoned, the Confederate States could neither conscript essential state officers¹⁴⁴ nor tax the state's own re-

¹⁴⁰ Contract for Whiskey (Dec. 18, 1863), in *Opinions of the Confederate Attorneys General*, supra note 31, at 358, 360; Manufacture of Whiskey (Mar. 7, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 392, 392–93; Manufacture of Whiskey (Nov. 30, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 528, 529–30.

¹⁴¹ Virginia, having seized an Army distillery, refused to back down in the face of the Attorney General's interpretation, and "[t]he distillery was abandoned." William M. Robinson, Jr., *Prohibition in the Confederacy*, 37 *Am. Hist. Rev.* 50, 56 (1931).

¹⁴² 78 U.S. (11 Wall.) 113 (1871).

¹⁴³ Contract for Whiskey (Dec. 18th, 1863), supra note 140, at 359.

¹⁴⁴ *Id.* at 359. A year later, however, when the Secretary of the Treasury posed the related question whether *Confederate* functionaries could constitutionally be drafted, Keyes declined to answer it, suggesting that because the Executive was required to enforce even unconstitutional laws the constitutional question did not pertain to the Secretary's functions, as the statute required. See *Powers and Duties of Attorney General* (Sept. 20, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 504, 504–05; see also Act of Feb. 21, 1861, ch. 12, § 2, Provisional Cong., 1st Sess., reprinted in *Statutes at Large*, supra note 5, at 33, 33 (defining the Attorney General's duties). Attorney General George Davis confirmed this conclusion a few days later. *Powers and Duties of Attorney General* (Oct. 4, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 513, 514.

This newly minted abstemiousness did not escape contemporary criticism. "Is not the Constitution the law?" inquired a diarist in the War Department, and had not the Attorney General sworn to support it? 2 John B. Jones, *A Rebel War Clerk's Diary at the Confederate States Capital* 322 (Howard Swiggett ed., 1935) (statement dated Nov. 2, 1864). This criticism, I think, was well taken. Not only was the Constitution, as Jones argued, one of the "laws" for whose faithful execution the President is bound to take care; if the draft statute was unconstitutional, it was not law. The President's obligation not to enforce unconstitutional laws, like his obligation to veto unconstitutional bills, provides yet another check to prevent Congress from exceeding its powers. See *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 *Op. Off. Legal Counsel* No. 35 (Nov. 2, 1994), in H. Jefferson Powell, *The Constitution and the Attorneys General* 577–80 (Carolina Academic Press 1999) (Mem. from Walter Dellinger, Assistant Att'y Gen., to the Honorable Abner J. Mikva, Counsel to the President). Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803) (recognizing a *judicial* check on unconstitutional legislation), with *Veto Mes-*

sources,¹⁴⁵ and he later concluded they could not tax its fiscal agents either, as in *McCulloch*.¹⁴⁶ The governing principle, this last opinion made clear, was not supremacy but autonomy: Neither government might act directly on the other.¹⁴⁷

Congress rejected all constitutional objections and passed the draft bill by an overwhelming margin.¹⁴⁸ The Attorney General blessed it,¹⁴⁹ President Davis signed it,¹⁵⁰ and the state courts upheld

sage from President Andrew Jackson to the Senate (July 10, 1832), *reprinted in* 2 *A Compilation of the Messages and Papers of the Presidents*, supra note 42, at 576, 582 (explaining his veto of the bill to extend the charter of the second Bank of the United States), and Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 10 *The Writings of Thomas Jefferson* 88, 89 (Paul Leicester Ford ed., 1905) (explaining his pardon of persons convicted under the Sedition Act, which he believed contravened the Constitution: "That instrument meant that its co-ordinate branches should be checks on each other.").

¹⁴⁵ Contract for Whiskey (Dec. 18, 1863), supra note 140, at 359. "The Confederate Government can no more tax the sovereign right of the several States of the Confederacy to borrow money," Judge Magrath of the Confederate District Court for South Carolina was reported to have concluded in rejecting the authority of Congress to tax bonds or stocks issued by the state, "than the several States could constitutionally tax the delegated right of the Confederate Government to borrow money on the pledge of the Confederate faith and credit." Confederate War Tax, *Charleston Daily Courier*, Apr. 21, 1862, at 2; cf. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583–86 (1895) (striking down a similar tax in the United States).

¹⁴⁶ Taxation of State Property (Aug. 29, 1864), *in* *Opinions of the Confederate Attorneys General*, supra note 31, at 497, 498–500 (citing *McCulloch*).

¹⁴⁷ See *id.* at 498–500. Similarly, when Governor Brown protested General Braxton Bragg's order to seize the Western and Atlantic Railroad, "which 'is as absolutely the property of this State as is the state house,'" Letter from Joseph E. Brown to Jefferson Davis (Mar. 16, 1863), *in* 9 *The Papers of Jefferson Davis* 101, 101–02 (Lynda Lasswell Crist et al. eds., 1997), President Davis promptly countermanded the order. Letter from Jefferson Davis to Braxton Bragg (Mar. 17, 1863), *in* 9 *The Papers of Jefferson Davis*, supra, at 102, 102; Letter from Jefferson Davis to Joseph E. Brown (Mar. 17, 1863), *in* 9 *The Papers of Jefferson Davis*, supra, at 102, 102; see also Letters from Jefferson Davis to General Bragg and Governor Brown (Mar. 20, 1863), *in* 5 *Jefferson Davis, Constitutionalist*, supra note 32, at 453, 453 (expressing "regret[]" over the General's threat of force without calling it unconstitutional). Like the U.S. Supreme Court, however, Acting Attorney General Keyes concluded that mere state ownership of shares in a private corporation was not enough to give it immunity. Taxation of State Property (Aug. 29, 1864), supra note 146, at 498 (citing *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 907 (1824)).

¹⁴⁸ The Senate vote was 19–5. See 2 *Journal of the Confederate Congress*, supra note 5, *in* S. Doc. No. 58-234, at 154. The House vote was 54–26. See 5 *Id.* at 228.

¹⁴⁹ Powers of Confederate Government (May 16, 1862), supra note 97, at 94–99.

¹⁵⁰ Act of Apr. 16, 1862, ch. 31, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* *Statutes at Large*, supra note 5, at 29, 29–32.

it.¹⁵¹ Thus, the states' rights-minded Confederacy accepted compulsory military service before the United States did, while the Chief Justice of the United States argued it was unconstitutional.¹⁵²

V. ARMING THE SLAVES

The shortage of soldiers persisted. Congress extended the draft to white men between eighteen and forty-five,¹⁵³ then to those seventeen to fifty,¹⁵⁴ and to free blacks.¹⁵⁵ It drafted individuals who

¹⁵¹ See *Jeffers v. Fair*, 33 Ga. 347, 371 (1862); *Ex parte Coupland*, 26 Tex. 387, 430 (1862); *Burroughs v. Peyton*, 16 Va. 470 (1864). The state court decisions are summarized in *Brummer*, supra note 21, at 109–13, and in *Hamilton*, supra note 22, at 433–47.

Governor Brown refused to acquiesce in the Georgia Supreme Court's decision, and a legislative committee narrowly voted to support him, but the legislature adjourned without taking action on his proposal. See Letter from Joseph E. Brown to Jefferson Davis (Oct. 18, 1862), supra note 127, at 130 (announcing he would not permit further enrollment of conscripts until the legislature acted); 8 *The Papers of Jefferson Davis*, supra note 34, at 462 n.6. From the start Brown had refused to give affirmative assistance in enforcing the draft law. See Letter from Joseph E. Brown to Jefferson Davis (Apr. 22, 1862), supra note 133, at 1085; Letter from Joseph E. Brown to Jefferson Davis (May 8, 1862), supra note 100, at 1120.

¹⁵² More challenging perhaps in constitutional terms was the system of military “details,” authorized by statute in 1864, which enabled the Army to assign draftees to perform nonmilitary tasks. Act of Feb 17, 1864, ch. 65, § 10, Pub. Acts, 1st Cong., 4th Sess., reprinted in *Statutes at Large*, supra note 5, at 211, 211–15. “In effect,” wrote one later observer, this practice combined with a narrowing of draft exemptions meant “that if the War Office deemed a man’s contribution to the economy worth more than his service as a soldier, the government could draft him and send him back to his work or farm as a soldier on special assignment.” *Thomas*, supra note 20, at 260. Unless the employment to which the conscript was detailed was more or less closely connected with the war effort, it seems less obvious that this system was embraced within the power to raise and support armies. See *Wood v. Bradshaw*, 60 N.C. 419, 423 (1864) (holding that Congress could exempt those who produced provisions for the Army from service in the state militia). “I can not perceive any reason why these persons, who would otherwise be in the field as soldiers, may not be compelled to furnish, according to their respective abilities, such provisions and munitions of war, as the army may need.” *Id.* at 422–23 (opinion of Battle, J.).

¹⁵³ Act of Sept. 27, 1862, ch. 15, Pub. Laws, 1st Cong., 2d Sess., reprinted in *Statutes at Large*, supra note 5, at 61, 61–62.

¹⁵⁴ Act of Feb. 17, 1864, ch. 65, § 1, Pub. Laws, 1st Cong., 4th Sess., reprinted in *Statutes at Large*, supra note 5, at 211, 211.

¹⁵⁵ Act of Feb. 17, 1864, ch. 79, § 1, Pub. Laws, 1st Cong., 4th Sess., reprinted in *Statutes at Large*, supra note 5, at 235, 235. Free blacks so conscripted (or slaves employed or impressed under id. §§ 2 and 3) were limited to noncombatant duties “in the way of work upon fortifications or in Government works for the production or preparation of material of war, or in military hospitals.” *Id.*

had taken advantage of an earlier offer to provide substitutes,¹⁵⁶ despite arguments based on the Ex Post Facto and Contract Clauses,¹⁵⁷ for reasons given by proponents of the measure I find unconvincing.¹⁵⁸ It even provided for volunteer companies of per-

¹⁵⁶ Act of Jan. 5, 1864, ch. 4, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, supra note 5, at 172, 172 (stating that “no person shall be exempted from military service by reason of his having furnished a substitute”); Act of Feb. 17, 1864, ch. 79, § 4, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, supra note 5, at 211, 211 (making persons who have put in substitutes liable to military duty).

¹⁵⁷ See, e.g., Senate Proceedings (Feb. 24, 1863) (statements of Sens. Orr and Oldham), *reprinted in* 48 Southern Historical Society Papers, supra note 90, at 185, 188–89 (arguing that the amendment would be a clear violation of the contracts between principals and substitutes). Conf. Const. of Mar. 1861, art I, § 9, cls. 1, 4, 10, *reprinted in* Statutes at Large, supra note 5, at 15–16. These clauses were copied verbatim from the U.S. Constitution.

¹⁵⁸ The arguments that these two clauses do not apply are familiar from similar controversies in the United States. The Ex Post Facto Clause applies only to criminal matters; the Contract Clause limits only the states; the Government made no agreement never to draft those who provided substitutes, and it could not contract away its powers. See House Proceedings (Jan. 29, 1863) (statements of Foote and Chilton), *reprinted in* 48 Southern Historical Society Papers, supra note 90, at 5, 7–8; House Proceedings (Jan. 30, 1863) (statement of Russell), *reprinted in* 48 Southern Historical Society Papers, supra note 90, at 16, 17–18; Senate Proceedings (Feb. 24, 1863) (statements of Burnett, Sparrow, and Phelan), *reprinted in* 48 Southern Historical Society Papers, supra note 90, at 185, 188; House Proceedings (Dec. 11, 1863) (statement of Rep. Foote), *reprinted in* 50 Southern Historical Society Papers, supra note 136, at 36, 40; House Proceedings (Dec. 23, 1863) (statement of Gaither), *reprinted in* 50 Southern Historical Society Papers, supra note 136, at 112, 115–16; Senate Proceedings (Dec. 24, 1863) (statement of Sen. Wigfall), *reprinted in* 50 Southern Historical Society Papers, supra note 136, at 118, 120–21. State courts, invoking these arguments, tended to uphold the controversial provision. E.g., *Gatlin v. Walton*, 60 N.C. 325, 348–49 (1864); *Ex parte Mayer*, 27 Tex. 715, 723–25 (1864); *Burroughs v. Peyton*, 16 Va. 470, 498 (1864). Compare *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798) (limiting the Ex Post Facto Clause to criminal cases), with *Stone v. Mississippi*, 11 U.S. 814, 817–19 (1880) (holding the state could not contract away its police power); see also Currie, *The Federalist Period*, supra note 23, at 75 (discussing *Calder*); *Yearns*, supra note 5, at 78 (stating that the Contract Clause was not a limitation on Congress). A motion by Senator Withers to forbid the Confederacy to impair the obligation of its contracts had been defeated in the Constitutional Convention. 1 *Journal of the Confederate Congress*, supra note 5, in S. Doc. No. 58-234, at 869 (1904).

No one seems to have cited in this connection the Bankruptcy Clause of the Confederate Constitution, which unlike the U.S. provision on which it was based forbade Congress to enact any law discharging debts contracted before its passage. Conf. Const. of Mar. 1861, art. I, § 8, cl. 4, *reprinted in* Statutes at Large, supra note 5, at 14. Even if the context did not limit this prohibition to bankruptcy laws, it did not obviate all the objections to the contract theory advanced to preclude the drafting of those who had provided substitutes. Texas Representative Franklin B. Sexton seems to me to have got it about right: “The [Government] has power” to renege on its apparent

2004]

Through the Looking-Glass

1297

sons ineligible for the draft for purposes of what we have come to call homeland defense¹⁵⁹ and set up an “[i]nvalid [c]orps” of disabled soldiers and sailors liable to perform “such duty as they shall be qualified to perform.”¹⁶⁰

All this was still not enough, and in November 1864 President Davis urged Congress to consider taking slaves into the Army. Already, he noted, slaves served in such menial positions as teamsters and cooks and thus made additional white men available for combat. It was time to think about enlisting them in more responsible capacities such as “engineer laborer[s]” and “pioneer[s].”¹⁶¹ Four months later he asked Congress impatiently why it had not yet sent him a bill to draft Negro soldiers;¹⁶² Jefferson Davis was ready to arm the slaves.¹⁶³

That was a shocking enough suggestion in the Confederate South, though it seemed to raise no significant constitutional question; Congress had already authorized the impressment of slaves,

promise, “but it is such a departure from good faith as nothing but the most imperious necessity could justify.” Diary of a Confederate Congressman, *supra* note 91, at 293.

¹⁵⁹ Act of Oct. 13, 1862, ch. 63, Pub. Laws, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 90, 90.

¹⁶⁰ Act of Feb. 17, 1864, ch. 56, § 4, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, *supra* note 5, at 203, 203. In May 1864, as the tocsin sounded to warn of yet another Union threat to attack Richmond, Florida Representative Samuel Rogers urged members of Congress to organize themselves into companies to defend the city. Henry Chambers of Mississippi replied that he had been sent to serve as a legislator, not a soldier. Virginia’s Robert Whitfield added that for members of Congress to join the Army en masse would be “virtually a dissolution of the Government,” and Rogers’s motion was unceremoniously tabled. See House Proceedings (May 9, 1864) (statements of Chambers, Rogers, and Whitfield), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 46, 47–49.

¹⁶¹ Message to the Second Session of the Congress of the Confederate States of America (Nov. 7, 1864), *supra* note 136, at 493–95.

¹⁶² Message from Jefferson Davis to the Congress of the Confederate States of America (Mar. 13, 1865), *in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 544, 547.

¹⁶³ See also his postwar explanation of his position, 1 Jefferson Davis, *The Rise and Fall of the Confederate Government*, *supra* note 34, at 514–19. The tale is related briefly in Thomas, *supra* note 20, at 290–97, and exhaustively in Robert F. Durden, *The Gray and the Black: The Confederate Debate on Emancipation* (1972) (housing a gold mine of the relevant documents). See also Thomas R. Hay, *The South and the Arming of the Slaves*, 6 *Miss. Valley Hist. Rev.* 34 (1919) (predicting the impact of arming the slaves during the Civil War); N.W. Stephenson, *The Question of Arming the Slaves*, 18 *Am. Hist. Rev.* 295 (1913) (examining the Confederate debates surrounding the issue of whether to arm the slaves).

like any other property, for military purposes.¹⁶⁴ In his November message, however, President Davis made an additional suggestion that he rightly described as far more “radical.” It was true, he said, that slaves were property, but they were persons as well. Once they were given significant military responsibilities, he argued, the personal aspect would predominate: It was doubtful whether a continuing property relation would be consistent with their new duties. At a minimum, Davis concluded, the Government should acquire any slave who was taken into the Army, presumably in order to extinguish possibly conflicting loyalties to his master. Beyond this, said the President, Congress ought to consider promising slaves their freedom as an incentive to “a zealous discharge of [their] duty.”¹⁶⁵ Mississippi Senator Albert G. Brown moved that Congress do just that in February 1865: Slaves should be enlisted or drafted into the Army, their owners should be paid their full market value, and for faithful service they should be emancipated at the end of the war.¹⁶⁶

The idea was not new. “[B]rood[ing]” over the plight of the Confederate armies after the disastrous battle of Chattanooga, Major

¹⁶⁴ Act of Mar. 26, 1863, ch. 10, § 9, Pub. Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 102, 104; Act of Feb. 17, 1864, ch. 79, § 3, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, *supra* note 5, at 235, 235. Indeed, like other property, slaves had been impressed *without* statutory authority since the beginning of the war. See Coulter, *supra* note 35, at 258–59.

¹⁶⁵ Message to the Second Session of the Congress of the Confederate States of America (Nov. 7, 1864), *supra* note 136, at 493–94. It is said that Secretary of State Benjamin, who had persuaded the President to take this position, wrote this address. Evans, *supra* note 34, at 274. But then Benjamin, in a postwar letter to James Mason of Virginia, said that as Mason well knew he had *always* written the President’s messages to Congress. *Id.* at 153 (quoting an unpublished letter of February 8, 1871, in the Mason Papers in the Library of Congress); see also Cooper, *supra* note 35, at 426 (same). But see the December 8, 1865, letter from Navy Secretary Stephen Mallory to his son, maintaining that Davis drafted his own messages after Cabinet discussion and then gave them to Benjamin “to have a fair copy made and formality given to [them].” 2 *Diary of Stephen R. Mallory*, May 30, 1861–Sept. 15, 1865, at 203–04 (typescript in the Southern History Collection, University of North Carolina at Chapel Hill).

¹⁶⁶ Senate Proceedings (Feb. 7, 1865) (statement of Brown), *reprinted in* 52 Southern Historical Society Papers: Proceedings of the Second Confederate Congress, Second Session 309, 309 (Frank E. Vandiver ed., Broadfoot Publ’g Co. Morningside Bookshop 1992) (1959). Senator Hunter, who opposed the President’s proposal, thought emancipation would be the inevitable result of making slaves soldiers. Senate Proceedings (Mar. 7, 1865) (statement of Sen. Hunter), *reprinted in* 52 Southern Historical Society Papers, *supra*, at 450, 455.

2004]

Through the Looking-Glass

1299

General Patrick R. Cleburne had made an even more radical proposal in a letter to his commanding officer, General Joseph E. Johnston, in January 1864.¹⁶⁷ The military situation was grave, Cleburne wrote, and extraordinary measures were in order. The Confederacy was badly outnumbered in the field, and the President's suggested remedies were inadequate. Cleburne accordingly proposed that the South begin training slaves for military duty—"and further that we guarantee freedom within a reasonable time to every slave in the South who shall remain true to the Confederacy in this war."¹⁶⁸

Arming the slaves was logical enough; general emancipation took a little more explaining. Blacks could not be expected to fight with enthusiasm, Cleburne argued, unless they were given their freedom. To provide an even greater inducement, their wives and children could be liberated, too. And because a large free black population was incompatible with the continued existence of slavery, the remaining slave population should also be emancipated, on "reasonable terms."¹⁶⁹

President Davis had hushed up Cleburne's suggestion when it was made,¹⁷⁰ only to embrace it himself a scant ten months later. Judah Benjamin, now Secretary of State, took to the stump to plead for the President's policy in a celebrated speech at the African Church in Richmond in February 1865.¹⁷¹ "[I]f [slaves] are to fight for our freedom," Benjamin had written to a friend in December, "they are entitled to their own."¹⁷² At Benjamin's urging, General Robert E. Lee also lent his enormous prestige to the

¹⁶⁷ Letter from P.R. Cleburne et al. to Commanding General et al. of the Army of the Tennessee (Jan. 2, 1864), in 52 Official Army Records No. 1, supra note 33, at 586, 586–92, reprinted in Durden, supra note 163, at 54, 54–62. "[B]rood[ing]" is Durden's term. Durden, supra note 163, at 53.

¹⁶⁸ Durden, supra note 163, at 58. As the "et al." in the citation indicates, Cleburne's letter was also signed by a number of his fellow officers.

¹⁶⁹ Letter from P.R. Cleburne et al. to Commanding General et al. of the Army of the Tennessee (Jan. 2, 1864), supra note 167, at 60–61.

¹⁷⁰ See the communications cited in Durden, supra note 163, at 63–67.

¹⁷¹ See Evans, supra note 34, at 281–85 (quoting extensively from Benjamin's remarks). The entire speech was printed in the Richmond Dispatch, Feb. 10, 1865, at 1, and appears, lightly edited, in Durden, supra note 163, at 192–95.

¹⁷² Letter from Judah P. Benjamin to Frederick Porcher (Dec. 21, 1864), in 3 Official Army Records No. 4, supra note 33, at 959, 959, reprinted in part in Durden, supra note 163, at 182, 182–83.

President's cause. "[T]he employment of negroes as soldiers," he wrote, was "not only expedient but necessary," and "[i]t would be neither just nor wise . . . to require them to serve as slaves."¹⁷³ Lee had spelled out his reasons for this conclusion in an earlier letter to Virginia State Senator Andrew Hunter, and they were substantially the same as those General Cleburne had advanced a year before. "[I]n my opinion," Lee concluded, "the best means of securing the efficiency and fidelity of this auxiliary force would be to accompany the measure with a well-digested plan of gradual and general emancipation."¹⁷⁴

The President's proposal to offer black soldiers their freedom was thus neither original nor without impressive support. It broke an ultimate Southern taboo, however, and Virginia Senator Robert M.T. Hunter went wild. We dissolved the Union and went to war, he protested, because we feared the Republicans would free our slaves; now our own Government proposes to free them itself.¹⁷⁵ Representative Foote was equally appalled: "If it went out that the Confederate Government had the power to emancipate the slaves without the consent of the several States, President Davis would be made to occupy exactly the same position as Abraham Lincoln."¹⁷⁶

¹⁷³ Letter from Robert E. Lee to Rep. Ethelbert Barksdale (Feb. 18, 1865), in James D. McCabe, Jr., *Life and Campaigns of General Robert E. Lee* 574, 574-75 (1866), reprinted in Durden, *supra* note 163, at 206, 206-07.

¹⁷⁴ Letter from Robert E. Lee to Andrew Hunter (Jan. 11, 1865), in 3 *Official Army Records* No. 4, *supra* note 33, at 1012, 1012-13, reprinted in Durden, *supra* note 163, at 207, 207-09.

¹⁷⁵ See Senate Proceedings (Mar. 7, 1865), reprinted in 52 *Southern Historical Society Papers*, *supra* note 166, at 450, 454; see also *The Lynchburg Republican*, Nov. 2, 1864, reprinted in Durden, *supra* note 163, at 93, 93 ("The South went to war to defeat the designs of the abolitionists, and behold! in the midst of the war, we turn abolitionists ourselves!"); Governor Vance's address to the North Carolina legislature, *The Raleigh Confederate*, Nov. 23, 1864, reprinted in Durden, *supra* note 163, at 252, 253 (arguing that to free Negro soldiers would "surrender the entire question which has ever separated the North from the South"); *The North Carolina Standard*, Jan. 17, 1865, reprinted in Durden, *supra* note 163, at 176, 177 ("It is the very doctrine which the war was commenced to put down.").

¹⁷⁶ House Proceedings (Nov. 8, 1864) (statement of Rep. Foote), reprinted in 51 *Southern Historical Society Papers*, *supra* note 27, at 272, 276. This was not quite true; as South Carolina Representative William Porcher Miles had said earlier, they were our slaves, not theirs. House Proceedings (Jan. 23, 1864) (statement of Rep. Miles), reprinted in 50 *Southern Historical Society Papers*, *supra* note 136, at 288, 292. But others were quick to endorse Foote's essential message. To one Congressman, emancipation meant "the destruction of our social and political system." House Proceed-

2004]

Through the Looking-Glass

1301

The President's suggestion was all the more shocking because, as Foote said, before the despised Emancipation Proclamation even the Republicans had denied that the federal government had power to free the slaves.¹⁷⁷

Yet the argument that the Confederate Congress could do so was simple, straightforward, and convincing—more so than John Quincy Adams's labored efforts to demonstrate that it might be done by treaty following a servile war or even Lincoln's argument that he could do it without congressional authorization in order to create chaos behind enemy lines.¹⁷⁸ Congress had express power to raise armies; there were not enough men for the purpose unless slaves were included; ergo Congress could arm the slaves. Since soldiers needed an incentive to fight, Congress could offer them freedom, just as it could pay them wages.¹⁷⁹ For

ings (Nov. 10, 1864) (statement of Rep. Chambers), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 290, 295. Another stated that emancipation would be "the death knell of [the] cause." House Proceedings (Jan. 27, 1865) (statement of Leach), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 238, 242. Finally, one representative worried that the slaves would turn and fight against the South, and raised doubts as to the President's sanity for even suggesting such a proposition. See *id.* at 241 (statement of Rep. Turner).

¹⁷⁷ House Proceedings (Nov. 8, 1864), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 272, 276. See, e.g., President Lincoln's First Inaugural Address (Mar. 4, 1861), *in* 6 A Compilation of the Messages and Papers of the Presidents, *supra* note 42, at 5, 5 (noting the apprehension of many Southerners and reassuring them that the incoming Administration will not interfere with the property rights of the people of the South); Republican Platform of 1860, *in* National Party Platforms, 1840–1964, at 30, 32 (Kirk H. Porter & Donald B. Johnson eds., 1966) (recognizing the necessity of "the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively").

¹⁷⁸ See Currie, *Descent into the Maelstrom*, *supra* note 1, at 37–43; Proclamation by President Abraham Lincoln (Sept. 22, 1862), *in* 6 A Compilation of the Messages and Papers of the Presidents, *supra* note 42, at 157, 158–59.

¹⁷⁹ Patrick Henry, in opposing ratification of the U.S. Constitution in 1788, had foreseen this argument. Entrusted with authority over national defense, he reasoned, Congress might do whatever was "commensurate" to that end; might it not therefore require "*that every black man must fight?* Did we not see a little of this [in the] last war? We were not so hard pushed as to make emancipation general; but acts of Assembly passed that every slave who would go to the army should be free." Debate Before the Virginia Convention on Tuesday, June 24, 1788, *in* 3 Elliot's Debates, *supra* note 72, at 586, 590. Proponents of the Constitution dismissed Henry as a crank: No clause of the Constitution empowered Congress to free the slaves. See *id.* at 596–99 (statement of Randolph); *id.* at 621–22 (statement of Madison); see also 4 *id.* at 72, 102 (statement of Iredell).

the same reason, as others suggested, it could presumably free their families too.¹⁸⁰

The greatest stumbling block to this line of argument was the novel provision of Article I, Section 9, Clause 4 making clear what nearly everyone had understood the U.S. Constitution to mean before the Civil War: Congress could pass no law “denying or impairing the right of property in negro slaves.” Maybe this provision was the simple answer to President Davis’s emancipation proposal, but in the brief time that remained for debate no one in Congress was reported to have invoked it.¹⁸¹

Cleburne, Benjamin, and Lee all sidestepped the problem of limited Confederate authority by suggesting that the states, not Congress, should be asked to free the slaves.¹⁸² Neither President Davis

¹⁸⁰ See *supra* notes 167–74 and accompanying text (describing the arguments of Generals Cleburne and Lee). A pseudonymous letter to the editor of the *Richmond Enquirer*, Nov. 4, 1864, opposing the plan, spelled out the case for freeing the soldiers’ dependents: “[T]hese men must have their wives and children slaves, . . . whilst they are to enjoy all the privileges of freedom. Will not this necessarily make them discontented?,” *reprinted in* Durden, *supra* note 163, at 91.

¹⁸¹ Senator Hunter denied that Congress had power to free slaves, Senate Proceedings (Mar. 7, 1865) (Statement of Sen. Hunter), *reprinted in* 52 *Southern Historical Society Papers*, *supra* note 166, at 450, 454; North Carolina Representative James T. Leach offered a resolution declaring that the use of Negro soldiers would be “an infringement upon the States rights,” House Proceedings (Jan. 25, 1865) (Introduction of Joint Resolution), *reprinted in* 52 *Southern Historical Society Papers*, *supra* note 166, at 224, 226–27. Neither mentioned the explicit restriction of Article I, § 9. See also Speech by Virginia Representative Thomas S. Gholson in the House, Feb. 1, 1865, *in* Durden, *supra* note 163, at 166, 170 (quoting a pamphlet in the Duke University Library: “The Confederate Government has no authority over the institution of slavery in the States.”) The irrepressible Governor Brown protested to the Georgia legislature after Davis’s November 7 address that the Confederacy had no authority to abolish slavery “directly or indirectly”; he did not mention the restriction either. Letter from Governor Joseph E. Brown to the Georgia Senate and House of Representatives (Feb. 15, 1865), *in* 2 Allen D. Candler, *Confederate Records of Georgia* 818, 832–35 (1909). Virginia State Senator Collier finally dropped the shoe in a draft resolution submitted January 1, 1865. For the Confederacy to offer emancipation to Negro soldiers, or to bribe owners to do so, would in his view “transcend the delegated authority of the [C]ongress, and be a direct disregard of the constitutional provision that ‘[C]ongress shall not pass any law impairing the right of property in negro slaves.’” See Durden, *supra* note 163, at 165–66 (quoting from Va. Sen. J., Extra Sess. 1864, at 69–70).

¹⁸² See Letter from P.R. Cleburne et al. to Commanding General et al. of the Army of the Tennessee (Jan. 2, 1864), *supra* note 167, at 590 (declaring that the Constitution reserved to the states authority to grant freedom in exchange for service); Evans, *supra* note 34, at 283–85 (quoting Judah Benjamin’s speech at the African Church on

nor Senator Brown, however, took this namby-pamby approach, which would have left the fate of their program, and perhaps of the Confederacy, at the mercy of possibly recalcitrant states. Nor did either Davis or Brown even hint at requesting a constitutional amendment to permit Congress to free slaves drafted into the Army, and Congress could not have proposed one if they had.¹⁸³ In all probability many advocates and opponents of emancipation concluded that the provision forbidding Congress to interfere with “the right of property in negro slaves” was inapplicable. For the President’s plan would not abolish slavery as an institution. The Government would simply acquire slaves for military purposes and then free them; opponents of abolition in the District of Columbia had never denied that the Government, like any private slave-owner, could dispose of its own property.¹⁸⁴

One might have responded that the central Government, unlike the usual owner, had no authority to give away its assets. It was on this ground that U.S. Presidents Pierce and Buchanan had vetoed a variety of efforts to dispose of federal lands, and in some cases their arguments had had considerable force.¹⁸⁵ The sustainable

Feb. 9, 1865: “[I]t can only be done by the States separately.”); Letter from Robert E. Lee to Ethelbert Barksdale (Feb. 18, 1865) *in* Durden, *supra* note 163, at 206, 207 (“I think the matter should be left, as far as possible, to the people and to the States, which alone can legislate as the necessities of this particular service may require.”); see also Representative Barksdale’s Speech in the House (Feb. 6, 1865), *Richmond Sentinel*, Mar. 6, 1865, at 1, *reprinted in* Durden, *supra* note 163, at 242, 245 (“No ‘abolition’ is proposed. The question is left where it belongs, with the owner himself, under such laws as the State may enact.”).

¹⁸³ Article V of the Confederate Constitution, while making it easier for the states to amend the Constitution, denied Congress the right even to propose amendments for state adoption. See *infra* notes 546–50 and accompanying text.

¹⁸⁴ Two prominent newspapers urged this distinction: The emancipation of Negro soldiers “was not abolition, but manumission, which had been practiced for decades.” See *Yeans*, *supra* note 5, at 95–96 (citing the *Richmond Enquirer* and the *Montgomery Daily Mail*); see also Durden, *supra* note 163, at 125–28. Secretary Benjamin, who in his African Church address said that only the states could carry out the President’s proposal, had privately endorsed this argument: “[I]t is enough for the moment that the Confederacy should become the owner of as many negroes as are required for the public service and should emancipate them as a reward for good services.” Letter from Judah P. Benjamin to Fred A. Porcher (Dec 21, 1864), *in* 3 *Official Army Records* No. 4, at 959, 959 (Fred C. Ainsworth & Joseph Kirkley eds., 1900) (adding that the states should be left to decide whether to free their relatives as well). For the District of Columbia controversy see Currie, *Descent into the Maelstrom*, *supra* note 1, at 31–37.

¹⁸⁵ See Currie, *Democrats and Whigs*, *supra* note 1, at 59–79.

precedents, however, were not on point. For although there was much to be said for the proposition that Congress could expend neither tax nor land revenues to support such enterprises as insane asylums and agricultural colleges that had no connection with its enumerated powers, slaves would be given their freedom for the legitimate purpose of raising armies; emancipation was no less necessary and proper to this end, I have already suggested, than payment of their salary.¹⁸⁶

Though many members of Congress were aghast at the prospect of partial emancipation, others accepted it as the lesser evil. Better emancipation, said Mississippi Senator John Watson resignedly, than subjugation.¹⁸⁷ Southern independence, initially a means of protecting slavery, had become an end in itself, and many—including the President—were prepared to undermine the very institution they had seceded to preserve.¹⁸⁸

¹⁸⁶ It is true that under traditional contract law there was no consideration for the Government's promise of freedom, as the slave had a preexisting duty to render service to his master. Like wages, however, the incentive of freedom worked as a substitute for other enforcement measures such as incarceration and whipping and were equally necessary and proper to raising the army. Even Representative Foote found it expedient to offer black soldiers their freedom, provided the states agreed. House Proceedings (Nov. 10, 1864) (Employment of Negroes in the Army), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 290, 292–93.

¹⁸⁷ Senate Proceedings (Feb. 4, 1865) (statement of Watson), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 295, 296–97. “Men are beginning to say,” Robert Kean confided to his diary in January 1865, “that when the question is between slavery and independence, slavery must go”—which Kean thought logical enough since, if the war was lost, slavery would be abolished anyway. *Inside the Confederate Government: The Diary of Robert Garlick Hill Kean 182–83* (Edward Younger ed., 1957). Kean was head of the Confederate Bureau of War, working under the supervision of Assistant War Secretary John A. Campbell, a former Justice of the U.S. Supreme Court. See Edward Younger, Introduction *to* *Inside the Confederate Government: The Diary of Robert Garlick Hill Kean*, *supra*, at i, xi; see also William E. Dodd, *Jefferson Davis 343–44* (1907) (“[U]nder the stress of a strong sea, the good captain throws overboard many valuable possessions.”).

¹⁸⁸ See Vice President A.H. Stephens, Speech at Savannah (Mar. 21, 1861), *in* *Cleveland*, *supra* note 19, at 717, 721 (declaring that the “corner-stone” of the Confederate government “rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition”) President Davis, in contrast, had laid the groundwork for his startling proposal by downplaying slavery from the start and defending the Confederate cause as a struggle for Southern liberty in order to promote solidarity at home and possible sympathy abroad. See Paul D. Escott, *After Secession: Jefferson Davis and the Failure of the Confederate Nation 34–41* (1978).

Indeed, as we have seen, both General Cleburne and General Lee were prepared to do more than liberate black soldiers and their families; they were prepared to sacrifice slavery altogether. Among Cleburne's reasons for this sweeping suggestion was that slavery had become an embarrassment in foreign relations: It was the "peculiar institution" that prevented the Confederacy from obtaining invaluable foreign support.¹⁸⁹ Before the war was over, the Administration itself was prepared to go this last mile: At Benjamin's suggestion, President Davis went so far as to dispatch an envoy to England in a fruitless attempt to negotiate recognition in exchange for the abolition of slavery.¹⁹⁰

Congress did ultimately authorize the arming of black soldiers, finessing the constitutional question by specifying that they should

¹⁸⁹ Letter from P.R. Cleburne et al. to Commanding General et al. of the Army of the Tennessee (Jan. 2, 1864), *supra* note 167, at 589, *reprinted in* Durden, *supra* note 163, at 58.

¹⁹⁰ "[N]o sacrifice is too great, save that of honor," wrote Judah Benjamin to John Slidell in December, 1864, to gain "the sole object" of the war, "the vindication of our right to self-government and independence." Letter from Judah Benjamin to John Slidell (Dec. 27, 1864), *in* 3 Official Navy Records, No. 2, pt. 1, *supra* note 33, at 1253, 1255–56, *reprinted in* Durden, *supra* note 163, at 150, 150. The British proved uninterested, and the French, as usual, were unwilling to act without British support. See Evans, *supra* note 34, at 259–75; Craig A. Bauer, *The Last Effort: The Secret Mission of the Confederate Diplomat*, Duncan F. Kenner, 22 *La. Hist.* 67 (1981); Memorandum from William Wirt Henry to I.M. Callahan (Mar. 24, 1899), *in* Kenner's *Mission to Europe*, 25 *Wm. & Mary C. Q.* 9, 9–10 (1916), *reprinted in* Durden, *supra* note 163, at 148, 148–49; Letter from James Mason to Judah Benjamin (Mar. 31, 1865), *in* 3 *Navy Official Records* No. 2, *supra* note 33, at 1270, 1270–76; Patrick, *supra* note 32, at 188–89. President Davis himself was pessimistic about Kenner's mission, not least because of the difficulty of implementing any agreement:

In the first place, the Confederate Government can make no agreement nor arrangement with any Nation, which would interfere with State institutions, and if foreign Governments would consent to interpose in our behalf upon the conditions stated, it would be necessary to submit the terms to the different States of the Confederacy for their separate action.

Letter from Jefferson Davis to J.D. Shaw (Mar. 22, 1865), *in* 6 *Jefferson Davis, Constitutional*, *supra* note 32, at 518, 518–19, *reprinted in* Durden, *supra* note 163, at 266, 266. These fears do not appear misplaced. The treaty power may not be limited by the enumeration of central legislative authority, but it is limited by specific restrictions found elsewhere in the Constitution. Compare *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding a treaty without deciding whether its subject matter fell within Congress's enumerated powers), with *Reid v. Covert*, 354 U.S. 1 (1957) (striking down an international agreement that offended the Bill of Rights); see also the assertion in Cooper, *supra* note 35, at 514, that Davis viewed the proposal as "an extra-constitutional war measure essential for national survival."

not be freed without the consent both of their owners and of the state in which they lived.¹⁹¹ The Army implemented the statute with a General Order specifying that “[n]o slave will be accepted as a recruit unless with his own consent and with the approbation of his master by a written instrument conferring, as far as he may, the rights of a freedman.”¹⁹² “Black troops,” wrote Professor Emory Thomas, “would serve not as slaves or even with the hope of future emancipation; they were to serve as free men.”¹⁹³ But it was too late to help the Confederacy; the war ended before freedmen could take their place in the trenches, and the Confederate government never freed the slaves.

VI. PROCUREMENT

The Confederate States experienced serious difficulties in raising sufficient armies despite the express authority the Constitution gave them, and in endeavoring to do so they adopted or flirted with controversial measures that called into question the dedication of their leaders both to state rights and to slavery. The Confederate Congress confronted comparable challenges in attempting to support armies once it had raised them, as the same clause of Article I, Section 8 likewise empowered it to do.¹⁹⁴

I have already mentioned the states’ unwillingness to transfer arms to the central authorities and the statute authorizing the Government to buy or manufacture them.¹⁹⁵ This provision clearly fell within Congress’s authority to support armies, and as Attorney General George Davis ruled in the analogous case of liquor, the

¹⁹¹ Act of Mar. 18, 1865, No. 148, 2d Cong., 2d Sess., *in* *Laws of the Last Session*, *supra* note 24, at 118, 118.

¹⁹² General Order No. 14 (Mar. 23, 1865), *in* 3 *Official Army Records* No. 4, *supra* note 33, at 1161, 1161–62.

¹⁹³ Thomas, *supra* note 20, at 296 (adding that this provision and another requiring that black soldiers be treated with kindness and consideration “transformed an ambiguous public law into a radical public policy”).

¹⁹⁴ Conf. Const. of Mar. 1861, art. I, § 8, cl. 12, *reprinted in* *Statutes at Large*, *supra* note 5, at 14.

¹⁹⁵ See *supra* notes 64–73 and accompanying text.

2004]

Through the Looking-Glass

1307

states plainly had no right to interfere¹⁹⁶ since Confederate law was supreme.¹⁹⁷

The states were as reluctant to share other essential supplies as they were guns, however, and the government was unable to produce them in sufficient quantity. North Carolina, it is said, hoarded large numbers of uniforms and blankets as General Lee's soldiers froze in Virginia.¹⁹⁸ In addition, the rail system was inadequate, railroads were not always willing to carry either troops or their equipment,¹⁹⁹ and farmers became increasingly reluctant to sell provisions to the Army as Treasury notes lost much of their value.²⁰⁰ Faced with these difficulties, the Confederate Government resorted to a variety of expedients in its effort to secure supplies, once again raising numerous questions respecting not only states' rights but other constitutional concerns as well.

Acting without explicit statutory authority, Army officers desperate for food and other provisions began to "impress" or commandeer them from unwilling suppliers, creating much ill will and much angry congressional debate.²⁰¹ Few denied that the power to support armies implied authority to take private property for public use, although occasional members of the U.S. Congress had argued that the United States had no right of eminent domain.²⁰²

¹⁹⁶ See supra note 140 and accompanying text.

¹⁹⁷ Conf. Const. of Mar. 1861, art. VI, cl. 3, *reprinted in* Statutes at Large, supra note 5, at 21.

¹⁹⁸ See Owsley, supra note 33, at 110–27. Government efforts to manufacture clothing and shoes for the Army are detailed in Charles W. Ramsdell, *The Control of Manufacturing by the Confederate Government*, 8 *Miss. Valley Hist. Rev.* 231 (1921).

¹⁹⁹ For a thorough exposition of the difficulties that plagued the transportation of military supplies in the Confederacy, see Charles W. Ramsdell, *The Confederate Government and the Railroads*, 22 *Am. Hist. Rev.* 794 (1917).

²⁰⁰ See Owsley, supra note 33, at 219; see also *Inside the Confederate Government: The Diary of Robert Garlick Hill Kean*, supra note 187, at 40 (noting Robert Kean's observation that "[t]he most alarming feature of our condition by far is the failure of means of subsistence").

²⁰¹ See, e.g., House Proceedings (Jan. 16, 1863) (statement of Goode), *reprinted in* 47 *Southern Historical Society Papers*, supra note 72, at 124, 126. Robert Kean, of the Bureau of War, thought impressment counterproductive and feared that state courts might precipitate a constitutional crisis by enjoining it; he did not say he doubted its constitutionality. *Inside the Confederate Government: The Diary of Robert Garlick Hill Kean*, supra note 187, at 41.

²⁰² See Currie, *The Jeffersonians*, supra note 23, at 276–77. Senator Simms did deny it in January 1863. Senate Proceedings (Jan. 19, 1863), *reprinted in* 47 *Southern Historical Society Papers*, supra note 72, at 146, 149–50.

Confederate Attorney General Thomas Watts upheld the right to condemn property in July of 1862, equivocating as to whether it was inherent in government (which would contradict the enumeration principle confirmed by Article VI, which incorporated what in the United States was the Tenth Amendment) or implicit in the requirement of just compensation (which would offend the Ninth Amendment principle, likewise embodied in Article VI, that limitations on power do not imply its existence);²⁰³ he might better have said simply (as he later suggested) that it was necessary and proper to supporting the Army.²⁰⁴

The Attorney General denied, however, that property could be taken without statutory authority²⁰⁵—as Justices Black²⁰⁶ and Douglas²⁰⁷ would hold in the famous Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, nearly a hundred years later. Much of the impressment, however, occurred on or near the battlefield, where Justice Black would concede the Commander-in-Chief en-

²⁰³ Powers of Eminent Domain (July 31, 1862), in *Opinions of the Confederate Attorneys General*, supra note 31, at 127, 128. Attorney General Davis reaffirmed both Watts's conclusion and his reasoning in 1864, *Impressment of Land for Public Use* (Apr. 29, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 438, 439. Senator Wigfall had likewise argued that the Confederacy had the right to take property for just compensation. Senate Proceedings (Jan. 19, 1863) (statement of Sen. Wigfall), reprinted in 47 *Southern Historical Society Papers*, supra note 72, at 146, 149.

²⁰⁴ Liability of Government for Property (Oct. 17, 1862), in *Opinions of the Confederate Attorneys General*, supra note 31, at 159, 160. The U.S. Supreme Court would confirm in 1876 that the United States possessed the power of eminent domain "so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." *Kohl v. United States*, 91 U.S. 367, 372 (1875). The Georgia Supreme Court upheld Confederate condemnation power in the context of military impressment in 1863. *Cox & Hill v. Cummings*, 33 Ga. 549, 554–55 (1863).

²⁰⁵ Powers of Eminent Domain (July 31, 1862), supra note 203, at 128–29. U.S. Attorney General Caleb Cushing had reached the same conclusion in 1855, apparently on the basis of the Due Process Clause: The United States could take private property only by due process of law, and no statute authorized the Executive to do so. *Territorial Roads*, 7 Op. [U.S.] Att'y Gen. 320, 321 (1855).

²⁰⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

²⁰⁷ *Id.* at 631 (Douglas, J., concurring). Other Justices, three of whom professed to join Black's "opinion of the Court," argued in contrast that Congress had implicitly *forbidden* the President to seize the steel mills. *Id.* at 602 (Frankfurter, J., concurring); *id.* at 639 (Jackson, J., concurring); *id.* at 660 (Burton, J., concurring); *id.* at 662 (Clark, J., concurring in the result). See David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986*, at 365–67 (1990).

joyed broader powers;²⁰⁸ relying on U.S. precedent, Attorney General Davis would later acknowledge a limited exception based on imperative need.²⁰⁹ Bowing to necessity, the Confederate Congress expressly authorized impressment in certain cases in 1863.²¹⁰

Once the statute was enacted, the principal constitutional objection to impressment was that the Army did not pay just compensation for the goods it appropriated as Article I, Section 9 required.²¹¹ In the case of impressment from producers or consumers, Congress provided for local arbitration of actual value in the individual case.²¹² In the case of merchants, however, the statute set up commissions in each state to establish “prices” on a regional basis.²¹³ The Georgia Supreme Court balked: Just compensation meant actual market value, and any resemblance between that and state-wide schedules that were to remain in force for as long as sixty days was purely coincidental.²¹⁴ The statute was then amended to require payment of the value of the property “at the time and place of impressment,”²¹⁵ which Attorney General Davis agreed was the con-

²⁰⁸ See *Youngstown*, 343 U.S. at 587.

²⁰⁹ Impressment of Land for Public Use (Apr. 29, 1864), supra note 203, at 439–40 (citing *Mitchell v. Harmony*, 54 U.S. 115, 134–35 (1851)). See William Winthrop, *Military Law and Precedents* *1205 (1979).

²¹⁰ Act of Mar. 26, 1863, ch. 10, §§ 1, 4, Pub. Laws, 1st Cong., 3d Sess., reprinted in *Statutes at Large*, supra note 5, at 102, 102–04. In cases outside the statute, Attorney General Davis ruled in 1864, the government still could not impress property absent “imminent overruling necessity.” Impressment of Land for Public Use (Apr. 29, 1864), supra note 203, at 440.

²¹¹ Conf. Const. of Mar. 1861, art. I, § 9, cl. 16, reprinted in *Statutes at Large*, supra note 5, at 16; cf. U.S. Const. amend. V (the Takings Clause is identical in language to the Takings Clause in the Confederate States Constitution). There were loud complaints about “impressment” by unauthorized individuals posing as military agents as well, but the government could hardly be blamed for them. See, e.g., Letter from Gov. Joseph E. Brown to the General Assembly (Nov. 17, 1862), in 2 *Official Army Records* No. 4, at 180, 181 (Fred C. Ainsworth & Joseph Kirkley eds., 1900). Nor was there any constitutional requirement that the property in question be unavailable on the open market; the Constitution required only that it be taken “for public use.” See, e.g., *Cunningham v. Campbell*, 33 Ga. 625, 628 (1863).

²¹² Act of Mar. 26, 1863, ch. 10, § 1, Pub. Laws, 1st Cong., 3d Sess., reprinted in *Statutes at Large*, supra note 5, at 102, 102.

²¹³ *Id.* §§ 5, 6.

²¹⁴ *Cunningham*, 33 Ga. at 635–37.

²¹⁵ Act of Feb. 16, 1864, ch. 43, § 3, Pub. Laws, 1st Cong., 4th Sess., reprinted in *Statutes at Large*, supra note 5, at 192, 192; see also Act of Mar. 18, 1865, No. 195, § 2, Pub. Laws, 2d Cong., 2d Sess., reprinted in *Laws of the Last Session*, supra note 24, at

stitutional standard.²¹⁶ That seems right to me,²¹⁷ and the U.S. Supreme Court would later so hold²¹⁸—only to create a later wartime

151, 152 (defining “just compensation” as “the usual market price of such property at the time and place of impressment”).

²¹⁶ Liability of Government for Impressed Slaves (July 11, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 459, 460. Attorney General Watts had earlier enunciated the same rule for determining damages for an unauthorized impressment of private property. *Government Liability for Seized Property* (Feb. 16, 1863), in *Opinions of the Confederate Attorneys General*, supra note 31, at 216, 217.

²¹⁷ Otherwise, said the Georgia court in *Cunningham*, those whose property was impressed would bear a disproportionate share of the burden of supporting the war effort—contrary to one of the central purposes of the compensation requirement. 33 Ga. at 636; see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165, 1168–69 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 57–60, 75–76 (1964).

²¹⁸ *United States v. New River Collieries Co.*, 262 U.S. 341, 345 (1923). Disagreeing with this conclusion, Gustavus Henry of Tennessee reminded the Confederate Senate in March 1863 that Richard III of England was said at one point to have offered his entire kingdom for a horse. *Senate Proceedings* (Mar. 5, 1863) (statement of Sen. Henry), reprinted in 48 *Southern Historical Society Papers*, supra note 90, at 251, 255.

A distinct question respecting the obligation to pay just compensation for takings arose in March 1862, when Congress authorized the destruction of property to keep it out of enemy hands. Act of Mar. 17, 1864, ch. 5, Pub. Laws, 1st Cong., 1st Sess., reprinted in *Statutes at Large*, supra note 5, at 2, 2. Attorney General Watts seemed to suggest that to destroy property was not to take it for public use. *Liability of Government for Property* (Oct. 17, 1862), supra note 204, at 160–61, and on the basis of tradition the U.S. Supreme Court would later so hold—arguing unpersuasively that “[t]he safety of the state in such cases overrides all considerations of private loss.” *United States v. Pac. R.R.*, 120 U.S. 227, 234 (1887); see also *United States v. Caltex, Inc.*, 344 U.S. 149, 155–56 (1952) (reaffirming over two dissents that no compensation was required, emphasizing that the property in question was “destroyed, not appropriated for subsequent use,” and concluding that the loss “must be attributed solely to the fortunes of war, and not to the sovereign”); Winthrop, supra note 209, at *1206 (dismissing destruction or damage to property as “among the inevitable accidents and misfortunes of war”). Yet such a case clearly fell within the underlying policy of the Takings Clause that one person should not bear the sole burden of a sacrifice incurred for the common benefit, and Attorney General Watts, citing Vattel, argued that Congress “should” provide compensation for property deliberately destroyed—though not, he added, for losses inflicted by the enemy or as the unintended consequence of friendly fire. *Liability of Government for Property* (Oct. 17, 1862), supra note 204, at 160–61 (citing Vattel, supra note 109, bk. III, § 232). One may of course question whether the compensation payable in such a case would be substantial; the value of property about to be seized by the enemy seems likely to be low.

Whether the Constitution required it or not, Congress after a policy debate, see *House Proceedings* (Mar. 5, 1862) (*Burning of Cotton and Tobacco*), reprinted in 44 *Southern Historical Society Papers*, *Proceedings of First Confederate Congress—First Session* 97, 99–104, 116–19 (Broadfoot Publ’g Co. Morningside Bookshop 1991), did direct the payment of indemnity for property deliberately destroyed by the govern-

2004]

Through the Looking-Glass

1311

exception that seems to me difficult to reconcile with the purposes of the clause.²¹⁹

At the President's request, Congress appropriated money to help build railroads to plug gaps in the existing network, such as between Greensboro, North Carolina and Danville, Virginia.²²⁰ President Davis had told Congress that this road was plainly essential to the transportation of troops and supplies, bringing it easily within congressional authority to raise and support armies.²²¹ For although the Confederate Constitution forbade Congress to build internal improvements in order to promote commerce, it said nothing to preclude those that were necessary and proper to the war power. Davis himself hastened to point out this distinction:

If the construction of this road should, in the judgment of Congress as it is in mine, be indispensable for the most successful prosecution of the war, the action of the Government will not be

ment, though only out of the proceeds of sequestered or confiscated enemy assets, and only "in such manner as Congress may hereafter provide." Act of Mar. 17, 1862, ch. 5, § 2, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 2, 2. Apparently the follow-through was inadequate, for nearly a year later President Davis urged Congress to provide compensation in such cases, arguing that property so destroyed "in effect ha[d] been taken for public use, though not directly appropriated." Message from Jefferson Davis to the Third Session of the First Congress of the Confederate States (Jan. 12, 1863), *in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 276, 296. In 1865 Congress actually appropriated funds to compensate the owners of a ship that had been sunk to obstruct enemy access to Mobile harbor. Act of Mar. 1, 1865, ch. 90, Pub. Laws, 2d Cong., 2d Sess., *in* Laws of the Last Session, supra note 24, at 66, 72.

²¹⁹ *United States v. Cors*, 337 U.S. 325, 333 (1949).

²²⁰ Act of Feb. 10, 1862, ch. 67, Pub. Laws, Provisional Cong., *reprinted in* Statutes at Large, supra note 5, at 258, 258; see also Act of Apr. 19, 1862, ch. 36, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 34, 34 (railroad from New Iberia, Louisiana, to Houston, Texas); Act of Oct. 2, 1862, ch. 20, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 66, 66 (railroad from Blue Mountain, Alabama, to Rome, Georgia). The Greensboro road took two years to build, and the fall of New Orleans put an end to the Texas plan. See Coulter, supra note 35, at 270-72.

²²¹ Message from Jefferson Davis to the Congress of the Confederate States (Nov. 18, 1861), *in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 136, 139-40. An early biographer assures us, without documentation, that if Congress had not authorized the railroad Davis would have built it anyway "under his own authority as the commander-in-chief." Dodd, supra note 187, at 260.

restrained by the constitutional objection which would attach to a work for commercial purposes²²²

Even President Buchanan, who took a comparably dim view of the commerce power in the United States, had supported a Pacific railroad to defend the West Coast; and so, with arcane reservations that President Davis did not think it necessary to mention, had Senator Jefferson Davis of Mississippi.²²³

To the same end the Confederate Congress also authorized the President to order the railroads to carry troops and provisions and to seize them if they refused to comply.²²⁴ A later statute, dispensing with the necessity for a prior refusal to deal, flatly gave the Secretary of War the right to take over railroads, steamboats, and canals (and essentially to draft their employees) in order to ensure the effective transportation of personnel and supplies²²⁵—much as President Wilson would later do during World War I.²²⁶ An earlier

²²² Message from Jefferson Davis to the Congress of the Confederate States (Nov. 18, 1861), *supra* note 221, at 140. But see the written protest of Robert Toombs and other Senators that the bill was unconstitutional: they argued that there was no military necessity since no point on the projected road was more than twenty-five miles from an existing railway. 1 *Journal of the Confederate Congress*, *supra* note 5, *in* S. Doc. No. 58-234, at 781–82 (1904).

²²³ See Currie, *Democrats and Whigs*, *supra* note 1, at 53–56. Senator Semmes inquired on another occasion how troops could be transported to Texas in the event of invasion without a railroad. Senate Proceedings (Apr. 19, 1862) (statement of Sen. Semmes), *reprinted in* 45 *Southern Historical Society Papers*, *supra* note 81, at 158, 159. The Senate had initially refused to support the Texas railroad after Senator Oldham argued that the central Government had no right to “invade” Texas to build it. President Davis immediately sent word that the road was a military necessity, Sen. Semmes read a letter to the same effect from “a high military source in New Orleans,” and the bill was reconsidered and passed, all on the same day. *Id.* at 159–60. Similarly, the President asked Congress to provide financial aid to subsidize the manufacture of both rails and locomotives so that the railroads could better serve military needs. Message from Jefferson Davis to the Provisional Congress of the Confederate States (Dec. 17, 1861), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 151, 152–53. This too was plainly necessary and proper to the war effort; while serving the same ends as building a new railroad, it was quicker, cheaper, and less intrusive.

²²⁴ Act of May 1, 1863, ch. 98, § 1, Pub. Laws, 1st Cong., 3d Sess., *reprinted in* *Laws of the Last Session*, *supra* note 24, at 167, 167–68.

²²⁵ Act of Feb. 28, 1865, ch. 85, § 1, Pub. Laws, 2d Cong., 2d Sess., *reprinted in* *Statutes at Large*, *supra* note 5, at 60, 60–61.

²²⁶ See the authorizing statute, Act of Aug. 29, 1916, ch. 418, Pub. L. No. 64-242, 39 Stat. 645, and Wilson’s proclamation, 40 Stat. 1733–35 (Dec. 26, 1917); K. Austin Kerr, *American Railroad Politics, 1914–1920*, at 59–71 (1968).

2004]

Through the Looking-Glass

1313

statute had asserted Confederate control of telegraph operations, in part for the same reason.²²⁷ These measures, too, were necessary and proper to the raising and support of armies or the conduct of the war, though they reached deeply into matters that in normal times had been left either to the market or to the states. This legislation presented the *Youngstown* case without the separation of powers problem: All the Justices there agreed that Congress could authorize the President to seize the mills.²²⁸

Most interesting along this line, however, was the serious effort that was made to persuade Congress to forbid the planting of cotton. Almost as heretical as freeing the slaves to fight for the Confederacy, this proposal too was arguably necessary and proper to

²²⁷ Act of May 11, 1861, ch. IX, §§ 3, 8, *reprinted in* Statutes at Large, supra note 5, at 106, 106–07. Other provisions of this law served to promote military security. § 1, for example, empowered the President to “supervise” telegraphic communications in order to prevent the transmission of information calculated to endanger military operations, “to injure the cause of the Confederate States, or to give aid and comfort to their enemies.” *Id.* at § 1. For the freedom-of-expression aspects of this provision see infra notes 279–87 and accompanying text.

The House of Representatives also considered merging telegraph service with the Post Office, as had briefly been tried in the United States and was commonly done in Europe; for the telegraph was a modern substitute for the mail and thus arguably fell within the postal power, whose purpose was to overcome the inefficiency of multiple state systems for transmitting information. Asked to provide relevant information, President Davis scotched the idea, seeing no reason to think the government would do the job better than private entrepreneurs and adding that he refrained from commenting on the questions of constitutionality and patronage the suggestion raised because he assumed the House had already considered them. Letter from Jefferson Davis to the Confederate House of Representatives (Feb. 23, 1863), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 307, 307; see Currie, *Democrats and Whigs*, supra note 1, at 56–58.

²²⁸ See, e.g., 343 U.S. at 588. The Confederate Congress likewise imposed draconian limits on foreign trade in order to conserve scarce space for government cargoes and to limit the export of naval stores and other commodities so as to husband them for the Confederate cause. Act of Feb. 6, 1864, ch. 23, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, supra note 5, at 179, 179; Act of Feb. 6, 1864, ch. 24, § 1, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, supra note 5, at 181, 181. These measures were also necessary and proper to the war effort, and in contrast to the proposed limit on planting next to be considered they could easily be defended as regulations of commerce; one is reminded of President Thomas Jefferson’s controversial embargo. See Currie, *The Jeffersonians*, supra note 23, at 145–55; see also Louise B. Hill, *State Socialism in the Confederate States of America* 3 (Southern Sketches, 1st ser., no. 9, 1936) [hereinafter Hill, *State Socialism*] (characterizing this regulatory program, coupled with the government’s judicious acquisition of ships of its own, as “the most successful demonstration of State Socialism to be found up to the time in modern civilization”).

the support of armies, for its principal purpose was to induce farmers to produce food for the soldiers by denying them a possibly more profitable competing use of their land.²²⁹

This breathtaking suggestion reminds the modern observer of some of the most extreme Necessary and Proper Clause decisions ever rendered by the U.S. Supreme Court—of *Wickard v. Filburn*, which upheld the power of Congress to limit the wheat a farmer could plant for his own use in order to increase the demand for grain transported in interstate commerce,²³⁰ and most strikingly of *Hamilton v. Kentucky Distilleries & Warehouse Co.*, which permitted Congress to ban the manufacture and sale of alcoholic beverages because, among other things, the grain was needed to feed the soldiers.²³¹

This time states' rights prevailed, though narrowly, in the Confederate Congress. The Senate rejected the bill;²³² Congress and the

²²⁹ Senate Proceedings (Mar. 15, 1862) (statement of Sen. Phelan), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 162, 163–65, 169. An additional goal was to pressure Britain and France into recognizing the Confederacy by withholding the raw material their manufacturers required. See Senate Proceedings (Mar. 12, 1862) (statement of Sen. Brown), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 145, 148–49; Frank L. Owsley, *King Cotton Diplomacy* 43–50 (2d ed. 1959).

²³⁰ 317 U.S. 111, 128–29 (1942).

²³¹ 251 U.S. 146, 153, 155–57 (1919). Senator Haynes actually presented a petition to ban the distillation of grain in 1862, presumably on the same grounds. Senate Proceedings (Mar. 10, 1862) (Distillation of Grain), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 125, 126. Senator Semmes's ensuing committee report applauded the object of the petition but added that it “did not think it was a proper subject for the action of this government,” and the committee was discharged from further consideration of the issue. Senate Proceedings (Mar. 12, 1862) (Reports from the Military Committee), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 145, 146. Three members of the Cabinet went so far as to suggest that the executive seize the distillers' corn *without* statutory authorization, both to conserve the supply and to combat intoxication among the soldiers. Their colleagues, however, decried the proposal as “a dangerous and unauthorized exercise of power,” and it was abandoned. See Meade, *supra* note 35, at 231 (quoting 1 Diary of Thomas Bragg, *supra* note 73, at 148). Most of the states, it is said, did adopt prohibition laws in order to conserve grain. See Robinson, *supra* note 141, at 50–51.

²³² Senate Proceedings (Mar. 18, 1862) (The Cotton Prohibition Bill), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 178, 178. For shocked expostulations of the unconstitutionality of the proposal, see Senate Proceedings (Mar. 12, 1862) (statement of Sen. Wigfall), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 145, 147; Senate Proceedings (Mar. 15, 1862) (statement of Sen. Oldham), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 169,

2004]

Through the Looking-Glass

1315

President had to content themselves with wan pleas that patriotic farmers grow less cotton and more corn and ‘taters.²³³ That such an audacious exercise of central authority was contemplated at all was a testimonial to the distorting effect of total war on a system whose stated purpose was to preserve the rights of the constituent states.

Finally, in January 1865, Arkansas Senator Rufus K. Garland proposed that Congress establish a Home Department charged with “the development, management, and control of the internal resources of the Confederate States.” Now that Southern ports were effectively blocked, he argued, the Confederacy had to sustain itself without reliance on foreign supplies.²³⁴ In other words, it was time for the central Government to take over the entire economy in order more effectively to prosecute the war. That was too much for Congress even in extremis; Garland’s proposal quietly died. Nevertheless, as one historian reported, “Acts of Congress,

169–71; Richmond Dispatch, Mar. 15, 1862 (statement of Hill), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 160, 160.

²³³ See Act of Apr. 4, 1863, No. 2, Pub. Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 166, 166–67; Address by Jefferson Davis to the People of the Confederate States (Apr. 10, 1863), *in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 331, 331–35. Senator Brown had earlier moved that Congress *tax* the production of cotton above a specified minimum, Senate Proceedings (Feb. 24, 1862) (introduction of bill by Sen. Brown), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 42, 42–43. If the aim of this proposal was to create a disincentive to planting cotton, it was unconstitutional, for Article I, § 8 provided that the Confederacy could lay taxes only to raise revenue, not to promote ulterior ends. Conf. Const. of Mar. 1861, art. I, § 8, cl. 1, *reprinted in* Statutes at Large, *supra* note 5, at 14. State laws limiting cotton production, however, are thought to have had a significant effect; whether for this or other reasons, the 1863 cotton crop was only one-ninth that produced two years before. See Yearns, *supra* note 5, at 131. But see Letter from John Milton to Jefferson Davis, *in* 9 The Papers of Jefferson Davis, *supra* note 11, at 142, 142–43 (arguing that not even the states had power to forbid planting since one might as well argue it was permissible to “confiscate all rights of property for the benefit of the Confederate Government”). The takings clause of the Confederate Constitution, Conf. Const. of Mar. 1861, art. I, § 9, cl. 16, *reprinted in* Statutes at Large, *supra* note 5, at 16, like that of the United States, U.S. Const. amend. V, did not apply to individual states; see also *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (“[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.”); DeRosa, *supra* note 36, at 63–64 (“The fact that the C.S.A. framers intended that their bill of rights be applied [only] to the Confederate government is evidenced by their placement of most of the reserved rights in Article I, § 9, where the list of what the Congress shall not do is to be found.”).

²³⁴ Senate Proceedings (Jan. 23, 1865) (A Home Department), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 196, 196–97.

administration policy, and ‘military necessity’ allowed and encouraged government control of Southern war industry” and indeed of “the South’s wartime economy” as a whole.²³⁵

VII. INDIVIDUAL RIGHTS

Civil liberties as well as states’ rights are often jeopardized by war and, as a recent study has documented, the Confederacy was no exception in this regard.²³⁶

A. The Right to Travel

We have touched briefly upon issues of personal and property rights in connection with conscription and the impressment of supplies. No less significant, perhaps, were the severe restrictions on travel the Army imposed from an early date throughout the Confederacy, ostensibly to detect deserters.²³⁷ Senator Oldham complained in August 1862 that he had been prevented from traveling without a military pass.²³⁸ Representative Machen later demanded to know whether any statute required passports for travel within the Confederacy;²³⁹ Representative Dargan denounced the passport system as an example of military tyranny;²⁴⁰ Oldham privately branded it “an act of the grossest military usurpation.”²⁴¹ As these examples suggest, the readiest objections appeared to be based on

²³⁵ Thomas, *supra* note 20, at 206–10 (discussing as well a number of the measures noted in this section).

²³⁶ See generally Mark E. Neely, Jr., *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (1999) [hereinafter Neely, *Southern Rights*] (documenting widespread violations of civil liberties by the Confederate Government and the establishment of a domestic passport system); see also Mark E. Neely, Jr., *Confederate Bastille: Jefferson Davis and Civil Liberties* 16 (1993) [hereinafter Neely, *Confederate Bastille*] (tantalizing preview of the longer work just cited, concluding that, contrary to popular rumor, “[t]he Confederate citizen was not any freer than the Union citizen” and “may have been in some ways less free than his Northern counterpart”).

²³⁷ See Neely, *Southern Rights*, *supra* note 236, at 2–6.

²³⁸ Senate Proceedings (Aug. 25, 1862) (statement of Sen. Oldham), *reprinted in* 45 *Southern Historical Society Papers*, *supra* note 81, at 220, 226.

²³⁹ House Proceedings (Dec. 17, 1863) (The Passport System), *reprinted in* 50 *Southern Historical Society Papers*, *supra* note 136, at 72, 75.

²⁴⁰ House Proceedings (Dec. 23, 1863) (statement of Rep. Dargan), *reprinted in* 50 *Southern Historical Society Papers*, *supra* note 136, at 112, 114.

²⁴¹ Oldham Memoirs, *supra* note 104, at 185.

2004]

Through the Looking-Glass

1317

federalism and the separation of powers; the Confederate Bill of Rights, like that on which it was based, said nothing of a constitutional right to travel.²⁴²

Detained by military guards on his way to attend Congress in 1864, South Carolina Senator James Orr indignantly inquired whether the Army was authorized to prevent Congress from meeting.²⁴³ Senator Wigfall explained that there had been a misunderstanding,²⁴⁴ and Congress ultimately directed the Secretary of State to issue to members of the House and Senate passes entitling them to travel anywhere in the Confederate States (except to military or naval installations) without seeking permission—thereby appearing to acknowledge the Army’s right to restrict travel.²⁴⁵

B. Church and State

First Amendment concerns, as we would call them, played a rather muted role in the Confederate States.²⁴⁶ The religion clauses, for example, were scarcely mentioned in congressional debate. Congressional sessions were opened with prayers,²⁴⁷ the President

²⁴² Witness the later tortured efforts of the U.S. Supreme Court to identify the source of such a right in cases like *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43–49 (1868), and *Edwards v. California*, 314 U.S. 160, 178 (1941).

²⁴³ Senate Proceedings (May 5, 1864) (statement of Sen. Orr), *reprinted in* 51 Southern Historical Society Papers, supra note 27, at 22, 27; see Conf. Const. of Mar. 1861, art. I, § 6, *reprinted in* Statutes at Large, supra note 5, at 13. (“The Senators and Representatives . . . 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 . . .”).

²⁴⁴ Senate Proceedings (May 5, 1864) (statement of Sen. Wigfall), *reprinted in* 51 Southern Historical Society Papers, supra note 27, at 22, 27–28.

²⁴⁵ Act of May 23, 1864, ch. 3, Pub. Laws, 2d Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 254, 254.

²⁴⁶ The provisions respecting expression, assembly, and religion found in the U.S. Bill of Rights were incorporated without change into Article I, § 9 of the Confederate Constitution, where they belonged. Conf. Const. of Mar. 1861, art. I, § 9, cl. 12, *reprinted in* Statutes at Large, supra note 5, at 16.

²⁴⁷ See, e.g., Senate Proceedings (Feb. 19, 1862) (prayer by Bishop Early at opening of Senate), *in* 44 Southern Historical Society Papers, supra note 218, at 16, 16; House Proceedings (Feb. 19, 1862) (prayer by Rev. Mr. Duncan at opening of House), *in* 44 Southern Historical Society Papers, supra note 218, at 18, 18; Senate Proceedings (Feb. 21, 1862) (prayer by Rev. Dr. J.L. Burrows at opening of Senate), *in* 44 Southern Historical Society Papers, supra note 218, at 28, 28; House Proceedings (Feb. 22, 1862) (prayer by Rev. Mr. Duncan at opening of House), *in* 44 Southern Historical Society Papers, supra note 218, at 37, 37.

was authorized to appoint chaplains for the Army and Navy,²⁴⁸ and recurring days of Thanksgiving and prayer were proclaimed²⁴⁹ apparently without provoking the slightest constitutional reservations,²⁵⁰ while issues such as the exemption of Quakers and theological students from the draft were fought out in policy rather than constitutional terms.²⁵¹ The Preamble to the Constitution itself, in contrast to that of the United States, expressly invoked “the favor and guidance of Almighty God.”²⁵² In early 1862, however, when “sundry” petitions opposing the carriage of mail on Sunday were addressed to the Confederate Congress,²⁵³ Alabama Repre-

²⁴⁸ Act of May 3, 1861, ch. 1, § 1, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 99, 99; Act of Dec. 24, 1861, ch. 21, Pub. Laws, Provisional Cong., 5th Sess., *reprinted in* Statutes at Large, *supra* note 5, at 229, 229; Act of Apr. 19, 1862, ch. 50, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 42, 42.

²⁴⁹ House Proceedings (Sept. 17, 1862) (statement of Rep. Lyons), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 173, 173–74; House Proceedings (Feb. 17, 1864) (statement of Farrow), *reprinted in* 50 Southern Historical Society Papers, *supra* note 136, at 451, 451–52; House Proceedings (Nov. 15, 1864) (statement of Rep. Chilton), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 309, 311; Senate Proceedings (Jan. 11, 1865), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 123, 123. For corresponding presidential declarations see 1 The Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 103–04, 135, 217–18, 227–28, 268–69, 324–25, 328, 412–14, 567–68.

²⁵⁰ On one occasion, however, in response to the usual presidential plea that citizens assemble to implore divine endorsement of the Confederate cause, Representative Garnett suggested that members of the House could not better comply “than to assemble in the Hall after the hour of worship and get through with some of the bills on the calendar,” and the House agreed. House Proceedings (Feb. 27, 1862) (statement of Rep. Garnett), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 66, 66. The Richmond Examiner did criticize President Davis’s repeatedly proclaimed days of fasting and prayer, but on the ground that they wasted valuable time that might better have been used to save the country, not for violation of the Establishment Clause. Patrick, *supra* note 32, at 36–37.

²⁵¹ See Senate Proceedings (Sept. 17, 1862) (The Exemption Bill), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 168, 168–71; House Proceedings (Jan. 21, 1863) (statement of Rep. Conrad), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 166, 175. “To conscribe the ministers of religion,” a Senate committee declared in early 1865, “would shock the religious sentiment of the country.” 4 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 728.

²⁵² Conf. Const. of Mar. 1861, pmbl., *reprinted in* Statutes at Large, *supra* note 5, at 11.

²⁵³ 5 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 195.

2004]

Through the Looking-Glass

1319

sentative William Chilton presented a committee report²⁵⁴ that provided a counterweight of sorts to the powerful plea for separation of church and state penned by U.S. Senator Richard M. Johnson a third of a century before.²⁵⁵

Johnson's 1830 report, Representative Chilton wrote, contained much "to admire and applaud," but on close analysis it proved to be "sophistical and unsatisfactory."²⁵⁶ No one supposed that it was unconstitutional for Congress to open its sessions with prayer or to provide for the appointment of military chaplains; why should the Post Office have to carry the mail on Sunday? Johnson had insisted that it was not for Congress to define and punish violations of the laws of God.²⁵⁷ Of course, said Chilton, Congress had no power to "declare that any day . . . has been set apart by the Almighty for religious exercises,"²⁵⁸ but that was not what the petitioners asked Congress to do. "They merely ask[ed] that Congress shall not by affirmative legislation do violence to religion and the moral sense of the community, by requiring the mail to be carried, opened, or distributed and delivered on the Christian Sabbath."²⁵⁹ If it was unconstitutional to close the Post Office on Sunday, it was equally

²⁵⁴ Id. at 195–98.

²⁵⁵ For Johnson's report, see 5 Reg. Deb. App. 24–26 (1829); Am. St. Papers (Post Office) at 211–12 (1829); Currie, *The Jeffersonians*, supra note 23, at 325–29. In response to issues raised during the great confrontation over anti-slavery petitions in the U.S. Congress in the 1830s and 1840s, the Provisional Constitution had been amended in Convention to confine the right of petition to the presentation of "such grievances as the delegated powers of this Government may warrant it to consider and redress." Conf. Const. of Feb. 1861, art. I, § 7, cl. 9, *reprinted in* Statutes at Large, supra note 5, at 3; see 1 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 36. This language, however, was silently omitted from the permanent Constitution—whether as unnecessary or as undesirable we do not know. See Conf. Const. of Mar. 1861, art. I, § 9, cl. 12, *reprinted in* Statutes at Large, supra note 5, at 16. For the earlier controversy, see Currie, *Descent into the Maelstrom*, supra note 1, at 19–51.

²⁵⁶ 5 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 195.

²⁵⁷ 5 Reg. Deb. App. 24–25 (1829).

²⁵⁸ 5 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 196. Congress's "sphere of legitimate legislation," Chilton wrote, "is quite limited, being bounded by the express grant of powers contained in the Constitution." Id. The reader will observe that he did not say a law setting aside a day of worship would offend the Establishment Clause.

²⁵⁹ 5 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 196.

unconstitutional to close the courts or to adjourn Congress. Yet both had always been done, and why? “Out of respect for the Christian Sabbath,” and for “the Christian constituency who send us here.”²⁶⁰ Should the government continue to “deny to a large number of its employees the privileges of the sanctuary, and the means it affords for moral and religious improvement?”²⁶¹ No. The laws requiring that the Post Office operate on Sunday required many citizens to violate their Sabbath, and they ought to be repealed.²⁶²

Two strains of thought familiar to the modern reader permeate Representative Chilton’s report: that Government may take reasonable steps to accommodate the spiritual needs of the people and that it ought not to condition public employment on the sacrifice of religious freedom.²⁶³ Senator Johnson had addressed both of these concerns in 1830: The Post Office excused religious objectors from working on their Sabbath, and it was free to close its facilities on Sunday in deference to the wishes of the majority—provided it did not do so in order to take sides in matters of religion.²⁶⁴

Chilton’s 1862 report, in contrast, fairly oozes with sectarian fervor. Although “no free government should ever interfere in matters of religion to control the religious faith and consciences of men,” the committee proclaimed, it did not follow “that Congress should . . . ignore the existence and overruling Providence of the Supreme Being, or enact laws in contravention of His known will.”²⁶⁵ The Confederate Government, whose very Constitution invoked “the favor and guidance of Almighty God,” ought not to “be guilty of treason by trampling His statutes under foot, and setting His authority at defiance.”²⁶⁶ Transmission and delivery of the mails on Sunday not only “interfere[d] with the worship of God”; it also

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 197.

²⁶³ See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁶⁴ 5 *Journal of the Confederate Congress*, *supra* note 5, in S. Doc. No. 58-234, at 197.

²⁶⁵ *Id.* at 195–96.

²⁶⁶ *Id.* at 196.

2004]

Through the Looking-Glass

1321

provided “an example of impiety which tends to demoralize our people.”²⁶⁷ “May the Confederate States,” Chilton wrote,

while eschewing all bigotry, . . . and all attempts to violate the rights of conscience, early learn that the only sure basis of national prosperity and happiness are the great principles of justice, morality, and religion, as taught in the revealed will of God, and that the Great Lawgiver will not suffer these principles to be violated with impunity.²⁶⁸

Maybe all this was indeed justified by the Preamble’s non-neutral invocation of “the favor and guidance of Almighty God,” but it did make it look as though, despite its apparent disclaimer, the committee was indeed urging Congress to codify the law of God.²⁶⁹

C. Freedom of Expression

Freedom of expression is a more complicated story. Congress and the President, it is generally agreed, basically left the press alone. “Except for attempts to impress Confederate journals with the necessity for discretion in reporting military affairs,” wrote Professor Rembert Patrick, “the newspapers were not molested.”²⁷⁰ Vitriolic criticism of the Confederate Government and its policies abounded.²⁷¹ Even Professor Mark Neely, who as we shall see has expressed serious doubt that the Confederacy was as free as it has traditionally been asserted to be, acknowledged a few years ago that “the surprisingly secure freedom of the press” was “a way in which the Confederacy,” despite an ugly tradition of censorship respecting slavery, “was freer than the North.”²⁷²

²⁶⁷ Id. at 198.

²⁶⁸ Id. at 197 (going on to heap praise upon state laws that imposed penal sanctions for “violation” of the Sabbath by private citizens).

²⁶⁹ Id. at 196. It is not clear, however, that a majority of the House shared Rep. Chilton’s views, for although his bill to repeal the laws requiring mail carriage on Sunday was read twice and placed on the calendar, it was never taken up again. Id. at 198.

²⁷⁰ Patrick, *supra* note 32, at 40 n.36; see also Coulter, *supra* note 35, at 503; Robert N. Mathis, *Freedom of the Press in the Confederacy: A Reality*, 37 *The Historian* 633 (1975).

²⁷¹ See Dodd, *supra* note 187, at 292; Mathis, *supra* note 270, at 634.

²⁷² Neely, *Confederate Bastille*, *supra* note 236, at 20–21. For a glimpse of that ugly tradition see Currie, *Descent into the Maelstrom*, *supra* note 1, at 43–51. Even the relative freedom of the institutional press, Neely has since written, was “as much a

Occasional legislation nevertheless did impinge to some degree on expressive freedoms. Least problematic in this regard, perhaps, was the 1865 statutory provision making it a capital offense to convey military information to the enemy.²⁷³ South Carolina Representative Milledge Bonham was surely right that the government could constitutionally make it a crime to reveal military plans;²⁷⁴ in *Near v. Minnesota*, the U.S. Supreme Court would plausibly suggest that even an injunction might be permissible in such a case.²⁷⁵ More troublesome perhaps was the further clause of the same section more broadly interdicting all correspondence with the enemy “with intent to injure the Confederate States of America.”²⁷⁶ Notwithstanding the kinship between this offense and the constitutional definition of treason,²⁷⁷ a modern court might at least insist upon a showing of clear and present danger before permitting prosecution on this basis.²⁷⁸

The telegraph law, already mentioned, raised serious questions of privacy by authorizing the government to “supervise” the dispatch of messages in order to prevent communications injurious to the Confederate cause.²⁷⁹ To open the mail generally, even in wartime, would surely overstep the bounds of a reasonable search.²⁸⁰ Telegraph messages are arguably distinguishable, since they are necessarily revealed to the operator who transmits them; there may

tribute to a long tradition of self-censorship as to consistent respect for constitutional liberty.” Neely, *Southern Rights*, supra note 236, at 91.

²⁷³ Act of Mar. 13, 1865, ch. 164, § 1, Pub. Acts, 2d Cong., 2d Sess., in *Laws of the Last Session*, supra note 24, at 130, 130–31.

²⁷⁴ House Proceedings (Aug. 26, 1862) (statement of Bonham), reprinted in 45 *Southern Historical Society Papers*, supra note 81, at 237, 245.

²⁷⁵ 283 U.S. 697, 716 (1931) (dictum).

²⁷⁶ Act of Mar. 13, 1865, ch. 164, § 1, Pub. Acts, 2d Cong., 2d Sess., in *Laws of the Last Session*, supra note 24, at 130, 130–31.

²⁷⁷ See Conf. Const. of Mar. 1861, art. III, § 3, cl. 1, reprinted in *Statutes at Large*, supra note 5, at 20 (“Treason against the Confederate States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”).

²⁷⁸ Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁷⁹ Act of May 11, 1861, ch. 9, § 1, Pub. Laws, Provisional Cong., 2d Sess., in *Statutes at Large*, supra note 5, at 106, 106–07.

²⁸⁰ See *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (“The constitutional guaranty of the right of the people to be secure . . . against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant.”); see also Conf. Const. of Mar. 1861, art. I, § 9, cl. 15, reprinted in *Statutes at Large*, supra note 5, at 16 (similarly prohibiting “unreasonable searches and seizures”).

2004]

Through the Looking-Glass

1323

perhaps be a diminished expectation of confidentiality.²⁸¹ The statutory definition of messages that were not to be dispatched, however, was broad enough to raise bothersome issues of freedom of expression as well.

Two categories of messages were prescribed: “communications . . . of the military operations of the government to endanger the success of such operations,”²⁸² and “any communication or information calculated to injure the cause of the Confederate States, or to give aid and comfort to their enemies.”²⁸³ The first of these provisions is the easier to uphold; disclosure of military plans, as we have seen, does not rank high in the scale of constitutional protection. This exclusion was reinforced by an exercise in naked censorship: Section 10 of the statute made it a crime knowingly to send “*any* message or communication touching the military operations of the government” without having first submitted it to a government agent for approval.²⁸⁴ Even prior restraints, the *Near* dictum tells us, may perhaps be tolerated to protect military operations; yet the twenty-first-century observer may be forgiven if he winces at the breadth of even this exclusion.

The second exclusion from the telegraph wires is more frightening. Ordinary criticism of public officials and of public policy, which lies at the core of the constitutional guarantee, may well be “calculated to injure the cause of the Confederate States,” or to

²⁸¹ See *United States v. White*, 401 U.S. 745, 749 (1971) (White, J., plurality opinion) (denying that anyone has “a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police”); *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (noting that, although one who makes calls from a telephone booth is “surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world . . . [w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection”). But see Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 *Am. B. Found. Res. J.* 1193, 1218 (arguing that in many situations one may have a justifiable expectation of confidentiality in information he has voluntarily disclosed to another, because “the individual who invited only selected persons to enter his home or office for business, social, or other purposes cannot fairly be said to have exposed these areas to public view”).

²⁸² Act of May 11, 1861, ch. 9, § 1, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 106, 106–07.

²⁸³ *Id.* § 9.

²⁸⁴ *Id.* § 10 (emphasis added).

promote the cause of their enemies.²⁸⁵ One is reminded of the since-repudiated “natural tendency” test that once prevailed in First Amendment cases in the federal courts.²⁸⁶ To save a comparable provision today one would have to read “calculated” to mean “intended” and once again to read in a requirement of clear and present danger.²⁸⁷

As the secret debates of the Provisional Congress were never published, we do not know what objections, if any, were made to the telegraph provisions. We do know, however, that a big stink was raised in September 1862 when Tennessee Senator Landon Haynes offered a resolution directing the Judiciary Committee, among other things, to inquire into the expediency of “fixing suitable penalties for the abuse of [freedom of speech or of the press] when exercised to disturb the public peace or incite to domestic violence or rebellion.”²⁸⁸ Senator Semmes objected at once that “[t]he freedom of the press was a matter with which Congress had no right to interfere,”²⁸⁹ and Senator Phelan said he was “opposed to Congress enacting laws to restrain the fullest freedom of speech.”²⁹⁰ Haynes responded that there was “a distinction between the freedom of speech and the press, and efforts to stir up rebellion within the Confederate States,” and the Committee reported a bill “to suppress rebellion and insurrection against the Confederate States.”²⁹¹ After a debate in which Senator Wigfall is said to have likened Haynes’s proposal to the notorious Sedition Act of 1798, consideration of the bill was indefinitely postponed.²⁹²

²⁸⁵ Id. § 1. Section 10 of the statute buttressed this exclusion too, by making it a crime to transmit “any message calculated to aid and promote the cause of the enemies of the Confederate States.” Id. § 10.

²⁸⁶ See, e.g., *Shaffer v. United States*, 255 F. 886, 889 (9th Cir. 1919); *Masses Publ’g Co. v. Patten*, 246 F. 24, 38 (2d Cir. 1917).

²⁸⁷ Once again the crucial decision is *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁸⁸ Senate Proceedings (Sept. 10, 1862) (statement of Sen. Haynes), reprinted in 46 Southern Historical Society Papers, supra note 91, at 85, 87.

²⁸⁹ Id. at 88.

²⁹⁰ Senate Proceedings (Sept. 11, 1862) (statement of Phelan), reprinted in 46 Southern Historical Society Papers, supra note 91, at 98, 98–99.

²⁹¹ Senate Proceedings (Sept. 20, 1862) (statement of Sen. Haynes), reprinted in 46 Southern Historical Society Papers, supra note 91, at 187, 187; Senate Proceedings (Sept. 11, 1862) (statement of Sen. Haynes), reprinted in 46 Southern Historical Society Papers, supra note 91, at 98, 99.

²⁹² See Robinson, supra note 21, at 452 n.33; 2 Journal of the Confederate Congress, supra note 5, reprinted in S. Doc. No. 58-234, at 435 (1904).

2004]

Through the Looking-Glass

1325

Thus the record of the Confederate Congress, while not spotless in this regard, seems to confirm that that body did less than one might have apprehended to interfere with freedom of expression during the Civil War. At one point, indeed, Georgia Senator Herschel Johnson even seemed to hint that the Constitution required that newsmen be exempted from the draft. “There were two methods of breaking down the power and usefulness of the press,” said Johnson:

[O]ne, which was being practiced by the enemy, was to forbid the circulation of the papers and to incarcerate the editors. But a method of crippling it equally as effective was to deprive the editors of the employees indispensable to the publication and conduct of their papers.²⁹³

Defending a statutory exemption in an 1865 Senate report, James Orr of South Carolina was still more emphatic:

The conscription of editors and of the printers necessary to the publication of newspapers would destroy the independence of the press and subject it to the control of the executive department of the Government.”²⁹⁴

Nor does the record suggest that President Davis can fairly be characterized as an enemy of free expression during his years in office. When General Earl Van Dorn issued a ukase essentially making it a crime to criticize the Army, for example, Davis promptly revoked the order.²⁹⁵ President Davis did inform North Carolina Governor Zebulon Vance at one point that Raleigh editor William Holden was reportedly “engaged in the treasonable purpose of exciting the people . . . to resistance against their Government” and

²⁹³ Senate Proceedings (Feb. 23, 1863) (statement of Sen. Johnson), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 176, 182–83.

²⁹⁴ 4 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 728 (1904).

²⁹⁵ See General Orders No. 9 (July 4, 1862), in 15 Official Army Records No. 1, *supra* note 32, at 771, 771–72; see also Senate Proceedings (Aug. 25, 1862) (statement of Sen. Semmes), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 220, 225; Senate Proceedings (Aug. 25, 1862) (statement of Rep. Foote), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 237, 243; Senate Proceedings (Aug. 25, 1862) (statement of Sen. Barksdale), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 237, 246–47; Mathis, *supra* note 270, at 638.

inquired whether Holden had “gone so far as to render him liable to criminal prosecution”;²⁹⁶ Vance replied that it would be “impolitic in the very highest degree” to go after the editor, and the matter apparently was dropped.²⁹⁷

As Professor Neely has lately reminded us, however, it can be misleading to confine one’s attention to such highly visible sources as statutes and presidential messages.²⁹⁸ In the reports of commissioners appointed to determine what to do with numerous individuals in military custody, buried without identifying markers in War Department records, he finds proof that in a substantial number of instances “political opinion was the key to the prisoner’s arrest.”²⁹⁹ However free the newspapers may have been to criticize President Davis, Neely concludes, “[t]here was never a moment in Confederate history when pro-Union opinions could be held without fear of government restraint.”³⁰⁰

Evidence that the Confederate States took their share of political prisoners surely tarnishes any notion that the South was a haven of civil liberty during the Civil War. The fact that this distressing activity took place largely in the dark, however, means that it was not the subject of extensive reported debate, and that leaves us with less to say about the obvious constitutional issues it raised. The most ventilated questions of individual liberty concerned not freedom of expression but the suspension of habeas corpus and the imposition of martial law.³⁰¹

D. Habeas Corpus

The Confederate Constitution, like that of the United States, provided that the privilege of the writ should not be suspended “unless when in cases of rebellion or invasion the public safety may

²⁹⁶ Letter from Jefferson Davis to Governor Vance (July 24, 1863), in 5 Jefferson Davis, *Constitutionalist*, supra note 32, at 576, 576–77.

²⁹⁷ Letter from Governor Vance to Jefferson Davis (July 26, 1863), noted in 9 *The Papers of Jefferson Davis*, supra note 147, at 306, 306.

²⁹⁸ Neely, *Southern Rights*, supra note 236, at 9.

²⁹⁹ *Id.* at 80–82, 88.

³⁰⁰ *Id.* at 87–88.

³⁰¹ Because of the Southern tradition of state rights, one commentator has written, “[t]he only liberty actively threatened [by the Confederate Government] was the right of habeas corpus.” Yearns, supra note 5, at 150.

2004]

Through the Looking-Glass

1327

require it”]; it did not say who was to suspend it in those cases.³⁰² President Davis made clear in 1862 that individual military commanders were not to do so on their own authority.³⁰³ Unlike President Lincoln, moreover, Davis never claimed such power himself; he thrice asked Congress to suspend the writ,³⁰⁴ and when Congress

³⁰² Conf. Const. of Mar. 1861, art. I, § 9, cl. 3, *reprinted in* Statutes at Large, supra note 5, at 15. The corresponding provision of the Provisional Constitution, art. I, § 7, cl. 3, *reprinted in* Statutes at Large, supra note 5, at 3, was identical. Representative Foote argued in May 1864 that suspension was unconstitutional per se, noting that in England the writ had not been suspended for two hundred years. House Proceedings (May 19, 1864) (statement of Rep. Foote), *reprinted in* 51 Southern Historical Society Papers, supra note 27, at 102, 102. Even Vice-President Stephens, however, critical as he was of suspension, conceded that the provision restricting the occasions for suspension implied that it could be done if the prescribed conditions were met, “just as if a mother should say to her daughter, you shall not go unless you ride.” Alexander Stephens, Speech on the State of the Confederacy, Delivered Before the Georgia Legislature at Milledgeville, Georgia (Mar. 16, 1864), supra note 80, at 767. For reservations respecting this line of reasoning on the basis of the much misunderstood Ninth Amendment see Currie, *The Jeffersonians*, supra note 23, at 7 n.23 (discussing the importation of slaves).

At the same time, however, Stephens virtually construed away the implied authority he professed to acknowledge by insisting that (except in cases arising in the armed forces) the courts must retain power to determine the legality of an arrest, since the Constitution permitted seizure of persons only on the basis of judicial warrants issued on probable cause. Alexander Stephens, Speech on the State of the Confederacy, Delivered Before the Georgia Legislature at Milledgeville, Georgia (Mar. 16, 1864), supra note 80, at 768–71 (invoking the Constitution of the Confederate States of America art. I, § 9, cl. 15, *reprinted in* Statutes at Large, supra note 5, at 16, a tintype of the United States Constitution amend. IV). In Congress, Representative Conrad responded with much force that the Constitution did not say only judges might order arrests, buttressing his point with references to English history. House Proceedings (May 21, 1864) (statement of Rep. Conrad), *reprinted in* 51 Southern Historical Society Papers, supra note 27, at 118, 122; see Currie, supra note 207, at 166–67; Telford Taylor, *Two Studies in Constitutional Interpretation* 23–24, 41 (1969) (arguing that the Fourth Amendment does not preclude warrantless searches and seizures as such). More fundamentally, Stephens’s argument seems to ignore the compelling distinction he himself had drawn between the suspension of rights and that of remedies. See *infra* note 332 and accompanying text.

³⁰³ See General Order No. 56 (Aug. 6, 1862), in 2 Official Army Records No. 4, supra note 32, at 39, 39; see also House Proceedings (Aug. 26, 1862) (statement of Barksdale), *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 237, 242–43; Letter from S. Cooper to P.O. Herbert (Sept. 12, 1862), in 9 Official Army Records No. 1, supra note 32, at 735, 735.

³⁰⁴ See Message from Jefferson Davis to the Congress of the Confederate States (Feb. 3, 1864), in 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 395, 399–400; Message from Jefferson Davis to the Congress of the Confederate States (May 20, 1864), in 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 452, 452–53; Message from Jefferson Davis to

finally declined he acquiesced in its decision. In short, President Davis appeared to agree with Chief Justice Taney that the power belonged exclusively to Congress,³⁰⁵ although there was a respectable argument that in an emergency it was implicit in the Commander-in-Chief.³⁰⁶

In February 1862 Congress authorized the President to suspend habeas corpus “during the present invasion” in places where there was “such danger of attack by the enemy as to require the declaration of martial law for their effective defence.”³⁰⁷ The President’s authority was thus limited; he could exercise it only where (and presumably only when) necessary to repel invasion.

He did so at once in and around Norfolk, extending the suspension within the next few days to Richmond, to Petersburg, and to seven Virginia counties bordering on the Chesapeake Bay.³⁰⁸ Ten more Virginia counties were soon added, along with the entire “Department of Eastern Tennessee” and all of South Carolina be-

the Congress of the Confederate States (Nov. 9, 1864), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 498, 498.

³⁰⁵ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); see also William Rawle, *A View of the Constitution of the United States of America* 118 (1829) (arguing that, because Congress had authorized issuance of the writ, only Congress could suspend it); 1 *Blackstone’s Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 292, *136 (St. George Tucker ed., 1996) (1803) (concluding that the power was reserved to the legislature, as Blackstone had said was the case in England); Winthrop, supra note 209, at *1294 (declaring it “settled” (as of 1920) that the President could not suspend the writ “of his own authority”).

³⁰⁶ This was as U.S. Attorney General Edward Bates argued at the time of the *Merryman* decision. 10 Op. [U.S.] Att’y Gen. 74, 90 (1861).

³⁰⁷ Act of Feb. 27, 1862, ch. 2, Pub. Laws, 1st Cong., 1st Sess., reprinted in *Statutes at Large*, supra note 5, at 1, 1. The Senate debate was in secret; Wigfall, the Senate sponsor, said the bill was designed “to meet cases involving the safety of cities,” Senate Proceedings (Feb. 27, 1862) (statement of Sen. Wigfall), reprinted in 44 *Southern Historical Society Papers*, supra note 218, at 61, 65, and it was largely so used. The immediate occasion for passage of the law was an imminent threat of invasion in Tidewater Virginia. See Robinson, supra note 21, at 390.

³⁰⁸ Proclamation by President Jefferson Davis (Feb. 27, 1863), reprinted in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 219, 219; General Orders No. 8 (Mar. 1, 1862), reprinted in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 220, 220–21; General Orders No. 11 (Mar. 8, 1862), reprinted in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 221, 221–22; General Orders No. 15 (Mar. 14, 1862), reprinted in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 222, 222–23.

2004]

Through the Looking-Glass

1329

tween the Santee and South Edisto Rivers (including Charleston), so that by early May habeas corpus was unavailable in wide areas of the Confederacy.³⁰⁹

The initial statute, hastily drafted, was soon reexamined and revised. Within two months Congress passed a second statute that narrowed the President's power in two significant respects. The writ could be suspended only with regard to arrests by Confederate authorities or for offenses against the Confederacy, and the authorization would expire "thirty days after the next meeting of Congress."³¹⁰ Suspension was thus restricted to the necessities on which it was based, and Congress retained control over the process by enabling the Executive to act only while it was unable to do so itself.³¹¹

When the First Congress met for its second session later in 1862, it renewed the President's authority—but not before it had expired, and not without further modifications. In one respect the President's discretion was increased: He could now suspend the writ not only in the face of imminent attack (or in proximity to an army, as the Senate committee had suggested³¹²) but wherever and whenever, in the words of the Constitution, the public safety so required.³¹³ With respect to Confederate arrests and Confederate offenses, Congress appeared to have handed the President its entire power to decide—raising a serious question, one might have thought, of the delegation of legislative authority.³¹⁴ A further provision of the statute, however, required the President to cause the

³⁰⁹ General Orders No. 21 (Apr. 8, 1862), *reprinted in* 1 Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 224, 224–25; General Orders No. 33 (May 1, 1862), *reprinted in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 225, 225–26.

³¹⁰ Act of Apr. 19, 1862, ch. 44, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 40, 40.

³¹¹ Reports of the debates do not reveal that either of these limitations was justified in constitutional terms, though it might easily have been argued that the constitutional provision permitted the writ to be suspended only to the extent that public safety required.

³¹² Senate Proceedings (Sept. 20, 1862) (statement of Sen. Semmes), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 187, 187–88.

³¹³ Act of Oct. 13, 1862, ch. 51, Pub. Laws, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 84, 84; see Robinson, *supra* note 21, at 405 (reporting after a search of the Official Records that the President appeared to have exercised his authority under this statute "very sparingly").

³¹⁴ No one in Congress was reported as having made this objection at the time.

investigation of cases of military arrest in order to ensure the release of persons improperly detained³¹⁵—underlining Vice-President Stephens’s argument that suspension of the writ did not authorize illegal arrest by effectively transferring to the President the reviewing authority normally exercised by the courts.³¹⁶

Like its immediate predecessor, this authorization contained a sunset provision,³¹⁷ and in February 1863 it expired. Congress met for its third session in January of that year and sat until May without ever extending the President’s power of suspension; for a whole year the courts were everywhere open to prevent unlawful imprisonment.

In February 1864, President Davis pleaded with Congress to suspend the writ once again. The “technicalities” of the law of treason, he argued, threatened national security, and state courts were employing habeas to obstruct the draft.³¹⁸ Congress responded imme-

³¹⁵ Act of Oct. 13, 1862, ch. 51, § 2, Pub. Laws, 1st Cong., 2d Sess., reprinted in Statutes at Large, supra note 5, at 84, 84. This provision essentially codified a practice initially instituted by the War Department itself. See Robinson, supra note 21, at 387–89; see also id. at 409–11 (adding that “distinguished lawyers,” including a former Confederate Attorney General, were appointed as Commissioners under the comparable provision of the 1864 law and that they were instructed to recommend that prisoners they found cause to detain be turned over to civilian authorities and that others be released). They did not always do so, however, and their inaction meant continued military custody. See Neely, Southern Rights, supra note 236, at 82–85.

³¹⁶ See infra note 332 and accompanying text. Compare article 10(2) of the German Constitution, which in the interest of national security substitutes legislative for judicial review of certain orders respecting electronic surveillance without abrogating the substantive constitutional guarantee. See David P. Currie, *The Constitution of the Federal Republic of Germany* 171–72 (1994).

³¹⁷ Act of Oct. 13, 1862, ch. 51, § 3, Pub. Laws, 1st Cong., 2d Sess., reprinted in Statutes at Large, supra note 5, at 84, 84.

³¹⁸ Message from Jefferson Davis to the Congress of the Confederate States (Feb. 3, 1864), supra note 304, at 395–400. Senator Wigfall argued a few months later that Congress had no power to suspend the writ in *state* courts, Senate Proceedings (May 10, 1864) (statement of Sen. Wigfall), reprinted in 51 Southern Historical Society Papers, supra note 27, at 53, 55; Senate Proceedings (May 6, 1864) (statement of Sen. Wigfall), reprinted in 51 Southern Historical Society Papers, supra note 27, at 35, 36, but that seems mistaken. If the power exists at all, it must reach as far as necessary to accomplish its purpose. Indeed, the North Carolina Supreme Court concluded on two occasions that Congress could close the state courts to *habeas* claims. In re Long, 60 N.C. (Win.) 534 (1864); In re Rafter, 60 N.C. (Win.) 537 (1864).

Wigfall added, however, that state courts had no jurisdiction to release prisoners held in Confederate custody to begin with. Senate Proceedings (May 10, 1864) (statement of Sen. Wigfall), reprinted in 51 Southern Historical Society Papers, supra note 27, at 53, 55; Senate Proceedings (May 6, 1864) (statement of Sen. Wigfall), re-

2004]

Through the Looking-Glass

1331

diately, but not by giving the President his accustomed authority. In apparent repudiation of its own earlier actions, Congress pointedly declared that the Constitution vested power to suspend the writ in the legislature alone and proceeded to suspend it on its own responsibility, but only until ninety days after the next meeting of Congress.³¹⁹ The implication seemed to be that, as the respected Mississippi Judge William Sharkey had argued in an essay apparently unpublished at the time, Congress could not delegate its authority to the President, even if in so doing it laid down standards that significantly limited his discretion.³²⁰

The statute itself illustrated the downside of this ostensibly protective interpretation. For while the new law commendably nar-

printed in 51 Southern Historical Society Papers, *supra* note 27, at 35, 36. Attorney General Watts had so ruled in 1863, as had the U.S. Supreme Court in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), which Watts cited, on the unconvincing ground that Confederate law was supreme. Writ of Habeas Corpus (Aug. 8, 1863), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 311, 314. State courts normally have both the right and the duty to interpret the Constitution and laws of the central government. See U.S. Const. art. VI; Conf. Const. of Mar. 1861, art. VI, *reprinted in* Statutes at Large, *supra* note 5, at 21; Richard S. Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385, 1401–02 (1964). Watts might have been on firmer ground had he said simply that state jurisdiction to release Confederate prisoners, like state power to tax the Bank of the United States, was the power to interfere with legitimate operations of the central government. Compare *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408–09 (1871) (holding no state habeas corpus jurisdiction), with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (holding states do not have the power to tax the federal government). The Georgia and North Carolina courts upheld their jurisdiction to determine the legality of federal custody; the Alabama court was divided. *Mims v. Wimberly*, 33 Ga. 587 (1863); *In re Bryan*, 60 N.C. (Win.) 1 (1863); *Ex parte Hill*, 38 Ala. 458 (1863).

³¹⁹ Act of Feb. 15, 1864, ch. 37, pmb., §§ 1, 4, Pub. Laws., 1st Cong., 4th Sess., *reprinted in* Statutes at Large, *supra* note 5, at 187, 187–89.

³²⁰ See The Essay on *Habeas Corpus* in the Judge Sharkey Papers, 23 Miss. Valley Hist. Rev. 243, 245–46 (F. Garvin Davenport ed., 1936); see also Alexander Stephens, Speech on the State of the Confederacy, Delivered Before the Georgia Legislature at Milledgeville, Georgia (Mar. 16, 1864), *supra* note 80, at 774 (“Congress alone, under the constitution, has the power to suspend the privileges of the writ. They cannot confer this power upon the President or anybody else.”). Earlier discussions of the delegation problem in the U.S. Congress, like later decisions of the U.S. Supreme Court, had yielded the principle that Congress need only enunciate standards sufficiently confining that the President can fairly be said to be executing the legislative decision rather than legislating on his own. See U.S. Const. art. I, § 8, art. II, §§ 1, 3; Conf. Const. of Mar. 1861, art. I, § 8, art. II, §§ 1, 3, *reprinted in* Statutes at Large, *supra* note 5, at 14–15, 17, 19; *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); Currie, *The Federalist Period*, *supra* note 23, at 245–48 (discussing the Provisional Army).

rowed the occasions for suspension to embrace only arrests made by specified officers for specified reasons,³²¹ it contained no geographic limitation; it appeared to suspend habeas corpus all over the country, which at least arguably was more than the public safety could reasonably be thought to require. Legislative suspension thus proved a far blunter tool and far more destructive of liberty than if Congress had empowered the President, as before, to suspend the writ selectively on a finding of need.

President Davis told the Second Congress in May 1864 that the reasons for suspension still existed.³²² Congress was unimpressed, and suspension expired again. He tried again in November, with equal lack of success.³²³ Two years earlier Louisiana Representative Charles Conrad had warned that if Congress did not authorize the President to suspend the writ he might be compelled to do it without authority,³²⁴ but President Davis did no such thing. In contrast to President Lincoln, he accepted Congress's exclusive power to decide whether or not to suspend habeas corpus; and at the end,

³²¹ Act of Feb. 15, 1864, ch. 37, § 1, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, *supra* note 5, at 187, 188. Among the cases in which the writ was suspended were those of "attempts to avoid military service." *Id.* The courts were not to determine whether a conscript was exempt from the draft. Once again the President was required to investigate each case and to release those individuals "improperly detained." *Id.* § 2.

³²² Suspension had helped, the President added, and few arrests for treasonable practices had had to be made. Moreover, "[t]he effect of the law in preventing the abuse of the writ for the purpose of avoiding military service by men whose plain duty it is to defend their country can hardly be overestimated." Message from Jefferson Davis to the Congress of the Confederate States (May 20, 1864), *supra* note 304, at 452–53.

³²³ Suspension was necessary, Davis argued, to combat "a dangerous conspiracy" in the mountains of Virginia, North Carolina, and Tennessee. Message from Jefferson Davis to the Congress of the Confederate States (Nov. 9, 1864), *supra* note 304, at 498 (noting in addition the difficulties that had arisen in cases of spies and persons "holding treasonable communication with the enemy" in Mobile, Wilmington, and Richmond, due to the inability to produce "legal proof" of their culpability).

³²⁴ See House Proceedings (Sept. 17, 1862) (statement of Rep. Conrad), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 173, 175.

2004]

Through the Looking-Glass

1333

when suspension arguably was most urgent,³²⁵ Congress weighed liberty more heavily than the asserted military need.³²⁶

E. Military Justice and Martial Law

When President Davis acted to suspend habeas corpus in parts of Virginia in early 1862, he did not stop with suppression of the writ itself. His Norfolk order, for example, went on to proclaim martial law and to suspend “all civil jurisdiction.”³²⁷ His other orders were similar, although some of them permitted certain civil officers (such as mayors, probate judges, or county tax collectors) to continue performing their functions.³²⁸ With these exceptions, however, the President went far beyond mere foreclosure of a particular judicial remedy; he purported to substitute military for civilian government.³²⁹

It was not clear that the relevant statute even purported to give President Davis authority to impose martial law; what it said was that he might suspend the writ.³³⁰ After the President acted, Senator Oldham protested that in voting to give him that authority he had had no idea he was also empowering him to suspend civil government.³³¹ In providing that the President might suspend habeas corpus wherever martial law was needed, however, it could be argued that Congress had either assumed he already possessed the

³²⁵ See Owsley, *supra* note 33, at 202 (noting that “after August 1, 1864, when the last act suspending the writ had expired, the fortunes of the South never rose again”); Robinson, *supra* note 21, at 415 (doubting that the fall of the Confederacy could be blamed entirely on Congress’s refusal to act but conceding that the availability of habeas corpus did significantly reduce “the efficiency of the executive branch of government”).

³²⁶ “[T]he deliberate judgment of Congress,” wrote Senator Orr in an 1865 report, “was expressed by its silence on the subject.” 4 *Journal of the Confederate Congress*, *supra* note 5, in S. Doc. No. 58-234, at 726, 729 (1904).

³²⁷ Proclamation by President Jefferson Davis (Feb. 27, 1862), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 219, 219 (extending martial law to Norfolk, Portsmouth, and the surrounding areas).

³²⁸ Proclamation by President Jefferson Davis (Mar. 1, 1862), in *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 220, 220 (extending martial law to Richmond and the surrounding area).

³²⁹ See Thomas, *supra* note 20, at 151–52 (detailing the intrusive actions taken by General John H. Winder in Richmond during the reign of martial law).

³³⁰ Proclamation by President Jefferson Davis (Feb. 27, 1862), *supra* note 327, at 219.

³³¹ Senate Proceedings (Aug. 27, 1862) (statement of Sen. Oldham), *reprinted in* 45 *Southern Historical Society Papers*, *supra* note 81, at 248, 248–49.

latter power or implicitly granted it to him.³³² The more fundamental question was whether Congress had the power to do so.

The Constitution spoke only of suspending habeas corpus, not of imposing martial law. As Vice-President Stephens said, suspension of the writ merely denies a judicial remedy for unlawful detention; it does not displace the civil law.³³³ Yet the Constitution did not expressly authorize suspension either—it seemed to assume implicit authority in the President or Congress and imposed limits on that authority. Tradition permitted martial law as well as suspension in an emergency; the U.S. Supreme Court would concede later in *Ex parte Milligan* that civilians could be tried by military tribunals when the ordinary courts were closed.³³⁴ There was a plausible argument that in the situations contemplated by the Confederate statute, martial law was necessary and proper to defend against en-

³³² A House committee appointed to investigate the matter drew exactly that conclusion. 5 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 373 (1904); see also Thomas, supra note 20, at 150 (“The act contained internal ambiguities implying that suspension of habeas corpus and martial law were the same thing.”). Later definitions of the President’s authority omitted the indirect reference to martial law. Andrew Jackson, who had declared martial law in New Orleans during the War of 1812 and been fined for it, had argued without benefit of such statutory language that authority to suspend the writ “impliedly admits the operation of martial law.” See H.R. Rep. No. 27-122, at 9 (1843) (citing Andrew Jackson’s General Order of Mar. 14, 1815). When the English Parliament suspended the writ, a committee of the U.S. House later replied it authorized only detention of civilians, not courts-martial; apart from rules for government of the armed forces themselves, “[t]here is no martial law known to the laws of the United States.” *Id.* at 9, 11.

³³³ Letter from Alexander Stephens to James M. Calhoun (Sept. 8, 1862), in Cleveland, supra note 19, at 747, 747–48, reprinted in 2 Stephens, supra note 19, at 786, 787. Senator Oldham, not surprisingly, was of the same opinion. Oldham Memoirs, supra note 104, at 159–60. The Confederate House committee whose report is cited in the preceding note similarly concluded that suspension provided no authority for trial and punishment of civilians otherwise than as provided by law. 5 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 375 (1904); see also Letter of Senator Benjamin Hill to Alexander Stephens (Mar. 14, 1864), in The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb, supra note 34, at 634, 636 (agreeing that “[t]he suspension of the writ of habeas corpus does not and cannot annul, repeal or modify the citizen’s constitutional bill of rights” and suggesting that President Davis shared this opinion). Unlike Stephens, Hill was in most respects one of the President’s staunchest supporters; by 1862, we are told, he had become President Davis’s principal spokesman in the Senate. Haywood J. Pearce, Benjamin H. Hill: Secession and Reconstruction 62 (1928).

³³⁴ 71 U.S. (4 Wall.) 2, 127 (1866). It did not necessarily follow, however, that the President could bootstrap himself into this necessity by closing the civilian courts himself, as Davis had done in Norfolk and Richmond.

2004]

Through the Looking-Glass

1335

emy assault and thus within the war powers of Congress,³³⁵ if not also within the constitutional authority of the President as Commander-in-Chief.³³⁶

Not surprisingly, martial law came under sharp attack in the Confederate Congress.³³⁷ The Senate Judiciary Committee, reporting a bill to renew the President's suspension power in September

³³⁵ See Winthrop, *supra* note 209, at *1274–76 (arguing that the *Milligan* test was too narrow and endorsing Chief Justice Chase's argument that martial law was permissible whenever "ordinary law no longer adequately secures public safety and private rights"); *Milligan*, 71 U.S. (4 Wall.) at 140–41 (Chase, C.J., concurring).

³³⁶ Cf. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) (acknowledging the right of a military commander, without statutory authorization, to impress military supplies in cases of urgency). U.S. commanders, indeed, had exercised general military jurisdiction over conquered portions of Mexico during the Mexican War, without specific statutory authority. See Currie, *Descent into the Maelstrom*, *supra* note 1, at 81–104. Military government might be acceptable in enemy territory, said Oldham, perhaps in recollection of this experience, but it is not acceptable at home. Senate Proceedings (Aug. 27, 1862) (statement of Sen. Oldham), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 248, 249–50. The House report cited in note 332 drew the same distinction. 5 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 376 (1905); see also *Milligan*, 71 U.S. (4 Wall.) at 137–40 (Chase, C.J., concurring) (arguing that while under the circumstances of that case Congress might perhaps subject a civilian to military trial, the President could not do so on his own, at least when Congress had implicitly forbidden him to do so).

³³⁷ There were particularly vehement objections to the alleged interference by military Provost Marshals with the rights of civilians. War Secretary George W. Randolph, in response to a Senate inquiry, explained that the officers in question were essentially what we would call military policemen with no jurisdiction over civilians except in areas subject to martial law, and that he had taken steps to prevent future abuse of their authority. Senate Proceedings (Sept. 11, 1862) (Letter from George Randolph to Jefferson Davis), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 98, 103–04. Unmollified, the Senate passed a joint resolution denying Provost Marshals any authority over civilians, see Senate Proceedings (Oct. 1, 1862) (statement of Sen. Semmes), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 24, 32; Senate Proceedings (Oct. 8, 1862), *reprinted in* 47 Southern Historical Society Papers, *supra* note 70, at 70, 75–76, but the House apparently did not concur; the resolution does not appear in the published laws. See also Act of Mar. 8, 1865, ch. 117, Pub. Laws, 2d Cong., 2d Sess., *reprinted in* Laws of the Last Session, *supra* note 24, at 90, 90–91 (abolishing the office of Provost Marshal altogether "except within the lines of an army in the field"); The War Department's General Order No. 42 (June 11, 1862), in 1 Official Army Records No. 4, *supra* note 33, at 1149, 1149 (forbidding Provost Marshals to try civilian cases); Letter from President Davis to Mansfield Lovell (Apr. 23, 1862), in 8 The Papers of Jefferson Davis, *supra* note 34, at 152, 152, *reprinted in* 6 Official Army Records No. 1, *supra* note 33, at 883, 883 (directing him to "[c]onfine the functions of your Provost Marshals to subjects proper to Military police . . . [,] and leave all State institutions as far as possible undisturbed by military power").

1862, specified that it meant neither to interfere with the right of civilian defendants to a grand jury and public trial nor to empower any officer to declare martial law.³³⁸ Tennessee Representative George Washington Jones said not even Congress could authorize martial law,³³⁹ and Representative Russell offered a bill to prohibit it anywhere in the Confederacy.³⁴⁰ Nothing came of these legislative initiatives, but President Davis was moved to explain in October that, although he had suspended *civil* jurisdiction as well as habeas corpus in some cases, he had done nothing to interfere with the ordinary criminal courts: They remained open to reinforce military efforts to preserve order.³⁴¹

³³⁸ Senate Proceedings (Sept. 20, 1862) (statement of Sen. Semmes), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 187, 187–88.

³³⁹ House Proceedings (Oct. 8, 1862) (statement of Rep. Jones), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 80, 82; see also Senate Proceedings (Aug. 25, 1862) (statement of Sen. Oldham), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 220, 226; Letter from Benjamin Hill to Alexander Stephens (Mar. 14, 1864), *in* The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb, *supra* note 34, at 634, 636; Letter from Alexander Stephens to James M. Calhoun (Sept. 8, 1862), *in* Cleveland, *supra* note 19, at 747, 747–48, *reprinted in* 2 Stephens, *supra* note 19, at 786, 786–87 (“[I]n this country there is no such thing as Martial Law, and cannot be until the Constitution is set aside . . .”).

The Calhoun just cited, appointed as “civil governor” of Atlanta by General Braxton Bragg, had sought advice as to the nature of his duties. Stephens responded that he ought not to act at all, for his office was “unknown to the law”:

General Bragg had no more authority for appointing you Civil Governor of Atlanta, than I had; and I had, or have, no more authority than any street-walker in your city. Under his appointment, therefore, you can rightfully exercise no more power than if the appointment had been made by a street-walker.

Id. Representative Dargan agreed that martial law was unconstitutional but argued that it might sometimes be necessary to impose it anyway. House Proceedings (Oct. 8, 1862) (statement of Rep. Dargan), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 80, 82–83; cf. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) (“I do not think [the Army] may be asked to execute a military expedient that has no place in law under the Constitution.”).

³⁴⁰ House Proceedings (Oct. 13, 1862) (statement of Rep. Russell), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 111, 112.

³⁴¹ Message from Jefferson Davis to the Senate (Oct. 8, 1862), *reprinted in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, *supra* note 20, at 259, 259–60. Attorney General Watts confirmed that the President had forbidden the courts to entertain most civil cases, *Martial Law in East Tennessee* (Apr. 19, 1862) (opinion of Watts), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 71, 71–72, but urged him to modify his orders: Courts should be permitted to exercise civil jurisdiction “except where it interferes with some Military operation.” *Martial Law in Richmond* (Apr. 25, 1862) (opinion of Watts), *in* Opinions of the Confed-

At the President's request Congress at the same time established a system of military courts whose judges, appointed by the President with Senate consent, were to hold office throughout the war.³⁴² Intended essentially as alternatives to traditional courts-martial, these permanent and professional bodies are said to have been a vast improvement on the ad hoc tribunals they were designed to replace.³⁴³ As President Davis had urged, however, their jurisdiction was extended beyond those service-related offenses defined by the Articles of War to embrace crimes involving what he called injuries to private rights. In normal times, said Davis, such matters would be left to the ordinary civilian courts, but during the war (or outside the country) those courts were not always able to sit. Authority to create the new tribunals, he asserted, was found in Congress's powers to make rules to govern the Army and to establish inferior courts; the explicit exception from the grand-jury requirement of Article I, Section 9 for "cases arising in the land or naval forces" demonstrated that constitutional safeguards surrounding the ordinary criminal process did not apply.³⁴⁴

erate Attorneys General, *supra* note 31, at 73, 73–75; see Robinson, *supra* note 21, at 393 ("While subsequent proclamations were not modified in text, this opinion was often, though by no means always, made the rule of enforcement in areas under martial law"); Alexander Stephens, *Speech on the State of the Confederacy, Delivered Before the Georgia Legislature at Milledgeville, Georgia (Mar. 16, 1864)*, *supra* note 80, at 774 ("Martial law has [since] been abandoned.").

³⁴² Act of Oct. 9, 1862, ch. 36, Pub. Laws, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 71, 71; see Message from Jefferson Davis to the Congress (Sept. 11, 1862), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 244, 244–45. Davis, in turn, was responding to a request by General Robert E. Lee, who had complained that courts-martial were too slow and distracted officers from more pressing duties. Letter from Robert E. Lee to Jefferson Davis (Sept. 7, 1862), *in* 19 *Official Army Records No. 1, pt. 2*, *supra* note 33, at 597, 597.

³⁴³ The judges named to these courts were said to have been of unusually high quality, and the War Department reported that their work had given great satisfaction. See Robinson, *supra* note 21, at 371–72. Courts-martial, however, were not precluded by the initial act, though later amendments tended to give the new tribunals exclusive jurisdiction. See *id.* at 369.

³⁴⁴ Message from Jefferson Davis to the Congress (Sept. 11, 1862), *supra* note 342, at 244–45; see Conf. Const. of Mar. 1861, art. I, § 8, cls. 9, 14, *reprinted in* Statutes at Large, *supra* note 5, at 14–15; Conf. Const. of Mar. 1861, art. I, § 9, cl. 16, *reprinted in* Statutes at Large, *supra* note 5, at 16. The grand-jury provision was taken without alteration from the Fifth Amendment to the U.S. Constitution. The second Justice Harlan, however, would later explain with much force that the inferior courts contemplated by Article I were those in which the judicial power was vested by Article

Later statutes reaffirmed the extension of military jurisdiction to offenses by military personnel that were not related to their duties,³⁴⁵ and Attorney General George Davis upheld the constitutionality of this practice in early 1865 on the basis of the arguments the President had made in 1862.³⁴⁶ The U.S. Supreme Court would briefly reach the opposite conclusion in the next century.³⁴⁷ The extension was not swallowed without protest in the Confederacy; North Carolina Senator William A. Graham insisted in December 1864 that citizens entering the service did not forfeit their right to jury trial “for offences not affecting the good order and efficiency of the army or navy.”³⁴⁸

Conspicuously, however, the Confederate Congress seems never to have attempted to authorize the military trial of *civilians*, as President Lincoln did, even where martial law had been declared³⁴⁹—except for passing or importing counterfeit notes in

III. *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (opinion of Harlan, J.). The power to make rules for governing the Army was a more promising source of authority; it was the basis of the Articles of War and the courts-martial that had always been established to enforce them. See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955).

³⁴⁵ See Act of Dec. 19, 1864, ch. 10, 2d Cong., 2 Sess., reprinted in *Laws of the Last Session*, supra note 24, at 8, 8 (prohibiting false claims against the Government); Act of Dec. 29, 1864, ch. 15, 2d Cong., 2d Sess., reprinted in *Laws of the Last Session*, supra note 24, at 11, 11–12 (making the engagement in a conspiracy to overthrow the Confederate States or forcibly to obstruct the enforcement of their laws a crime).

³⁴⁶ *Jurisdiction of the Military Courts* (Mar. 7, 1865) (opinion of Davis), in *Opinions of the Confederate Attorneys General*, supra note 31, at 570, 573–74 (sustaining military jurisdiction to try a soldier for murder). Since the defendant was a soldier, wrote Davis, the case was one “arising in the land[] or naval forces” within the meaning of Article I, § 9. *Id.* at 573; see also *Senate Proceedings* (Dec. 15, 1864) (statement of Sen. Hill), reprinted in *52 Southern Historical Society Papers*, supra note 166, at 1, 3 (stating that “[i]t was a mistake to say that crimes violative of the laws of the land could not be tried by military courts or courts martial, in cases where the offenders belonged to the land or naval services”).

³⁴⁷ *O’Callahan v. Parker*, 395 U.S. 258, 274 (1969). The Court would subsequently overrule itself, concluding that the tradition on which the exception for military courts was based included offenses unrelated to the defendant’s duties. *Solorio v. United States*, 483 U.S. 435 (1987).

³⁴⁸ *Senate Proceedings* (Dec. 15, 1864) (statement of Sen. Graham), reprinted in *52 Southern Historical Society Papers*, supra note 166, at 1, 3; see also *Senate Proceedings* (Dec. 15, 1864) (statement of Sen. Watson), reprinted in *52 Southern Historical Society Papers*, supra note 166, at 1, 5.

³⁴⁹ After President Davis declared martial law in parts of Virginia, Adjutant-General Samuel Cooper forbade the manufacture and sale there of spirituous liquors and subjected violators to trial by courts-martial. After protests from a prominent attorney

2004]

Through the Looking-Glass

1339

the service of the enemy,³⁵⁰ which Clement C. Clay in the Senate argued was a war crime. If that was so, then (as courts in the United States would later conclude) the case fell within another traditional exception to the requirements of tenured judge and jury trial.³⁵¹ Indeed, when the Confederate Congress in the waning days of the war made it a crime to assert false claims against the government, to conspire to overthrow the Confederacy, or to give military information to the enemy, it provided for courts-martial only of members of the armed forces; civilian defendants were to be tried in the ordinary civil courts,³⁵² as Acting Attorney

who was also a member of the Virginia legislature the government “backed away from” the military trial of civilians under these provisions, and “[a]fter that no more such trials occurred.” Neely, *Southern Rights*, supra note 236, at 37–38, 49–50, 80.

³⁵⁰ Act of Oct. 13, 1862, ch. 49, Pub. Laws, 1st Cong., 2d Sess., reprinted in *Statutes at Large*, supra note 5, at 80, 80–81.

³⁵¹ Senate Proceedings (Oct. 3, 1862) (statement of Sen. Clay), reprinted in 47 *Southern Historical Society Papers*, supra note 72, at 37, 41–42. In the Confederate Congress, Florida Senator Augustus Maxwell objected that counterfeiting was not a military offense and thus could not be tried by a military court; Semmes of Louisiana replied that the Constitution applied only to citizens of the Confederate States or of nations with which they were at peace. Senate Proceedings (Oct. 3, 1862) (statements of Sens. Maxwell and Semmes), reprinted in 47 *Southern Historical Society Papers*, supra note 72, at 37, 42. This response seems both erroneous and incomplete: The relevant constitutional provisions were general on their face, and the statute appeared to apply to citizens of the Confederacy.

See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942). The United States would also employ military tribunals to try civilians for war crimes in connection with the Civil War, and both the Attorney General and the only civilian court to consider the constitutionality of this practice upheld it. See Act of July 2, 1864, Pub. L. No. 38-215, 13 Stat. 356, § 1 (recognizing the jurisdiction of military commissions over “violations of the laws and customs of war”); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899) (involving alleged accessories to the assassination of President Lincoln); 11 Op. [U.S.] Att’y Gen. 297, 317 (1865) (Attorney General James Speed); Winthrop, *Military Law*, supra note 209, at *1219–21.

³⁵² See Act of Dec. 19, 1864, ch. 10, Pub. Laws, 2d Cong., 2d Sess., reprinted in *Laws of the Last Session*, supra note 24, at 8, 8–9; Act of Dec. 29, 1864, ch. 15, Pub. Laws, 2d Cong., 2d Sess., reprinted in *Laws of the Last Session*, supra note 24, at 11, 11–12; Act of Mar. 13, 1865, ch. 164, Pub. Laws, 2d Cong., 2d Sess., reprinted in *Laws of the Last Session*, supra note 24, at 130, 130–31. In the debate on the conspiracy provision, Georgia Senator Herschel Johnson complained that he found little solace in the fact that the bill exempted civilians from military trial, since all white males between the ages of seventeen and fifty had been declared to be in the Army. Senate Proceedings (Dec. 15, 1864) (statement of Sen. Johnson), reprinted in 52 *Southern Historical Society Papers*, supra note 166, at 1, 4. If that was true, responded his colleague Benjamin Hill, it was the fault of the Conscription Act, not of the law punishing conspiracy.

General Keyes in November 1863 ruled they must be for treason.³⁵³

There were occasions, nevertheless, on which Confederate military authorities undertook without statutory authorization to subject civilians to military justice.³⁵⁴ In late 1861, for example, follow-

Senate Proceedings (Dec. 15, 1864) (statement of Sen. Hill), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 1, 6.

³⁵³ Jurisdiction of Courts Martial (Nov. 18, 1863) (opinion of Keyes), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 352, 352–54 (invoking the provisions of Confederate Constitution art. I, § 9 respecting grand and petit juries). See also the dictum to the same effect in *Ex parte Coupland*, 26 Tex. 386, 406 (1862) (Bell, J., concurring); cf. *Ex parte Milligan*, 71 U.S. 2, 33 (1866) (striking down President Lincoln's attempt to subject civilians to military trial in Indiana and holding that so long as the ordinary courts were open, not even Congress could deny a civilian defendant the right to trial by jury before a tenured judge). Responding to a general inquiry as to when non-servicemen were subject to court-martial, Keyes made no allusion in the opinion just cited either to cases arising where the ordinary courts could not function or to those involving war crimes, both of which typically had been processed by military commissions. See Jurisdiction of Courts Martial (Nov. 18, 1863) (opinion of Keyes), *supra*, at 352–54. But see Letter from Jefferson Davis to Theophilus H. Holmes (Feb. 26, 1863), *in* 9 The Papers of Jefferson Davis, *supra* note 147, at 74, 74–75, regretting that the President's order suspending habeas corpus in Arkansas had reached the General only after the statute authorizing it expired and expressing the hope that Holmes's own declaration of martial law (see the editorial note in 9 The Papers of Jefferson Davis, *supra* note 147, at 76 n.5) might help restore order in the absence of civilian courts to punish crime. See also Neely, Confederate Bastille, *supra* note 236, at 22 (“[T]he Confederate Congress allowed almost no trials by military commission to occur. The North conducted at least 4271 trials of civilians by military commissions; the South, none, after a brief experiment in Texas in 1862. This was yet another way in which the Confederacy was freer than the North.”). In his later comprehensive study of military records, however, Professor Neely concluded that the difference between Northern and Southern practices in this respect “was not as sharp as it may seem,” arguing that the commissioners appointed to determine whether military prisoners should be released or handed over to civilian prosecutors functioned as a “substitute” for military commissions—“a shadow system of courts that played some of the roles of military commissions in the North”—as they often determined in essence, and without the trappings of civil justice, whether or not an individual remained in prison. Neely, Southern Rights, *supra* note 236, at 80, 82, 86. This argument is intriguing, but I would be inclined to stress rather that investigation by the commissioners served as a sort of intra-agency alternative to habeas corpus, which was not always available, as a remedy for imprisonment *without* trial. For a description of the commissioners and their functions, see *supra* note 315 and accompanying text.

³⁵⁴ Explaining an 1862 resolution looking toward legislation expressly forbidding the trial of civilians “otherwise than upon presentment or indictment by a grand jury,” Senator Haynes acknowledged that the Constitution already provided for jury trial but added that “in the districts which have been put under martial law, all power is in the hands of the Provost Marshal, and . . . there are no trials by jury.” Senate Proceedings (Sept. 10, 1862) (statement of Sen. Haynes), *reprinted in* 46 Southern Historical

2004]

Through the Looking-Glass

1341

ing the burning of several railroad bridges by Union sympathizers in eastern Tennessee,³⁵⁵ Secretary of War Judah Benjamin ordered that the alleged perpetrators “be tried summarily by drum-head court-martial and if found guilty executed on the spot by hanging.”³⁵⁶ Habeas corpus not having been suspended there at the time, Judge West H. Humphreys of the Confederate District Court issued writs on behalf of prisoners who argued that the Army lacked jurisdiction to try civilians.³⁵⁷ “[G]reatly annoyed” by judicial efforts to “take offenders out of [his] hands”³⁵⁸ for trials before civilian courts that would never convict them, Brigadier General William Carroll declared martial law in and around Knoxville, in order “to suspend for a time the functions of the civil tribunals.”³⁵⁹

Secretary Benjamin had already declared in no uncertain terms that “[c]ourts of justice have no power to take prisoners of war out of the hands of the military,”³⁶⁰ but Colonel Danville Leadbetter, Carroll’s successor as Army commander at Knoxville, was not so sure. Right after the bridges were burned, wrote Leadbetter to Benjamin in January 1862, he would have ignored a writ of habeas corpus, invoking “the military law of self-preservation.”³⁶¹ Now that the insurrection had been put down, however, the situation was

Society Papers, *supra* note 91, at 85, 87; see also Senate Proceedings (Sept. 11, 1862) (statement of Sen. Haynes), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 98, 99.

³⁵⁵ The entire mountainous area from the Pennsylvania border to northern Alabama, we are told, “formed a huge area of discontent” and Union sentiment. Hendrick, *supra* note 73, at 331.

³⁵⁶ Letter from J.P. Benjamin to W.B. Wood (Nov. 25, 1861), *in* 1 Official Army Records No. 2, *supra* note 33, at 848, 848; see also Letter from J.P. Benjamin to William C. Carroll (Dec. 10, 1861), *in* 7 Official Army Records No. 1, *supra* note 33, at 754, 754 (noting that, although a death sentence imposed in pursuance of this order did not require presidential endorsement, President Davis “entirely approves my order” and desired that the Army “hang every bridge-burner you can catch and convict”).

³⁵⁷ Letter from William Carroll to J.P. Benjamin (Nov. 29, 1861), *in* 7 Official Army Records No. 1, *supra* note 33, at 720, 720. “Your instructions are fully understood,” Carroll wrote, “and I shall not allow any interference in their execution.” *Id.*

³⁵⁸ Letter from William H. Carroll to J.P. Benjamin (Dec. 11, 1861), *in* 7 Official Army Records No. 1, *supra* note 33, at 759, 759–60.

³⁵⁹ Proclamation of Brig. Gen. William H. Carroll (Dec. 11, 1861), *in* 7 Official Army Records No. 1, *supra* note 33, at 760, 760.

³⁶⁰ Letter from J.P. Benjamin to R.F. Looney (Nov. 30, 1861), *in* 1 Official Army Records No. 2, *supra* note 33, at 851, 851.

³⁶¹ Letter from D. Leadbetter to J.P. Benjamin (Jan. 11, 1862), *in* 1 Official Army Records No. 2, *supra* note 33, at 870, 870.

less urgent. Congress had refused to interfere with habeas corpus, and although the closing of civilian courts under martial law effectively prevented them from issuing the writ, Leadbetter was unable to see how the Army could do that “so long as Congress has not suspended the writ.”³⁶²

General Carroll was the first military commander to impose martial law inside the Confederacy, but he was not the last.³⁶³ Not all the subsequent orders attempted to interfere with civilian courts, but in August 1862 Secretary Benjamin was moved to inform commanders everywhere that they had no authority to suspend habeas corpus,³⁶⁴ and a month later he unceremoniously set aside all declarations of martial law made without express presidential authorization—one of which, he noted the same day in a note to the General who had issued it, the President himself had termed “an unwarrantable assumption of authority.”³⁶⁵

Thus the judges in eastern Tennessee regained their right to inquire into the legality of military detention, but that did not mean that persons in the position of the alleged bridge-burners were entitled to be turned over to civilian courts. For Benjamin had said at the time that, if an officer was summoned to explain why he held the petitioner in custody, the assertion “that the prisoner was cap-

³⁶² *Id.*

³⁶³ Finding “a virtual abdication of the civil authorities” when he arrived in Arkansas in May 1862, for example, General Thomas Hindman imposed martial law throughout the state and later defended his actions in a report that Professor Neely has described as “a minor masterpiece.” Neely, *Southern Rights*, *supra* note 236, at 12–13, 16. By this time there was precedent for what he had done, Hindman wrote, and if there had not been he would have done it anyway, “risking myself upon the justice of my country and the rectitude of my motives.” Report of Maj. Gen. Thomas Hindman (June 19, 1863), *in* 13 *Official Army Records No. 1*, *supra* note 33, at 29, 29–40; see also Robinson, *supra* note 21, at 396 (listing other occasions when military commanders imposed martial law).

³⁶⁴ General Order No. 56 (Aug. 6, 1862), *in* 2 *Official Army Records No. 4*, *supra* note 33, at 39, 39.

³⁶⁵ General Order No. 66 (Sep. 12, 1862), *in* 9 *Official Army Records No. 1*, *supra* note 33, at 735, 735–36; Letter from S. Cooper to P.O. Herbert (Sep. 12, 1862), *in* 9 *Official Army Records No. 1*, *supra* note 33, at 735, 735; see also Letter from Jefferson Davis to J.J. Pettus (Aug. 3, 1862), *in* 1 *Official Army Records No. 8*, *supra* note 32, at 874, 874, *reprinted in* 5 *Jefferson Davis, Constitutionalist*, *supra* note 32, at 309, 309–10 (asking that General Holmes be informed that he was reported to have “usurped powers” by (inter alia) declaring martial law and directed to “correct these abuses as rapidly as is consistent with the defence of the country”).

2004]

Through the Looking-Glass

1343

tured in arms against the Government and is held as a prisoner of war” would be “a good and complete answer to the writ.”³⁶⁶

It was true, Benjamin later wrote, that the citizen who had taken arms against his own government was a traitor subject to prosecution in the civilian courts. But he was also a prisoner of war, subject under the laws of war to be kept in custody until the cessation of hostilities as a matter of self-defense; it was “an act of clemency” not to have him condemned for treason.³⁶⁷ It was on this ground that, when the insurrection had broken out, Benjamin had ordered most individuals taken “in arms against the government . . . to be held as prisoners of war, and held in jail till the end of the war.”³⁶⁸

For the bridge-burners themselves, however, clemency was not in the cards; as noted, they were to be tried summarily by court-martial and hanged.³⁶⁹ Secretary Benjamin never explained the basis of military jurisdiction over bridge-burners, but General Kirby Smith did. One David Fry, he reported in April 1862, had been apprehended “in citizen’s dress” and charged with bridge-burning.

His presence within our lines in citizen’s dress and engaged in the felonious occupation of bridge-burning makes him amenable either as a citizen of East Tennessee to the criminal courts of the land or as a spy to the military court of the service.³⁷⁰

In other words, as the leading commentator on Confederate courts later put it, the bridge-burners “were accused not of treason but of a violation of the common law of war.”³⁷¹ That was enough to bring them within the principle later recognized by the *Mudd* and *Quirin* cases in the United States; there is no doubt that, at least if Con-

³⁶⁶ Letter from J.P. Benjamin to R.F. Looney (Nov. 30, 1861), in 2 Official Army Records No. 1, supra note 33, at 851, 851.

³⁶⁷ Letter from J.P. Benjamin to Tennessee Members of Congress (Feb. 24, 1862), in 2 Official Army Records No. 1, supra note 33, at 879, 880.

³⁶⁸ See Letter from J.P. Benjamin to W.B. Wood (Nov. 25, 1861), in 7 Official Army Records No. 1, supra note 33, at 701, 701. For the relevant principle of the law of nations, which was just what Benjamin said it was, see Vattel, supra note 109, bk. III, § 148.

³⁶⁹ See supra note 356 and accompanying text.

³⁷⁰ Letter from E. Kirby Smith to S.P. Carter (Apr. 19, 1862), in 1 Official Army Records No. 2, supra note 33, at 882, 882–83.

³⁷¹ See Robinson, supra note 21, at 275; see also Vattel, supra note 109, bk. III, §§ 149, 179 (distinguishing spies, for example, from ordinary prisoners of war, who were not to be put to death).

gress had so provided, they could be tried by military tribunals in the United States today.³⁷²

Perhaps all this sounds vaguely familiar. In late 2001, after the abominations of September 11, President George W. Bush authorized the establishment of military tribunals to try unlawful combatants accused of war crimes,³⁷³ and a few days before these lines were written the Fourth Circuit Court of Appeals upheld the Army's right to detain as a prisoner of war a citizen who had borne arms against his country.³⁷⁴ It all found a precedent in Secretary Benjamin's 1861 orders to Confederate commanders in East Tennessee.

VIII. SEPARATION OF POWERS AND THE VETO

In one respect the provisions of the Confederate Constitution respecting executive disapproval of legislative action departed significantly from the U.S. model: The President was authorized to disapprove particular appropriations while approving others in the same bill.³⁷⁵ Otherwise, however, the veto clauses of the two Constitutions were identical. Although President Davis never exercised

³⁷² Two Confederate Army attorneys, however, denied that military tribunals could try civilians even for war crimes, at least in the absence of a declaration of martial law, and a Mississippi state court reached the same conclusion. Letter from H.L. Clay to D. Leadbetter (Apr. 28, 1862), *in* 1 Official Army Records No. 2, *supra* note 33, at 886, 886 (purporting to convey a decision of the Attorney General); Letter from James O. Fuqua to Daniel Ruggles (Sept. 22, 1862), *in* 4 Official Army Records No. 2, *supra* note 33 at 894, 894-97; Robinson, *supra* note 21, at 380-81.

³⁷³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Unlike Benjamin's order, President Bush's applied only to aliens, but there was nothing in the theory that justified it to require this limitation.

³⁷⁴ Hamdi v. Rumsfeld, 296 F.3d 278, 283-84 (4th Cir. 2002), *rev'd*, 124 S. Ct. 2633 (2004).

³⁷⁵ Article I, § 7, Clause 2, of the Constitution of the Confederate States of America, *reprinted in* Statutes at Large, *supra* note 5, at 14, states:

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 the case of other bills disapproved by the President.

See Lee, *supra* note 5, at 64 (asserting that this provision was a response to experience in the United States, where in order to keep the government running the President often had to approve the bad along with the good).

2004]

Through the Looking-Glass

1345

his novel power to reject individual expenditures, he wielded the veto itself more liberally than any U.S. President before Grover Cleveland—not only on constitutional grounds, which practically everyone conceded was appropriate, but also for reasons of mere disagreement with congressional policy, which had been more controversial in the United States.³⁷⁶ Good Democrat that he had been, Davis had never shared the narrow Whig conception of the veto power; Democratic Presidents under what Confederates liked to call the “old Government” had long employed their authority to forestall the enactment of laws they found merely misguided, and President Davis rightly followed their example. First and foremost, however, he employed the veto to protect executive authority from congressional encroachment, on both constitutional and policy grounds—as even the old Whigs had acknowledged was proper.

Several of Davis’s vetoes served to defend his constitutional authority as Commander-in-Chief.³⁷⁷ In January 1862, for example, he torpedoed a bill to raise a regiment of volunteers to protect the Texas frontier. Although the troops were to be a part of the Confederate Army, the bill would have placed them under the control of the Governor of Texas rather than “the Executive of the Confederate States,” which “of necessity,” he said, was to command “all troops employed in their service.”³⁷⁸ A month later he vetoed a measure that apparently would have required furloughs for five percent of the troops at any given time, no matter how seriously they were needed at the front. Congress, he acknowledged, had constitutional authority “to make rules for the government and

³⁷⁶ As early as August 1861, for example, President Davis vetoed a proposal to require the appointment of an assistant surgeon for each Army regiment on the ground that it was both costly and unnecessary. Veto Message (Aug. 22, 1861), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 130, 130–31; see also Veto Message (Jan. 22, 1862), *in* *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 158, 158–59 (rejecting a bill to encourage the private manufacture of arms on the ground that it deprived the Executive of discretion to prevent “unnecessary or improvident contracts”); Veto Message (Dec. 14, 1861), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 156, 156–58 (vetoing a bill regulating furloughs).

³⁷⁷ See Conf. Const. of Mar. 1861, art. II, § 2, cl. 1, *reprinted in* *Statutes at Large*, supra note 5, at 18 (“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 . . .”).

³⁷⁸ Veto Message (Jan. 22, 1862), supra note 376, at 160.

regulation of the land and naval forces,” and “[w]hen rules are established for the regulation of such matters as are in their nature susceptible of fixed and unvarying application, there can be no impolicy in providing them by statute.” The question of furloughs, however, was so “variable” and so dependent upon “time, place, and circumstances” as to be “essentially administrative in character” and “not susceptible of being determined” by rigid rules.³⁷⁹ “[T]here is an obvious distinction,” he lectured the legislators, “between making rules for the government of the Army and undertaking to administer the Army by statute.”³⁸⁰

In March 1862 Davis likewise interposed to prevent the creation of a “Commanding General” of the Army. This officer, he complained, was to be “authorized to take the field at his own discretion and command any army or armies he may choose,” even in the teeth of presidential orders, since the President’s sole means of controlling him was to take the drastic step of abolishing his office.³⁸¹ “The Executive could in no just sense be said to be Commander-in-Chief,” Davis wrote, “if without the power to control the discretion” of his subordinates.³⁸²

In September 1862 the President disapproved a bill that would have required him to construct a warship in accordance with a specified plan. Congress, the President gently observed, must have

³⁷⁹ Veto Message (Feb. 1, 1862), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 162, 162–63.

³⁸⁰ *Id.* at 162–63. Two months earlier Davis had vetoed on pure policy grounds another furlough provision requiring temporary or permanent release of any soldier whom an Army surgeon, or a surgeon of any hospital in which the applicant was being treated, certified as disabled. Among other things, he said:

I cannot but regard it as extremely unwise to grant control over any soldier, to the extent of discharging him from service, to any body of men not employed in the service of the Government, over whom it exercises no control, and who present to it no guarantee whatever for the faithful discharge of the duties imposed on them.

Veto Message (Dec. 14, 1861), *supra* note 376, at 156–57.

³⁸¹ Veto Message (Mar. 14, 1862), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 215, 215–16.

³⁸² *Id.* at 216. “Davis recognized the bill for what it was, an oblique expression of no confidence in the constitutional commander-in-chief” Thomas, *supra* note 20, at 139. Georgia Representative Augustus Wright had objected in the House on the same ground. House Proceedings (Feb. 27, 1862) (statement of Rep. Wright), *reprinted in* 44 *Southern Historical Society Papers*, *supra* note 218, at 65, 70; see also 1 *Diary of Thomas Bragg*, *supra* note 73, at 184 (“setting aside, virtually, the constitutional power of the President”).

2004]

Through the Looking-Glass

1347

been unaware that the design in question had been thrice rejected by responsible Navy experts, and he thought it his duty to return the bill for reconsideration “with a full knowledge that the plan proposed is not approved by the Executive Department, charged with the supervision of such subjects.”³⁸³

In March 1863, spelling out several convincing policy objections to a bill designating an existing infantry unit as the Second Regiment of South Carolina Artillery, Davis added that the bill was unconstitutional as well. Pursuant to its authority to raise armies and make rules for their government, he said, Congress might “undoubtedly order the raising of regiments of artillery for seacoast defense” or “direct that a certain number of regiments of infantry be converted into artillery.”³⁸⁴ The bill before him, however, did nothing of the kind but rather “order[ed] a specified regiment to be employed for seacoast defense.”³⁸⁵

If this be a legitimate exercise of legislative power, Congress can, of course, select other regiments and order them to the defense of the Indian country, and select again other regiments and order them to be sent to the Tennessee, the Virginia, or the Texan frontier.

Such orders seem to me purely Executive. They have hitherto been made through the Adjutant General of the Army, and it requires but little reflection to perceive that the exercise of such powers by Congress withdraws from the Executive the authority indispensable to the fulfillment of his functions as Commander in Chief.³⁸⁶

Finally, in 1864 President Davis pocketed a bill to organize a “general staff for armies in the field,”³⁸⁷ reciting numerous policy arguments and singling out a provision that would have authorized commanding generals to assign officers to staff positions “without

³⁸³ Veto Message (Oct. 13, 1862), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 266, 266.

³⁸⁴ Veto Message (Mar. 31, 1863), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 320, 323.

³⁸⁵ *Id.* at 323.

³⁸⁶ *Id.*

³⁸⁷ Veto Message (May 28, 1864), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 457, 457.

reference to or consultation with the War Department or the Executive,” and apparently in contravention of their views.³⁸⁸

Leaving out of view the question whether it is in accordance with the Constitution to make the commander of an army independent of the Commander in Chief in the discharge of any of the duties of his office, and looking only to the effect of such a system, it plainly creates in this branch of the service as many independent executives as there are generals commanding armies in the field, and thus destroys that unity of design and concert of action which are indispensable elements of success in war.³⁸⁹

President Davis, in short, was commendably alert not to permit Congress either to run the Army and Navy itself or to transfer the prerogatives of the Commander-in-Chief to those the Constitution subjected to his command.³⁹⁰

Davis was equally vigilant in defending his constitutional authority with respect to the nomination and appointment of officers.³⁹¹ In

³⁸⁸ Id. at 460.

³⁸⁹ Id. at 460–61.

³⁹⁰ Toward the end of the war, nevertheless, the President signed a bill providing for appointment of a “General-in-Chief” who was to be “ranking officer of the Army” and, “as such,” to “have command of the military forces of the Confederate States.” Act of Jan. 23, 1865, ch. 35, Pub. Laws, 2d Cong., 2d Sess., *reprinted in* Laws of the Last Session, supra note 24, at 22, 22. Taken literally, this bill was flatly unconstitutional. Henry Foote, never a reliable source, crowed after the war that, “by a sort of *coup d’état*,” Congress had “stripped [the President] of all military power.” Foote, *Casket of Reminiscences*, supra note 34, at 299. Davis, in contrast, must have read the statute, unlike the earlier measure he had scotched in 1862, to leave the “General-in-Chief” subject to presidential orders, as the Constitution required. See also General Order No. 3 (Feb 6, 1865), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 570, 570 (informing the Army of General Lee’s appointment to the new post); Coulter, supra note 35, at 558 (arguing that the law changed nothing, for it “took no powers away from the President, and Lee would not have assumed them” if it had); Yearns, supra note 5, at 227–28 (noting that, while the House had rejected an amendment to make clear that the bill would not interfere with the President’s authority, Lee himself read the statute narrowly). Robert Kean, of the War Bureau, reported that the General-in-Chief bill was “very distasteful to the President,” that he had offered the post to General Lee “with the greatest reluctance and disgust,” and that Lee had declined to accept it—which seems not to be true. *Inside the Confederate Government: Diary of Robert Garlick Hill Kean*, supra note 187, at 190–91.

³⁹¹ Article II, § 2, Clause 2 of the Constitution of the Confederate States of America, *reprinted in* Statutes at Large, supra note 5, at 18–19, reads:

2004]

Through the Looking-Glass

1349

June 1864, for example, he axed a provision for the appointment of additional artillery officers because it gave a preference to “acting ordnance officers having been found duly qualified according to the regulations of the War Department” and “already on duty in the field.” No such officers were in the field, the President wrote, and therefore the bill had the effect “of restricting the Executive in the choice of persons to fill the offices created by the bill to a list of employees selected by a chief of bureau, which is plainly not in accordance with the expressed intention of Congress, nor with the terms of the Constitution.”³⁹² Similarly, in March 1865, President Davis vetoed a bill that would have authorized “the commanding general in the field”³⁹³ to promote his own subordinates, on the ground that generals were not “heads of departments” in whom appointment authority could be vested under Article II: “This seems to me to confer a power of appointment on commanding generals not warranted by the Constitution.”³⁹⁴ Six weeks earlier, moreover, Davis had nixed a plan for adding midshipmen to the Navy because two were to be appointed from each state and one from each congressional district “upon the recommendation” of their respective Senators and Representatives. Neither the House, nor the Senate, nor the members of either Chamber, the President

[The President] . . . 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.

³⁹² Veto Message (June 7, 1864), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 466, 466. An earlier proposal by Arkansas Senator Robert W. Johnson to limit Cabinet officers to two-year terms, widely interpreted as a slap at President Davis, was similarly attacked as making executive officers overly dependent upon the Senate and never got out of Congress. See Senate Proceedings (Dec. 10, 1863) (Term of Office of the Various Secretaries), *reprinted in* 50 *Southern Historical Society Papers*, *supra* note 136, at 24, 24; see also *Inside the Confederate Government: Diary of Robert Garlick Hill Kean*, *supra* note 187, at 126.

³⁹³ Veto Message (Mar. 9, 1865), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 558, 558.

³⁹⁴ *Id.*

correctly concluded, could be given authority to appoint executive officers.³⁹⁵

³⁹⁵ Veto Message (Jan. 23, 1865), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 553, 553–56 (anticipating the reasoning of *Buckley v. Valeo*, 424 U.S. 1, 109–43 (1976), arguing that midshipmen were “officers” and not mere “employees” because, among other things, their appointment was “authorized by law” and not subject to termination at the pleasure of their superiors, and adding that even if they had been employees it would not have mattered: “[I]t is as little in accordance with the letter and the spirit of the Constitution for the members of Congress to participate in choosing employees as in choosing officers for the Executive or Judicial Departments”). A motion to pass this bill over the veto passed the Senate overwhelmingly, Senate Proceedings (Jan. 25, 1865) (Acting Midshipmen—A Veto), reprinted in 52 *Southern Historical Society Papers*, supra note 166, at 217, 221, but failed in the House, House Proceedings (Jan. 16, 1865) (Bill of the Appointment of Midshipmen), reprinted in 52 *Southern Historical Society Papers*, supra note 166, at 231, 232. Its supporters argued that the President was not meant to be bound by the legislators’ recommendation. Senate Proceedings (Jan. 25, 1865) (statement of Sen. Brown), reprinted in 52 *Southern Historical Society Papers*, supra note 166, at 217, 218.

President Davis said nothing about the further provision apportioning midshipmen among the states according to their representation in Congress, but the Senate had killed an analogous proposal respecting Brigadier Generals in 1862 after it too was attacked on constitutional grounds. These officers, Senator Yancey had argued, ought to be appointed according to the ratio of each state’s troops. Virginia, he complained, had more than its share. Unconstitutional, responded Senator Sparrow: The President was required to appoint on merit, not according to the candidate’s state of origin. Senate Proceedings (Sept. 8, 1862) (Nomination and Appointment of Brigadier Generals), reprinted in 46 *Southern Historical Society Papers*, supra note 91, at 59, 59–60. That suggested limits on the President’s power not found in the text, and the Judiciary Committee’s objection was more to the point: The Constitution empowered the President to make the nomination, and, while the Senate might consider the relation between a general and his troops in deciding whether to consent to an appointment, Congress had no authority to limit his discretion. Senate Proceedings (Sept. 22, 1861) (Brigadier Generals), reprinted in 46 *Southern Historical Society Papers*, supra note 91, at 202, 202–03. Even this argument, while reflecting legitimate constitutional concerns, went too far; President Davis, like President Washington, had had no difficulty in approving a provision sensibly requiring that District Attorneys be persons “learned in the law.” Act of Mar. 16, 1861, ch. 61, § 31, Pub. Laws, Provisional Cong., 1st Sess., reprinted in *Statutes at Large*, supra note 5, at 75, 81; cf. 1 Stat. (U.S.) 73, 92, § 35 (Sept. 24, 1789); Currie, *The Federalist Period*, supra note 23, at 43 & n.255. Indeed, in 1863 Davis without fanfare signed a bill that arguably contained the same vice attributed to the Brigadier General provision, for it required tax collectors to be both residents and freeholders in the states in which they served. Act of May 1, 1863, ch. 67, § 2, Pub. Laws, 1st Cong., 3d Sess., reprinted in *Statutes at Large*, supra note 5, at 140, 141. The following section of this statute, id. § 3 at 141, also authorized each collector to appoint his own deputies, in arguable violation of the principle Davis would invoke with respect to military appointments in 1865. See supra note 393 and accompanying text.

2004]

Through the Looking-Glass

1351

Indeed at one point the President went even further than may have been necessary to protect an additional executive prerogative that was another innovation of the Confederacy. The House of Representatives innocently asked him how much it would cost to send a diplomatic agent to Brazil, and he refused to answer. By requiring a two-thirds vote to appropriate money for expenses not proposed by the President, he wrote, the Constitution had placed upon that officer “the responsibility of unwise and extravagant expenditures,” and neither house could be permitted to control his discretion by demanding that he order the State Department “to ask for and transmit” estimates of the requisite sums.³⁹⁶

Apart from actual vetoes, President Davis made a number of creative uses of his limited role vis-à-vis the Confederate Congress. On one occasion, unwilling to prevent enactment of otherwise desirable legislation simply because it contained one section of which he disapproved, he signed the bill and in the same breath urged Congress to repeal the offending provision.³⁹⁷ On another he signed a bill to allow minors to hold commissions in the Army but took pains to explain that he did so on the understanding that it was merely “de-

³⁹⁶ Message from Jefferson Davis to the House of Representatives (Oct. 1, 1862), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 253, 253–54; see Conf. Const. of Mar. 1861, art. I, § 9, cl. 9, reprinted in *Statutes at Large*, supra note 5, at 15. Acquiescing in the President’s interpretation of this provision, the House Committee on Foreign Affairs hastened to say that it had had “no intention of trenching upon the President’s powers” but had merely requested information, “leaving it to his judgment to decide whether an appropriation should be recommended.” 5 *Journal of the Confederate Congress*, supra note 5, in S. Doc. No. 58-234, at 493 (1905); see also Stephens, supra note 19, at 336 (“The object of this [constitutional provision] was to make, as far as possible, each Administration responsible for the public expenditures.”). In contrast, Attorney General Bragg had advised the Secretary of War only a few months before that the Secretary of the Treasury had no right to overrule decisions made by his subordinates in the exercise of duties conferred upon them by statute. *Duty of the Secretary of the Treasury* (Jan. 7, 1862), in *Opinions of the Confederate Attorneys General*, supra note 31, at 60, 64–65. After all his hard work during the controversy over removing government deposits from the Bank of the United States, Andrew Jackson must have been turning over in his grave. See Currie, *Democrats and Whigs*, supra note 1, at 80–109.

³⁹⁷ Message from Jefferson Davis to the Congress of the Confederate States (Mar. 13, 1865), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 540, 542. Implicit in this disposition was Davis’s understanding that, apart from the special provision respecting appropriations, the President had to approve a bill in toto or not at all. U.S. Presidents since Washington had similarly concluded they possessed no item veto. See Currie, *The Federalist Period*, supra note 23, at 32; Currie, *Democrats and Whigs*, supra note 1, at 31–58.

claratory of the preëxisting law.”³⁹⁸ On a third, as he urged Congress to adopt an amendment to a bill it had already presented to him in order to ensure that it would meet with his approval, he issued a sort of anticipatory veto in conjunction with the exercise of his authority to recommend legislation.³⁹⁹ Finally, in September 1862, President Davis actually asked the Senate for advice respecting appointments, as the Constitution plainly envisioned, and as President Washington had once tried to do in the case of treaties: Did military officers commissioned under the Provisional Constitution need to be reappointed?⁴⁰⁰ The answer seems a clear no, as the Constitution provided that they should remain in office until their successors were qualified or their offices abolished. It was nevertheless refreshing to see the President take advantage of the opportunity for consultation the basic law afforded.⁴⁰¹

Not all of Davis’s vetoes concerned the separation of powers. His very first struck down a bill to implement the Provisional Constitution’s partial ban on the importation of slaves because it provided in the last resort for public auction of slaves illegally brought into the country and thus allowed them to be imported after all.⁴⁰² In 1862 he vetoed a bill requiring that the wages of a dead soldier be paid to his widow: As applied to soldiers already

³⁹⁸ Message from Jefferson Davis to the House of Representatives (Apr. 16, 1863), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 314, 314.

³⁹⁹ Message from Jefferson Davis to the Senate (Mar. 11, 1865), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 540, 540.

⁴⁰⁰ Message from Jefferson Davis to the Senate (Sept. 12, 1862), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 246, 246. For Washington’s disillusioning experience, see Currie, *The Federalist Period*, supra note 23, at 24–26.

⁴⁰¹ See Conf. Const. of Mar. 1861, art. VI, cl. 1, *reprinted in Statutes at Large*, supra note 5, at 21.

⁴⁰² Veto Message (Feb. 28, 1861), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 59, 59; see Provisional Conf. Const. of Feb. 1861, art. I, § 7, *reprinted in Statutes at Large*, supra note 5, at 3 (forbidding importation of slaves from any foreign country other than the slaveholding states of the United States). The permanent Constitution contained a similar provision and authorized Congress to forbid importation from the United States as well, which it never did. Conf. Const. of Mar. 1861, art. I, § 9, cl. 2, *reprinted in Statutes at Large*, supra note 5, at 15. Davis recognized, one later commentator wrote, “that if their Constitution was to present them to the world as opposing the slave trade, then he could not approve a bill that made the government itself *de facto* a slave trader.” Davis, supra note 4, at 408.

2004]

Through the Looking-Glass

1353

deceased it destroyed vested rights, and even as applied prospectively it seemed of doubtful constitutionality since the distribution of estates was a matter reserved to the states.⁴⁰³ In 1863, when Congress confronted the need for legislation to ensure that areas occupied by the enemy continued to be represented in Congress, President Davis rejected the resulting bill. By prescribing that Tennessee Representatives be chosen by general ticket rather than by district, he wrote, Congress appeared to have tried to alter “the mode of representation” rather than of election and thus to have gone beyond its authority to regulate the “time, place, and manner” of congressional elections. In assuming that an individual might lose his citizenship by adhering to the enemy, Congress had both “repudiate[d] State sovereignty” and endeavored to prescribe the qualifications of voters, a subject that (under the express terms of Article I, Section 2, we may add) “belongs exclusively to the States.”⁴⁰⁴

⁴⁰³ Veto Message (Apr. 19, 1862), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 216, 216–17. Commenting on an earlier version of this provision which the President had signed, Act of Feb. 15, 1862, ch. 81, Pub. Laws, Provisional Cong., 5th Sess., reprinted in *Statutes at Large*, supra note 5, at 275, 275–76 (concerning the pay and allowances due deceased soldiers), Attorney General Watts agreed that Congress could not impair vested rights, noting that although the Contract Clause of the Confederate Constitution, like that on which it was based, applied only to the states, the preexisting law providing for payment to the “*personal representatives*” of dead soldiers had become “a part of their contract with the Government.” *Pay and Allowances of Deceased Soldiers* (May 9, 1862), in *Opinions of the Confederate Attorneys General*, supra note 31, at 89, 89–91. He added, however, that (presumably as necessary and proper to the raising of armies under Article I, § 8) the government could make payment to the widow a condition of *future* enlistment contracts. *Id.*; cf. *Wissner v. Wissner*, 338 U.S. 655, 660–61 (1950) (holding that federal law respecting the beneficiaries of servicemen’s life insurance overrode the state community property provisions that otherwise would have applied).

⁴⁰⁴ Veto Message (May 1, 1863), in 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 324, 324. When the veto message reached the House, Congress rushed through a new bill omitting the contested provision respecting disloyalty but providing again for election by general ticket; the President swallowed his remaining reservations and signed it the same day. See 3 *Journal of the Confederate Congress*, supra note 5, in S. Doc. No. 58-234, at 421–22 (1904); 6 *Id.* at 484–85 (1905); see also Act of May 1, 1863, ch. 91, Pub. Laws, 1st Cong., 3d Sess., supra note 20, at 164, 164–65. For Congress’s authority respecting Congressional elections see Confederate Constitution of Mar. 1861, art. I, § 4, reprinted in *Statutes at Large*, supra note 5, at 12. Compare the 1841 discussion of the converse question whether the U.S. Congress under an almost identically worded provision could *require* that Representatives be elected by district. See Currie, *Democrats and Whigs*,

States' rights prevailed once again in President Davis's 1864 veto of a bill to establish a home for disabled servicemen. Without denying that looking after the wounded might be necessary and proper to the raising of armies or the conduct of war, the President concluded that the means selected for achieving that laudable object exceeded congressional authority. For in effect the bill would give the new institution "corporate powers," and that it could not do:

However enlightened opinions may have differed under the old Government, the whole history and theory of the contest in which we are engaged and the express recognition in our Constitution of the sovereignty of the States preclude all idea of so widely extending by construction the field of implied powers.⁴⁰⁵

In the ensuing debate on the unsuccessful motion to override President Davis's veto at least one supporter of the bill denied that it would confer any such powers,⁴⁰⁶ but that was not the main point. Davis had said more than once, and would repeat after he was out of office, that decisions of the U.S. Supreme Court would serve as guides to the interpretation of provisions of the Confederate Constitution that had been borrowed from the United States.⁴⁰⁷ That seemed to make eminent sense, as the Framers in Montgomery had made a number of explicit alterations designed to anchor their states' rights theology in the new constitutional text; in light of these emendations, adoption of the Necessary and

supra note 1, at 250–74. For reasons there stated it seems to me President Davis's doubts as to Congress's power were unfounded.

The additional provision of the adopted bill specifying that only citizens might vote, Act of May 1, 1863, ch. 91, § 5, Pub. Laws, 1st Cong., 3d Sess., supra note 20, at 164, 164–65, did not add qualifications in violation of Article I, § 2; the preceding clause of that section, conspicuously missing from the U.S. model, already required that "the electors in each State shall be citizens of the Confederate States." Conf. Const. of Mar. 1861, art. I, § 2, cl. 1, *reprinted in* Statutes at Large, supra note 5, at 11. For debates on the question whether such a limitation was implicit in the United States, see Currie, *Descent into the Maelstrom*, supra note 1, at 167–73 (discussing the admission of Michigan).

⁴⁰⁵ Veto Message (Feb. 11, 1864), *in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 409, 411. The vetoed bill is printed in 6 Journal of the Confederate Congress, supra note 5, *in* S. Doc. No. 58-234, at 809–10 (1905).

⁴⁰⁶ House Proceedings (Feb. 17, 1864) (statement of Clapp), *reprinted in* 50 Southern Historical Society Papers, supra note 136, at 451, 453.

⁴⁰⁷ See supra note 49 and accompanying text.

2004]

Through the Looking-Glass

1355

Proper Clause without change might have been thought to reflect acceptance of its settled interpretation. *McCulloch v. Maryland* had established that the U.S. Congress could create corporations that were necessary and proper to the exercise of its powers, and Chief Justice Marshall's argument had been crushing: No talismanic symbol of untouchable state sovereignty, a corporation was a perfectly ordinary means to an end.⁴⁰⁸ The end in question being a legitimate one for the Confederate Congress to pursue, one might have expected a pragmatic President who would soon show himself sufficiently flexible to propose emancipation as an inducement to black riflemen to follow the great Chief Justice in the case of the soldiers' home—as his own prior pronouncements had led us to believe he would do.⁴⁰⁹

One final presidential message, while not involving a veto of legislation, helps to round out our portrait of President Davis as a hawkeyed defender of the Confederate Constitution. In December 1861, he submitted to the Provisional Congress (the permanent Senate not yet having convened) a number of treaties with a variety of Indian tribes.⁴¹⁰ Although these agreements had been negotiated by his own agent, Davis recommended that Congress approve them only in part for some of the treaties contained provisions guaranteeing the tribes Delegates to the Confederate House of Representatives as well as statehood on demand and the right of their members to testify in state court. All of these provisions, the President argued, were unconstitutional. It was

⁴⁰⁸ 17 U.S. 316, 410–11 (1819). Davis had paraphrased the language of this very opinion in espousing a broad test for determining the necessity and propriety of military conscription. See text accompanying notes 102–103.

⁴⁰⁹ Davis added an alternative ground for his veto. Established on Confederate land with Confederate funds and subject to direction by the Secretary of War, the soldiers' home was to be "a Government institution" and its officers those of the Confederacy; yet the President and Treasurer were to be appointed by a board of managers selected in turn "by the Governors of the several States," and thus "not . . . in any of the ways by which alone such appointments can be constitutionally made." Veto Message (Feb. 11, 1864), *supra* note 405, at 411. As I have suggested in connection with the arguably analogous case of the Smithsonian Institution, I think there is a good deal of bite in this argument, unless a valid distinction can be drawn for this purpose between those who govern and those who merely provide services. See Currie, *Democrats and Whigs*, *supra* note 1, at 145–78.

⁴¹⁰ Message from Jefferson Davis to the Congress of the Confederate States (Dec. 12, 1861), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 149, 149–51.

“not . . . within the limits of the treaty-making power,” wrote Davis, “to admit a State or to control the House of Representatives in the matter of admission to its privileges,” while the competence of witnesses in state courts was a matter for each state to decide for itself, “independently of any action of the Confederate Government.”⁴¹¹ Congress followed his advice in the main, promising only to “consider” statehood applications, approving Delegates to participate only with respect to their own tribal affairs, and endorsing a right to testify only in accordance with state law.⁴¹²

As usual, I think President Davis was right in this case insofar as he dealt with the separation of powers. As I have argued in connection with the eighteenth-century Jay Treaty, I think the grant of certain powers to Congress (most notably those of the sword and the purse, but at least arguably the power to admit states as well) was meant to exclude them from executive authority, even with Senate consent—just as the grant of the treaty power, as I have argued with respect to the annexation of Texas, was meant to preclude Congress from entering into agreements with other nations.⁴¹³ Application of this line of reasoning to the Confederate Indian treaties is complicated by the fact that under the Provisional Constitution, which was then in force, it was Congress rather than a separate Senate whose consent to a treaty was required; the same body could have granted statehood by simple legislation without even a two-thirds majority. I think the President was right to conclude that this did not mean it could do so by approving a treaty, for the requisite procedures were different; a bill would have required presentation to the President for his approval—which in this case at least would not have been a foregone conclusion, since he had not committed himself as to the de-

⁴¹¹ *Id.* at 149–50. On the statehood question see also Attorney General Thomas Bragg’s unpublished report of a Cabinet discussion, 1 *Diary of Thomas Bragg*, *supra* note 73, at 78 (“This last, it was concluded, we could not do by treaty, as now States by the Constitution can only be admitted by Congress.”).

⁴¹² The Indian Nations accepted these revisions. See, e.g., Amendment to Treaty of Friendship and Alliance, Dec. 20, 1861, Choctaws and Chickasaws-Confederacy, *reprinted in* *Statutes at Large*, *supra* note 5, at 311, 330–31. No Indian state, of course, was ever admitted.

⁴¹³ See Currie, *The Federalist Period*, *supra* note 23, at 209–17; Currie, *Descent into the Maelstrom*, *supra* note 1, at 80–102.

2004]

Through the Looking-Glass

1357

sirability of admitting the putative Indian states. Moreover, what the treaties proposed was not immediate admission but the grant of an unqualified right of admission in the future, which I have argued (also in the case of Texas) would be nothing less than an abdication of Congress's duty to decide on the merits of each application and therefore beyond the power of Congress to achieve even by statute.⁴¹⁴

On the question of Indian testimony in state courts I think President Davis was wrong, although Vice-President Jefferson, among others, had once taken a similar position in the United States.⁴¹⁵ The states having been excluded entirely from making treaties, to deny the Confederacy authority to make those dealing with subjects outside the legislative competence of Congress would mean no one could make them at all; it seems more plausible to conclude, as the U.S. Supreme Court would say in *Geofroy v. Riggs* in 1890, that the Constitution transferred to the central government authority to make treaties concerning "all proper subjects of negotiation between our government and the governments of other nations."⁴¹⁶

Not only do the materials in this section show President Davis, in my opinion, in a good light; I think they also go a long way toward justifying that *bête noir* of the U.S. Whigs, the presidential veto power. Examination of Davis's messages suggests that the Confederate Congress was often neither very wise nor very mindful of its constitutional obligations. President Davis, on the other hand, thought carefully and persuasively most of the time both about policy and about the Constitution; and, though a soldier rather than a lawyer by trade, he benefited from excellent legal advice. The Confederacy had troubles enough without having

⁴¹⁴ See Currie, *Descent into the Maelstrom*, supra note 1, at 80–102. States could lawfully be admitted, the Provisional Congress unanimously voted, only "by the Congress of the Confederate States, . . . whose consent it is not in the power of the President or of the present Congress to guarantee in advance." 1 *Journal of the Confederate Congress*, supra note 5, in *S. Doc. No. 58-234*, at 592 (1904).

⁴¹⁵ See Currie, *The Jeffersonians*, supra note 23, at 105 n.137.

⁴¹⁶ 133 U.S. 258, 266 (1890); see also *Missouri v. Holland*, 252 U.S. 416 (1920) (holding it to be immaterial to the validity of a treaty respecting protection of migratory birds whether Congress could have achieved the same result by legislation); *Ware v. Hylton*, 3 U.S. (3 Dal.) 199 (1796) (enforcing a provision in the 1783 Treaty of Peace with Great Britain forbidding state sequestration of debts owed to British subjects).

them compounded by a blundering and insensitive Congress. President Davis's liberal use of the veto spared it a great many bad statutes and, like judicial review in the United States, numerous violations of the fundamental law.

IX. MONEY

When it came to financial matters the Confederate Congress had its collective head firmly in the sand. "[T]he fathers of the Confederacy," wrote Professor Rembert Patrick, had anticipated that "[a] low tax on imports, added to an export duty on cotton, would supply the government's needs."⁴¹⁷ Because Congress had a distinct aversion to the imposition of other taxes, the government was compelled to finance the war largely by borrowing unsupported by adequate resources. The result was financial disaster.⁴¹⁸

⁴¹⁷ Patrick, *supra* note 32, at 203–04. Ironically, although it was Southerners who had persuaded the Constitutional Convention in Philadelphia to ban federal export taxes, the Confederate Constitution permitted them to be imposed by a two-thirds vote of each House. Compare U.S. Const. art. I, § 9, with Conf. Const. of Mar. 1861, art. I, § 9, cl. 6, *reprinted in* Statutes at Large, *supra* note 5, at 15. Presumably, the reason behind this difference is that, in the absence of the anti-agrarian North, Southern states no longer had reason to fear sectional measures designed to disadvantage their part of the country. For more on the Southern position during the debates on federal export taxes at the Philadelphia Convention, see, e.g., Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 84–87 (1997); 1 *The Records of the Federal Convention of 1787*, *supra* note 16, at 592 (Charles Pinckney); 2 *Id.* at 305–06 (George Mason); *id.* at 360 (Pierce Butler).

The Provisional Congress laid a duty on cotton exports in February 1861. See Act of Feb. 28, 1861, ch. 21, § 5, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 42, 43. Three months later the same Congress enacted a tariff law of its own, with duties ranging mostly from five to twenty-five percent. Act of May 21, 1861, ch. 44, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 127, 127. Before that time existing United States rates had been in force. See Act of Feb. 9, 1861, ch. 1, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 27, 27 (adopting U.S. laws generally until altered, to the extent consistent with the Confederate Constitution). Owing in part to the Yankee blockade of Southern ports, the export duty "raised only a few hundred dollars a month." Yearns, *supra* note 5, at 188.

⁴¹⁸ See Patrick, *supra* note 32, at 201–34; John C. Schwab, *The Confederate States of America, 1861–1865: A Financial and Industrial History of the South during the Civil War* (1901).

Congress began by authorizing the sale of bonds,⁴¹⁹ which the public soon refused to buy.⁴²⁰ It then proceeded to provide for the issuance of mountains of treasury notes. So far as appears, no one questioned their constitutionality; apparently they were considered necessary and proper to the borrowing of money, to the payment of debts, or to the procurement of military supplies.⁴²¹

Treasury notes were made receivable to discharge obligations to the government,⁴²² but that was not enough to prevent a catastrophic decline in their value. Occasional suggestions that Congress make them legal tender got nowhere; opponents tended to deny its authority to do so without reported reasons.⁴²³ Tender too was ar-

⁴¹⁹ Act of Feb. 28, 1861, ch. 21, § 2, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 42, 42–43; Act of May 16, 1861, ch. 24, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 117, 117; Act of Dec. 24, 1861, ch. 26, Pub. Laws, Provisional Cong., 5th Sess., *reprinted in* Statutes at Large, supra note 5, at 231, 231; Act of Apr. 12, 1862, ch. 27, § 1, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 28, 28; Act of Sept. 23, 1862, ch. 6, § 1, Pub. Laws, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 59, 59.

⁴²⁰ See Schwab, supra note 418, at 18.

⁴²¹ See Act of Mar. 9, 1861, Res. 16, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 93, 93 (resolving to continue mints at New Orleans and Dahlonega); Act of May 16, 1861, ch. 24, Pub. Laws, Provisional Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 117, 117 (authorizing a loan); Act of Aug. 3, 1861, ch. 11, Pub. Laws, Provisional Cong., 3d Sess., *reprinted in* Statutes at Large, supra note 5, at 171, 171 (authorizing treasury bonds and war tax); Act of Aug. 19, 1861, ch. 23, Pub. Laws, Provisional Cong., 3d Sess., *reprinted in* Statutes at Large, supra note 5, at 177, 177, (abruptly raising the limit on such notes from a modest \$2,000,000 to \$100,000,000); Act of Dec. 24, 1861, ch. 26, § 1, Pub. Laws, Provisional Cong., 5th Sess., *reprinted in* Statutes at Large, supra note 5, at 231, 231 (supplementing the act authorizing the issue of Treasury notes); Act of Apr. 12, 1862, ch. 27, § 1, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 28, 28 (authorizing further issue of Treasury notes); Act of Apr. 17, 1862, ch. 35, § 1, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 34, 34 (authorizing the issue of Treasury notes in one and two dollar denominations); Act of Sept. 23, 1862, ch. 6, § 1, Pub. Laws, 1st Cong., 2d Sess., *reprinted in* Statutes at Large, supra note 5, at 59, 59 (authorizing further issue of treasury bonds). For more on the Confederacy's fiscal policies see Patrick, supra note 32, at 201–43. To compare, the U.S. Congress had provided for the issuance of Treasury notes as early as the War of 1812. See Currie, *The Jeffersonians*, supra note 23, at 254 n.32. “The inherent weakness of Confederate fiscal policy,” Rembert Patrick wrote, “was the issuance of and dependence upon treasury notes for revenue.” Patrick, supra note 32, at 232.

⁴²² E.g., Act of Mar. 9, 1861, ch. 33, § 6, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 54, 55.

⁴²³ See, e.g., Senate Proceedings (Sept. 24, 1862) (statement of Sen. Haynes), *reprinted in* 46 Southern Historical Society Papers, supra note 91, at 222, 224; House

guably necessary to borrowing, for it enhanced the attractiveness of lending to the government (as the U.S. Supreme Court, after a false start, would ultimately hold⁴²⁴), or to the conduct of the war; and only the states, as under the U.S. Constitution, were *forbidden* to make anything but gold and silver legal tender.⁴²⁵

Diverse evasions were put forward in efforts to circumvent the perceived constitutional hurdle. Those who refused to accept treasury notes should be imprisoned, subjected to discriminatory taxation, or required to pay their own debts in specie; depreciated paper should be shored up by preventing transactions in enemy currency, or even in gold. Though no one was reported as having said so, for those who thought there was a problem with paper tender none of these stratagems was acceptable. Most if not all of them were tender proposals in all but name, and only the ban on Yankee money (which arguably served other purposes as well) was adopted.⁴²⁶

Proceedings (Apr. 8, 1862) (statement of Rep. Gartrell), *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 96, 104 (presenting the report of a divided committee); Patrick, supra note 32, at 224 (discussing the debate regarding making treasury notes legal tender). An elaborate attack on the constitutionality of paper tender was mounted by a series of essays in the Charleston *Mercury* in 1862 and published separately in pamphlet form. Thomas J. Withers, "Cato" on Constitutional "Money" and Legal Tender (1862), <http://docsouth.unc.edu/witherst.html> (on file with the Virginia Law Review Association) (insisting that by declaring that no state should make anything but gold and silver tender Article I, § 10 confirmed that the subject of legal tender was reserved to the states).

⁴²⁴ The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871); *Hepburn v. Griswold*, 75 U.S. (12 Wall.) 603 (1870).

⁴²⁵ "[I]f this thing be necessary to sustain the currency, and thereby to make the war a success," said Mississippi Senator Albert Brown in December 1863, "it is constitutional." State of the Country: Speech of Hon. A.G. Brown, of Mississippi, In the Confederate Senate, Dec. 24, 1863, at 12 (1863) <http://docsouth.unc.edu/browna/browna.html> (on file with the Virginia Law Review Association); see U.S. Const. art. I, § 10; Conf. Const. of Mar. 1861, art. I, § 10, cl. 1, *reprinted in* Statutes at Large, supra note 5, at 16; Currie, supra note 43, at 320–29. See generally Schwab, supra note 418, at 84–105 (describing the "agitation" over the attempts to make treasury notes legal tender).

⁴²⁶ See Act of Feb. 6, 1864, ch. 25, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* Statutes at Large, supra note 5, at 183, 183 (prohibiting use of United States currency); House Proceedings (Oct. 3, 1862) (statement of Rep. Lyon), *reprinted in* 47 Southern Historical Society Papers, supra note 72, at 43, 45; House Proceedings (Jan. 28, 1863) (statement of Rep. Holcombe), *reprinted in* 47 Southern Historical Society Papers, supra note 72, at 226, 228–29; House Proceedings (Mar. 25, 1863) (statement of Rep. Holcombe), *reprinted in* 49 Southern Historical Society Papers: Proceedings of the

2004]

Through the Looking-Glass

1361

By August 1861 it had become clear even to Congress that additional revenues were indispensable. Congress accordingly levied a modest war tax amounting to one-half percent of the value of specified kinds of property, including land and slaves.⁴²⁷ As you may recall, the U.S. Supreme Court had said in dicta that land and slave taxes were “direct” and thus had to be apportioned among the states according to the census.⁴²⁸ The war tax was not so apportioned, but it did not matter, since the Provisional Constitution, which was then in force, contained no apportionment provision.⁴²⁹

The permanent Constitution did contain such a provision, however,⁴³⁰ and thus when Congress resolved to assess additional taxes in April 1863 it carefully avoided imposing them on land or slaves, resorting essentially to occupational and income taxes, and to an ad valorem tax mainly on agricultural products and money.⁴³¹ Though

First Confederate Congress, Third Session in Part, at 25, 27 (Broadfoot Publ’g Co. Morningside Bookshop 1992) (1943); Senate Proceedings (Jan. 22, 1864) (statements of Sens. Caperton and Clark), *reprinted in* 50 Southern Historical Society Papers, *supra* note 136, at 279, 281. The tax proposition would appear in addition to having been expressly forbidden by the explicit provision of Article I, § 8, Clause 1 prohibiting taxes for purposes other than revenue. See *supra* text accompanying note 40. Several states, in contrast, did enact legislation declaring notes legal tender, in the face of the flat prohibition in Article I, § 10. See Fehrenbacher, *supra* note 38, at 156.

⁴²⁷ Act of Aug. 19, 1861, ch. 23, § 4, Pub. Laws, Provisional Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 177, 177–78 (authorizing treasury bonds and war tax).

⁴²⁸ *Hylton v. United States*, 3 U.S. (3 Dal.) 171, 175, 177, 183 (1796) (dictum) (interpreting U.S. Const. art. I, §§ 2, 9).

⁴²⁹ Nor, since the Provisional Congress had only one Chamber, did the Provisional Constitution incorporate the provision of its U.S. antecedent that “[a]ll Bills for raising Revenue sh[ould] originate in the House of Representatives.” U.S. Const. art. I, § 7. The permanent Constitution did contain such a provision, Confederate Constitution of March 1861, Article I, § 7, Clause 1, *reprinted in* Statutes at Large, *supra* note 5, at 13, and the Confederate Senate promptly gave it about as sweeping a construction as its language could conceivably bear, voting 17-6 that the Senate could not originate a bill to *repeal* existing tariffs. 2 Journal of the Confederate Congress (Mar. 27, 1862), *supra* note 5, in S. Doc. No. 58-234, at 96 (1904). For earlier disputes over the meaning of the U.S. provision see Currie, *The Jeffersonians*, *supra* note 23, at 121 n.244, 279 n.181; Currie, *Democrats and Whigs*, *supra* note 1, at 110–41.

⁴³⁰ Conf. Const. of Mar. 1861, art. I, § 2, cl. 3, *reprinted in* Statutes at Large, *supra* note 5, at 11; *id.* art. I, § 9, cl. 5.

⁴³¹ Act of Apr. 24, 1863, ch. 38, Pub. Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 115, 115–26. Section 11 of the Act imposed an additional tax in kind on specified crops. *Id.* at 122. To the extent that this levy was designed as an alternative means of supplying the Army, it raised serious issues as to the dividing line between taxation and condemnation: If the Government had impressed the provisions

no objections were recorded, it is not clear that this selective scheme succeeded in traversing the constitutional minefield. By Adam Smith's definition all income taxes were direct, and the U.S. Supreme Court would strike them down in *Pollock v. Farmers' Loan & Trust Co.* in 1895.⁴³² Additional language in the *Pollock* decision, moreover, suggested that a tax on agricultural produce might be considered a tax on the land itself and thus subject to apportionment as well.⁴³³

Eight months later, desperate for money, President Davis in a most thought-provoking message appealed to Congress to consider taxing both land and slaves. Two-thirds of the wealth of the country, he complained, was in one or the other of these forms and therefore exempt from the taxes Congress had most recently imposed. The U.S. Supreme Court, he noted, had said that taxes on such property had to be apportioned, and by adopting the relevant provision verbatim the Confederacy had accepted the decisions that construed it. The war, however, had made it impossible to take the census⁴³⁴ and thus to apportion direct taxes in accordance with its results. At the same time, however, the Constitution enjoined upon Congress the paramount duty to lay and collect taxes necessary to provide for the common defense.⁴³⁵ Given the impracticability of raising adequate funds by other means, Davis reasoned, it was less offensive to the Constitution to impose unapportioned direct taxes than not to impose them at all:

in question, the Constitution would have required it to pay just compensation. See *supra* notes 211–219 and accompanying text.

⁴³² 157 U.S. 429 (1895), modified on reh'g, 158 U.S. 601 (1895). In *Pollock*, the Court first struck down the tax as applied to income from real property and from state or municipal bonds. 157 U.S. at 583–84. On rehearing, the Court concluded that a tax on the income from personal property was equally direct, 158 U.S. at 637, and that Congress would not have taxed earned income if it had known it could not tax the income from property as well. *Id.* For more on *Pollock*, see Currie, *supra* note 207, at 24–26.

⁴³³ See 157 U.S. at 580–81; 158 U.S. at 627–28 (finding a tax on the income from land “direct” because it fell effectively on the land).

⁴³⁴ See Conf. Const. of Mar. 1861, art. I, § 2, cl. 3, *reprinted in* Statutes at Large, *supra* note 5, at 11 (requiring that the census be taken “within three years after the first meeting of the Congress of the Confederate States, and within every subsequent term of ten years”).

⁴³⁵ Conf. Const. of Mar. 1861, art. I, § 8, cl. 1, *reprinted in* Statutes at Large, *supra* note 5, at 11.

2004]

Through the Looking-Glass

1363

The general intent of our constitutional charter is unquestionably that the property of the country is to be taxed in order to raise revenue for the common defense, and the special mode provided for levying this tax is impracticable from unforeseen causes. It is in my judgment our primary duty to execute the general intent expressed by the terms of the instrument which we have sworn to obey, and we cannot excuse ourselves for the failure to fulfill this obligation on the ground that we are unable to perform it in the precise mode pointed out. Whenever it shall be possible to execute our duty in all its parts we must do so in exact compliance with the whole letter and spirit of the Constitution. Until that period shall arrive we must execute so much of it as our condition renders practicable. Whenever the withdrawal of the enemy shall place it in our power to make a census and apportionment of direct taxes, any other mode of levying them will be contrary to the will of the lawgiver, and incompatible with our obligation to obey that will; until that period, the alternative left is to obey the paramount precept and to execute it according to the only other rule provided, which is to "make the tax uniform throughout the Confederate States."⁴³⁶

This constitutional *cy pres* doctrine was perhaps the most striking example of President Davis's creative ingenuity, and I can think of nothing quite like it in American law. It reminds one a little of President Lincoln's famous inquiry, in connection with his controversial suspension of habeas corpus, whether it could really be his duty to respect one constitutional provision at the expense of all the rest.⁴³⁷ Though Lincoln argued in court that he had acted within his powers, however,⁴³⁸ his question implies a duty to *violate*

⁴³⁶ Message from Jefferson Davis to the Congress of the Confederate States (Dec. 7, 1863), *reprinted in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 345, 363–66. It would have been closer still to the constitutional plan, however, to apportion the tax according to the existing ratio of seats in the House of Representatives, as Representative Baldwin proposed in early 1863. House Proceedings (Jan. 16, 1863) (statement of Rep. Baldwin), *reprinted in* 47 *Southern Historical Society Papers*, supra note 72, at 133, 134; see also Yearns, supra note 5, at 204 (reporting Treasury Secretary Christopher G. Memminger's equivalent suggestion that the tax be apportioned according to the 1860 census).

⁴³⁷ Message from President Abraham Lincoln to the Congress of the United States (July 4, 1861), *reprinted in* 6 *A Compilation of the Messages and Papers of the Presidents*, supra note 42, at 20, 25.

⁴³⁸ See *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J., sitting on circuit) (rejecting the President's contention).

the Constitution if necessary to save the country; Davis was arguing that a uniform direct tax was the nearest thing to actual obedience to the Constitution itself. Also related, perhaps, is the modern doctrine of severability, which enables a court to refashion a partly unconstitutional enactment into something the legislators never adopted on the theory that they would have preferred a truncated version of their handiwork to the alternative of having no statute at all.⁴³⁹

Qualms are in order whenever one argues that constitutional limitations should be disregarded, but part of me wants to agree with Davis's conclusion. If relevant interpretive principles permit courts to reduce statutes to those portions that pass constitutional muster and to rewrite wills and trusts on similar grounds when literal effectuation of the drafter's wishes is impossible, why should these principles not apply to the Constitution itself? Indeed there is recent German precedent in an equally appealing case to support Davis's suggestion: In 1955 the Federal Constitutional Court held that a transition government for the Saarland, which treaty restrictions did not permit to conform in all respects with the Basic Law, was better than no self-government at all.⁴⁴⁰

For better or worse, the Confederate Congress did as President Davis requested: In February 1864 it imposed a uniform ad valorem tax on all property, including land and slaves.⁴⁴¹

⁴³⁹ See, e.g., *United States v. Raines*, 362 U.S. 17, 22 (1960); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 *Harv. L. Rev.* 76, 80 (1937).

⁴⁴⁰ *Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [federal constitutional court decisions]* 4 (1955), 157 (168–78) (F.R.G.); see Currie, *supra* note 316, at 87. Vice President Stephens concocted a different scheme to get around the apportionment problem: Congress should simply “conscript” necessary supplies, as it conscripted soldiers. See Schott, *supra* note 35, at 367 (citing an unpublished letter dated January 17, 1863, to Senator Semmes). To “conscript” provisions, however, was to take them for public use, and the Constitution required that the government pay just compensation when it did so—as Congress (notwithstanding differences of opinion over how such compensation should be determined) recognized when it authorized impressment later the same year. See *supra* text accompanying notes 211–219. Thus, while “conscripting” of goods might enable the Government to overcome market shortages, it could hardly serve, as Stephens suggested, as a substitute for taxes.

⁴⁴¹ Act of Feb. 17, 1864, ch. 64, Pub. Laws, 1st Cong., 4th Sess., *reprinted in* *Statutes at Large*, *supra* note 5, at 208, 208–11. “Thus,” wrote Professor Fehrenbacher, “the exigencies of war at last overrode a troublesome provision of the Constitution.” Fehrenbacher, *supra* note 38, at 156. For a more upbeat interpretation, see Robinson,

2004]

Through the Looking-Glass

1365

X. STAMPS

Somewhat reminiscent of Davis's proposal for an unapportioned direct tax was his 1862 inquiry to Congress concerning the meaning of the novel constitutional requirement that by March of the following year "the expenses of the Post-office Department" should be "paid out of its own revenues"⁴⁴² in light of disruptions caused by the war:

If, in your opinion, the clause . . . merely directs that Congress shall pass such laws as may be best calculated to make the postal service self-sustaining, and does not prohibit the appropriation of money to meet deficiencies, the question is one of easy solution. But if, on the contrary, you should consider that the constitutional provision is a positive and unqualified prohibition against any appropriation from the Treasury to aid the operations of the Post Office Department, it is for you to determine whether the difficulty can be overcome by a further increase of the rates of postage or by other constitutional means.⁴⁴³

The parallel is not exact; in the postal case President Davis was suggesting a plausible interpretation of an ambiguous constitutional provision, not disregard of one whose meaning was thought to be clear.

A Senate committee concluded that the Post Office might lawfully borrow from the Treasury and repay the advance out of future revenues, and the Senate agreed.⁴⁴⁴ Increased use of stamps as money and low bids by contractors seeking draft exemptions produced postal surpluses by late 1863, but apparently not before Congress twice appropriated money to cover the deficiency.⁴⁴⁵

supra note 21, at 29–30 (surmising that the constitutional requirement that a new census be taken so soon after that of 1860 was "inadvertent[]" and rejoicing that in the end the President's "common sense and excellent arguments" prevailed).

⁴⁴² Conf. Const. of Mar. 1861, art. I, § 8, cl. 7, *reprinted in* Statutes at Large, supra note 5, at 14.

⁴⁴³ Message from Jefferson Davis to the Congress of the Confederate States (Sept. 30, 1862), *reprinted in* 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 252, 252.

⁴⁴⁴ Senate Proceedings (Oct. 3, 1862) (statement of Sen. Semmes), *reprinted in* 47 Southern Historical Society Papers, supra note 72, at 37, 38–39.

⁴⁴⁵ See Patrick, supra note 32, at 283–84, 288. But see John H. Reagan, An Account of the Organization and Operations of the Postoffice Department of the Confederate

On two occasions during the war the Confederate Congress passed bills directing the Post Office to deliver newspapers to soldiers on active duty free of postage. President Davis vetoed them both. The first was easy, for it provided that the cost of this service should be “a charge on the Treasury”; the Constitution required that the Post Office pay its own expenses.⁴⁴⁶ Omitting the provision for payment from the Treasury, Congress tried again in early 1865, but Davis was unimpressed. To require rates on other mail to be raised to cover the added cost, he wrote, would offend the principle of equal burdens reflected in various constitutional provisions respecting taxes, none of which strictly applied: “[W]here shall we find in the Constitution any power in the Confederate Government, expressed or implied, for dividing either the people or the public servants into classes unequally burdened with postal charges?”⁴⁴⁷

With respect, this seems to be carrying a good thing too far. To require the Post Office to support itself is one thing; to require each delivery to do so is to deny one of the principal reasons for public operation of the mails. Congress evidently agreed: it resoundingly overrode the President’s veto for the only time in Confederate history.⁴⁴⁸

XI. THE MISSING SUPREME COURT

I have mentioned that no Supreme Court of the Confederate States was ever convened. The permanent Constitution, like that of the United States, provided that there should be a Supreme

States of America, 1861 to 1865, 6 Publications S. Hist. Ass’n 314, 326 (1902) (maintaining that the Post Office was self-sustaining from the start).

⁴⁴⁶ Veto Message (Apr. 30, 1863), 3 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 415 (1904). This veto message does not appear in Richardson’s *The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20.

⁴⁴⁷ Message from Jefferson Davis to the Senate of the Confederate States (Jan. 25, 1865), reprinted in 1 The Messages and Papers of Jefferson Davis and the Confederacy, supra note 20, at 556, 557.

⁴⁴⁸ See Act of Jan. 31, 1865, ch. 44½, Pub. Laws, 2d Cong., 2d Sess., reprinted in Laws of the Last Session, supra note 24, at 28, 28; 4 Journal of the Confederate Congress, supra note 5, in S. Doc. No. 58-234, at 496–97, 502–08 (1904); see also Smith, Address to the Citizens of Alabama, supra note 5, at 206 (leaving open “the mooted question whether the correspondent should pay for the transmission of his own letters or whether cheap postage should be purchased at the expense of the whole people”).

2004]

Through the Looking-Glass

1367

Court,⁴⁴⁹ and repeated efforts were made to induce Congress to perform its constitutional duty. As was so often the case in the Confederacy, however, an arguably exaggerated concern for states' rights frustrated these efforts, and with them the constitutional plan.⁴⁵⁰

The Provisional Congress adopted a Judiciary Act in March 1861.⁴⁵¹ Closely modeled in many respects on the statute of the same name the U.S. Congress had enacted in 1789, it created district courts in each state⁴⁵² and gave them authority that had been divided between district and circuit courts in the United States. Jurisdiction in criminal and admiralty cases was conferred without regard to the amount in controversy.⁴⁵³ In addition, if the value of the dispute exceeded \$5000, the district courts could hear civil actions in which "the character of the parties is such, as by the constitution to authorise [them] to entertain jurisdiction."⁴⁵⁴ Under the

⁴⁴⁹ See Conf. Const. of Mar. 1861, art. III, § 1, *reprinted in* Statutes at Large, *supra* note 5, at 19 ("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.").

⁴⁵⁰ See DeRosa, *supra* note 36, at 105 ("The major obstacle to the C.S.A. Supreme Court's organization was the commitment to states' rights.").

⁴⁵¹ Judiciary Act of Mar. 16, 1861, ch. 61, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 75, 75.

⁴⁵² Id. § 2. The Provisional Constitution required that there be one District Court in each state, Provisional Conf. Const. of Feb. 1861 art. III, § 1, cl. 2, *reprinted in* Statutes at Large, *supra* note 5, at 6, and was amended to permit the erection of others, Amendment to the Provisional Constitution of the Confederate States (May 21, 1861), *reprinted in* Statutes at Large, *supra* note 5, at 9. The permanent Constitution, like that of the United States, left the establishment of inferior courts to the discretion of Congress. Conf. Const. of Mar. 1861, art. III, § 1, *reprinted in* Statutes at Large, *supra* note 5, at 19.

⁴⁵³ Judiciary Act of Mar. 16, 1861, ch. 61, §§ 35, 39, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 75, 81, 82. "The Confederate government," it has been said, "usually prosecuted its cases in the state courts in the knowledge that their decisions would be more respected than those of the district courts." Yearns, *supra* note 5, at 38. If the law was followed, this can have been true only of civil cases, for § 35 made the jurisdiction of the District Courts in criminal matters exclusive, "except where the laws of [the] Confederate States shall otherwise provide." Judiciary Act of Mar. 16, 1861, ch. 61, § 35, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 81. In admiralty cases, too, the jurisdiction was described as exclusive—"saving to suitors," as in the United States, "the right of a common law remedy." Id. § 39, at 82.

⁴⁵⁴ Id. § 10, at 77. As in the United States, this jurisdiction was to be "concurrent with [that of] the courts of the several states." Id.

Provisional Constitution, which was in force when the statute was adopted, that meant primarily controversies between citizens of different states (or between citizens of states and of foreign states) and cases to which the Confederate States were party.⁴⁵⁵ Under the permanent Constitution, which eliminated the diversity jurisdiction, this provision essentially embraced only government litigation.⁴⁵⁶ As in the United States at the time, there was no general statutory provision for jurisdiction of cases arising under the Constitution, laws, or treaties of the central government.

No intermediate courts of appeal were established. Instead, district court decisions in criminal as well as civil cases were to be reviewable directly by the Supreme Court.⁴⁵⁷ Section 45 of the Act, like Section 25 of the U.S. statute, provided that the Supreme Court should also have jurisdiction to review state court judgments in what we call federal question cases—in contrast to the 1789 provision, even if the state court had *upheld* the federal claim.⁴⁵⁸ Sec-

⁴⁵⁵ Conf. Const. of Feb. 1861, art. III, § 2, cl. 1, *reprinted in* Statutes at Large, supra note 5, at 6–7.

⁴⁵⁶ It seems also to have included certain cases brought by states, by foreign diplomats, or by or against foreign consuls. Conf. Const. of Mar. 1861, art. III, § 2, cl. 1, *reprinted in* Statutes at Large, supra note 5, at 19; see also Judiciary Act of Mar. 16, 1861, ch. 61, § 44, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 75, 83 (defining the original jurisdiction of the Supreme Court); Robinson, supra note 21, at 44 (“Perhaps the excision [of diversity jurisdiction] sprang from a State’s-rights impulse; but it may have sprung from a desire to unburden the federal courts of business really local in character.”).

⁴⁵⁷ Judiciary Act of Mar. 16, 1861, ch. 61, §§ 38, 40, 42, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 75, 82, 83. The U.S. Supreme Court at the time had no jurisdiction in federal criminal cases except to the limited extent permitted on habeas corpus or certified questions. See Judiciary Act of 1789, Pub. L. No. 1-20, §§ 14, 22, 1 Stat. 73, 81–82, 84; Judiciary Act of 1802, Pub. L. No. 7-31, § 6, 2 Stat. 156, 159; *United States v. More*, 7 U.S. (3 Cranch) 159, 172–73 (1805); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

⁴⁵⁸ Judiciary Act of Mar. 16, 1861, ch. 61, § 45, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 75, 84; cf. Judiciary Act of 1789, Pub. L. No. 1-20, § 25, 1 Stat. 73, 85–86. The U.S. Supreme Court was not given jurisdiction in those cases until 1914. Act of Dec. 23, 1914, Pub. L. No. 63-2, 38 Stat. 790. In the later debate on a proposal to repeal the Confederate provision (discussed in notes 472–504 and accompanying text), Senator Phelan called attention to the advantages of the Southern formulation. The U.S. Congress had erred, said Phelan, “not in *enlarging*, but in *limiting* . . . the appellate jurisdiction.” For the effect of restricting review to those cases in which the state court had denied the asserted federal right was to strengthen the President and Congress “by sheltering them behind the judgment of the State judicatures, whenever those tribunals, decided in favor of their

2004]

Through the Looking-Glass

1369

tion 1 provided that the Supreme Court should hold annual sessions,⁴⁵⁹ Section 43 gave it authority to adopt rules to govern its own original and appellate proceedings,⁴⁶⁰ Section 44 defined its original jurisdiction.⁴⁶¹ The statute, however, did not establish a separate Supreme Court. Article III of the Provisional Constitution provided that the Supreme Court should consist temporarily of all sitting District Judges, but before they could meet Congress enacted that the Court should not be convened until it was properly organized under the permanent Constitution.⁴⁶²

No sooner had the first regular Congress assembled under the permanent Constitution in February 1862 than President Davis called its attention to the problem.⁴⁶³ The Senate Judiciary Committee promptly reported a bill to establish the Court,⁴⁶⁴ but it evidently encountered substantial resistance. Two weeks later, its consideration was indefinitely postponed.⁴⁶⁵ The Committee soon provided information as to the source of the difficulty by proposing to repeal the Judiciary Act provision for Supreme Court review of

usurpations.” Speech of Hon. James Phelan, of Mississippi, on the Judiciary Bill, at 10, *microformed on Confederate Imprints, 1861–1865*, reel 91, No. 2811 [hereinafter Speech of Hon. James Phelan].

⁴⁵⁹ Judiciary Act of Mar. 16, 1861, ch. 61, § 1, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in Statutes at Large*, supra note 5, at 75, 75.

⁴⁶⁰ *Id.* § 43, at 83.

⁴⁶¹ *Id.* § 44. The want of an explicit rulemaking provision for original cases in the 1789 statute had led to embarrassments in the exercise of that jurisdiction in the United States. See *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 290 (1831); Currie, *Descent into the Maelstrom*, supra note 1, at 219–22.

⁴⁶² Act of July 31, 1861, ch. 3, Pub. Laws, Provisional Cong., 3d Sess., *reprinted in Statutes at Large*, supra note 5, at 168, 168; see Lee, supra note 5, at 109 (asserting without substantiation that the “primar[y]” reason for effectively negating the constitutional provision was the perceived difficulty of bringing together a number of judges from all over the country); Robinson, supra note 21, at 420–21; Yearns, supra note 5, at 37.

⁴⁶³ Message from Jefferson Davis to the Congress of the Confederate States (Feb. 25, 1862), *reprinted in 1 The Messages and Papers of Jefferson Davis and the Confederacy*, supra note 20, at 189, 192 (“I invite the attention of Congress to the duty of organizing a Supreme Court of the Confederate States, in accordance with the mandate of the Constitution.”).

⁴⁶⁴ Senate Proceedings (Mar. 11, 1862) (statement of Sen. Semmes), *reprinted in 44 Southern Historical Society Papers*, supra note 218, at 135, 137–38.

⁴⁶⁵ Senate Proceedings (Mar. 26, 1862), *reprinted in 45 Southern Historical Society Papers*, supra note 81, at 5, 6.

state judgments, but the session ended without final action on either proposal.⁴⁶⁶

In the next session, in September, proponents of the Court tried again. The need for a supreme tribunal, said Georgia Senator Benjamin Hill, had become acute: A circuit judge in his state had held the Conscription Act unconstitutional and was busily discharging draftees.⁴⁶⁷ Louis Wigfall of Texas agreed: It was indispensable that there be some tribunal to resolve controversies over the respective powers of the Confederacy and the states.⁴⁶⁸ Clark of Missouri did not agree: The district courts were adequate to handle private litigation; there was no need for appellate jurisdiction; there was no time to consider the proposal; there was no immediate necessity for a Supreme Court.⁴⁶⁹ But the Constitution *required* that there be a Supreme Court, replied the anguished Hill, and the government would be a “lame and limping affair” without it; yet the question was postponed again, and once more Congress adjourned without taking action.⁴⁷⁰

The most serious effort to establish a Supreme Court was made during the third and fourth sessions of the first regular Congress, in 1863. Louisiana Senator Thomas J. Semmes opened the debate for the proponents. Having introduced the original bill to establish the Court a year before, said Semmes, he had chosen not to press it, for the state of the country did not seem to require it at that time. Now, however, the situation was different: Many questions had arisen that only a Supreme Court could decide. The Treasury, for example, was clamoring for an income tax, yet the South Carolina courts had held state obligations immune from taxation. Earlier doubts as to the viability of the Confederacy engendered by past

⁴⁶⁶ Senate Proceedings (Apr. 4, 1862) (statement of Sen. Semmes), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 69, 70. A second bill to establish the Court was sent to committee but never emerged. House Proceedings (Apr. 10, 1862) (statement of Rep. Miles), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 112, 115.

⁴⁶⁷ Senate Proceedings (Sept. 26, 1862) (statement of Sen. Hill), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 243, 245. The Georgia Supreme Court would soon set him straight, see *supra* note 151 and accompanying text, but Hill’s argument was no less cogent for all that.

⁴⁶⁸ Senate Proceedings (Sept. 26, 1862) (statement of Sen. Wigfall), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 243, 245–46.

⁴⁶⁹ *Id.* at 246 (statement of Sen. Clark).

⁴⁷⁰ *Id.* (statement of Sen. Hill).

2004]

Through the Looking-Glass

1371

military reverses having been laid to rest, it was time to perfect the government by establishing all those institutions which the Constitution required.⁴⁷¹

Henry Burnett of Kentucky repeated Clark's implausible argument that there was no need for a Supreme Court.⁴⁷² South Carolina's Robert Barnwell echoed his mentor, the late John C. Calhoun: There might be a place for such a Court, but not for the authority already given it to review state court judgments.⁴⁷³ Senator Wigfall, who previously had supported the Court, concurred with both of them.⁴⁷⁴ Semmes, who had made the initial proposal, moved to gut his own bill: Section 45 of the Judiciary Act, which conferred the offending jurisdiction over state courts, should be repealed.⁴⁷⁵ That provision was unconstitutional, said Yancey of Alabama.⁴⁷⁶ Supreme Court review of state judgments, added Oldham of Texas, "would subordinate the States to the Confederate Government."⁴⁷⁷ No authority to review such judgments was expressly given to the central government, said Yancey, and thus it was reserved to the States.⁴⁷⁸ The Constitution gave the Supreme Court appellate jurisdiction, said Herschel Johnson of Georgia, only over

⁴⁷¹ Senate Proceedings (Jan. 26, 1863) (statement of Sen. Semmes), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 195, 197–98.

⁴⁷² *Id.* at 198 (statement of Sen. Burnett).

⁴⁷³ *Id.* at 199 (statement of Sen. Barnwell). For Calhoun's earlier arguments to this effect, see Currie, *Democrats and Whigs*, *supra* note 1, at 113–14, 121.

⁴⁷⁴ Senate Proceedings (Jan. 27, 1863) (statement of Sen. Wigfall), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 205, 207–08. Wigfall went so far as to assert that the Supreme Court of the United States was more responsible than anyone else for the destruction of the Union and that it would be better if the Court were lacking in talent. *Id.* at 208, 209; Senate Proceedings (Jan. 28, 1863) (statement of Sen. Wigfall), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 219, 224–25.

⁴⁷⁵ Senate Proceedings (Jan. 28, 1863) (statement of Sen. Semmes), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 219, 220. The report says his bill provided for "no repeal," which makes no sense; his later remarks favoring repeal shows what he really had in mind.

⁴⁷⁶ Senate Proceedings (Jan. 30, 1863) (statement of Yancey), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 9, 14. A second speech of Yancey's on this theme, largely taken from the *Montgomery Advertiser* of Feb. 27–28, 1863, is reproduced essentially verbatim in Robinson, *supra* note 21, at 458–73 (adding that Yancey's argument was "representative of the State's-rights majority in the Senate").

⁴⁷⁷ Senate Proceedings (Feb. 3, 1863) (statement of Sen. Oldham), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 37, 40.

⁴⁷⁸ Senate Proceedings (Mar. 17, 1863) (statement of Sen. Yancey), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 318, 319.

courts established by Congress; the states and the Confederacy were each supreme within their respective spheres.⁴⁷⁹ Wigfall, the report tells us, argued for an hour and a half in favor of repeal; it neglects to tell us what his arguments were.⁴⁸⁰

Without Supreme Court review of state courts, replied Tennessee Senator Gustavus Henry, the government could not last; disuniform interpretation of the Constitution would confound confusion.⁴⁸¹ State courts, explained James Phelan of Mississippi, had already rendered differing judgments respecting the constitutionality of impressment and conscription, and failure to settle such questions would disrupt the harmony of the Confederacy: "If each state was entitled to its own construction of what laws were constitutional, the Confederate Government was at an end."⁴⁸² The Tennessee legislature, Henry added, had declared treasury notes legal tender (in flat defiance, we should add, of an explicit constitutional prohibition), and the state courts would uphold its action; was there not in such a case a compelling argument for Supreme Court review?⁴⁸³ To repeal the provision authorizing that review, said Phelan, would give the state courts power to disregard Confederate laws.⁴⁸⁴

⁴⁷⁹ Senate Proceedings (Feb. 6, 1863) (statement of Sen. Johnson), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 71, 76.

⁴⁸⁰ Senate Proceedings (Mar. 16, 1863), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 312, 317.

⁴⁸¹ Senate Proceedings (Feb. 2, 1863) (statement of Sen. Henry), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 20, 26.

⁴⁸² Senate Proceedings (Jan. 29, 1863) (statement of Sen. Phelan), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 1, 4. "[T]he pending amendment," Phelan added, "stretches the doctrine of nullification to a point more dangerous and extreme than was ever imagined by its most idolatrous votaries in their wildest dreams" for "[i]t asserts the right, *not of a State in its sovereign capacity, in convention*, but of a supreme court, a mere co-ordinate department of a State government, . . . finally to declare null and void within the limits of that State, the laws of Congress." Speech of Hon. James Phelan, *supra* note 458, at 13, 24.

⁴⁸³ Senate Proceedings (Feb. 2, 1863) (statement of Sen. Henry), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 20, 25-26; see Conf. Const. of Mar. 1861, art. I, § 10, cl. 1, *reprinted in* Statutes at Large, *supra* note 5, at 16 ("No State shall . . . make anything but gold and silver coin a tender in payment of debts . . .").

⁴⁸⁴ Senate Proceedings (Feb. 5, 1863) (statement of Sen. Phelan), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 57, 61. Yancey responded that it was improper in determining the meaning of a constitutional provision to consider the consequences of a suggested interpretation: "It is only another mode of expressing the

Nor, said Phelan, did the Constitution say that the Supreme Court could review only Confederate judgments.⁴⁸⁵ Article III extended the judicial power to *all* cases enumerated in the Constitution, Henry added, and some of them arose in state courts.⁴⁸⁶ The Constitutional Convention itself, said Phelan, had adopted the provision for Supreme Court review in its capacity as Provisional Congress; it must have understood, he seemed to imply, what it had intended in drafting the constitutional provision.⁴⁸⁷ Phelan and Benjamin Hill, still a sturdy supporter of the Court, quoted extensively from the *Federalist* “and other ancient publications,” apparently in support of this conclusion; again the collected debates do not tell us what they said.⁴⁸⁸

Senator Phelan’s three speeches in defense of Supreme Court review, however, were published in full in pamphlet form and are available on microfilm.⁴⁸⁹ He did indeed quote from a number of “ancient publications,” including not only the *Federalist*⁴⁹⁰ but also

old Federal argument that the general welfare should guide in construing the Constitution.” Robinson, *supra* note 21, at 468. But if consequences could properly be consulted, Yancey added, they cut in the opposite direction, for Supreme Court review meant that the central Government would be the ultimate judge of its own powers. *Id.*

⁴⁸⁵ Senate Proceedings (Jan. 29, 1863) (statement of Sen. Phelan), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 1, 3.

⁴⁸⁶ Senate Proceedings (Feb. 2, 1863) (statement of Sen. Henry), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 20, 25.

⁴⁸⁷ Senate Proceedings (Jan. 29, 1863) (statement of Sen. Phelan), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 1, 3. Citing the passage of the Alien and Sedition Acts by a Congress barely ten years removed from the Philadelphia Convention, Senator Yancey pronounced “unsound” the notion “that those who adopted the Constitution are always its best judges and exponents[:]” “[W]e may safely assert that we are wiser than the men of those days.” Robinson, *supra* note 21, at 467. Phelan crushingly responded by paraphrasing Yancey’s own words: “[H]e proclaims, that we of to-day better comprehend the meaning of the constitution, than those sages whose creative minds brought it into being.” Speech of Hon. James Phelan, *supra* note 458, at 17. Only the fact that Florida Delegates were divided on the question prevented the Constitutional Convention itself from forbidding Confederate Supreme Court review of state court judgments. See 1 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 880–81 (1904); Yearn, *supra* note 5, at 27.

⁴⁸⁸ Senate Proceedings (Feb. 4, 1863) (statement of Sen. Hill), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 51, 54; Senate Proceedings (Feb. 5, 1863) (statement of Sen. Phelan), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 57, 61.

⁴⁸⁹ Speech of Hon. James Phelan, *supra* note 458.

⁴⁹⁰ See *id.* at 18 (quoting The Federalist No. 82 (Alexander Hamilton)):

debates in the early U.S. Congress⁴⁹¹ and in the Philadelphia Convention, including John Rutledge's famous argument that there was no need to provide for the creation of inferior federal courts, "the right of appeal to the supreme national tribunal [] being sufficient to secure the national rights [and] uniformity of Judgments."⁴⁹² Both in the Convention and in the First Congress, Phelan concluded, it had been universally agreed that from state court judgments "an appeal would and ought to lie to the [U.S.] Supreme Court."⁴⁹³

The latter tribunal had said much the same thing in upholding its authority to review federal questions decided by state courts in *Martin v. Hunter's Lessee*,⁴⁹⁴ and that decision posed yet another stumbling block for those who would deny the constitutionality of the corresponding Confederate provision. President Davis, as I have noted, had told Congress that U.S. precedents should serve as guides to the interpretation of constitutional clauses borrowed without alteration from the United States, though he would soon refuse to follow his own advice in the case of *McCulloch v. Maryland*.⁴⁹⁵ Opponents of review equally declined to follow it in the

What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the supreme court of the United States. The constitution, in direct terms gives an appellate jurisdiction to the supreme court in all the enumerated cases of Federal cognizance . . . without a single expression to confine its operation to the inferior Federal courts.

⁴⁹¹ See, e.g., *id.* at 5 (quoting a speech by South Carolina Representative William L. Smith in the First Congress in a debate over the establishment of lower federal courts: "Justice could be as well administered in the *State* as in the *District* courts; and their adjudications would be subject to revision in the Federal supreme court, which offered sufficient security."). In fact Mr. Smith, a proponent of lower federal courts, was paraphrasing the argument of one their opponents, Rep. Livermore of New Hampshire; but he did not disagree with the premise of Supreme Court review. See 1 *Annals of Cong.* 828–29 (Joseph Gales ed., 1789).

⁴⁹² Speech of Hon. James Phelan, *supra* note 458, at 30; see 1 *The Records of the Federal Convention of 1787*, *supra* note 16, at 124.

⁴⁹³ Speech of Hon. James Phelan, *supra* note 458, at 30.

⁴⁹⁴ 14 U.S. (1 Wheat.) 304, 379–82 (1816).

⁴⁹⁵ See *supra* notes 49 and 405 and accompanying text; see also Speech of Hon. James Phelan, *supra* note 458, at 8:

[W]ith the unmasked fact staring them in the face . . . , that this appellate jurisdiction over the State tribunals, had been asserted and exercised by the supreme court, they readopt the identical language If the most stolid stupidity or inveterate ignorance of the past not be alleged against them, then to

2004]

Through the Looking-Glass

1375

case of *Martin*—a decision, snarled Semmes, that Virginia had protested at the time and never accepted. The history of the U.S. Court, he continued, was one of “encroachment and usurpation” that the Confederacy ought not to repeat; it embraced numerous decisions, such as those upholding the National Bank, that had consistently been repudiated by the Southern states.⁴⁹⁶ Time could not sanction error, Yancey added, and U.S. precedents should never be followed; the Confederate Constitution ought to be construed on its own terms.⁴⁹⁷ The Framers of the old government, Barnwell concluded, may indeed have meant to authorize Supreme Court review of state court judgments, but those who created the Confederacy intended their work to be understood with a proper regard for states’ rights.⁴⁹⁸

Senator Clay’s motion to repeal the review provision was approved by the startling margin of 16-6.⁴⁹⁹ The Senate then voted nearly two to one to establish the Court without the rejected authority, which was better than nothing.⁵⁰⁰ The House sent the bill to its Judiciary Committee,⁵⁰¹ on whose behalf Arkansas Representative Augustus Garland made a last eloquent plea for restoring appellate power over state court judgments,⁵⁰² but in vain; the House never passed the bill either with or without the contested review provision. And that was the end of serious efforts to implement the constitutional directive that the judicial power be vested not only

assert that the framers of our compact *did not design* to confer this appellate jurisdiction on the supreme court, is to crucify all common sense

⁴⁹⁶ Senate Proceedings (Jan. 30, 1863) (statement of Sen. Semmes), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 9, 13–14.

⁴⁹⁷ Senate Proceedings (Mar. 17, 1863) (statement of Sen. Yancey), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 318, 318–19.

⁴⁹⁸ Senate Proceedings (Feb. 3, 1863) (statement of Sen. Barnwell), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 37, 39.

⁴⁹⁹ Senate Proceedings (Mar. 18, 1863), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 321, 324–25.

⁵⁰⁰ *Id.*

⁵⁰¹ House Proceedings (Mar. 20, 1863), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 1, 3.

⁵⁰² Garland’s speech, not reported in the Richmond papers from which the Southern Historical Society collected and published the debates, is reproduced in Robinson, *supra* note 21, at 474–90, from a handwritten draft unearthed in the Confederate Archives in the Library of Congress in 1935. *Id.* at 474 n.2.

in inferior courts of Congress's choosing but also "in one Supreme Court."⁵⁰³

That is how it came to pass that members of the Confederate House of Representatives, in disregard of their oath to uphold the Constitution the states' own agents had adopted only two years before, refused to create a tribunal whose establishment Article III plainly required. Justice Story to the contrary notwithstanding, I do not believe Congress was also required to provide for Supreme Court review of state court judgments.⁵⁰⁴ Story's central arguments in favor of congressional *power* to do so, however, I have always found convincing, and advocates of a like authority in the Confederate court faithfully reproduced them: The need for uniform interpretation of federal law and vindication of federal rights, both expressly invoked in the Philadelphia Convention as justifications for federal judicial power, similarly cried out for Supreme Court review of state court decisions respecting Confederate law.⁵⁰⁵

⁵⁰³ Tennessee Representative Henry Foote, to the accompaniment of another of his typical harangues, stymied an attempt to take up the Senate bill, which was apparently still alive, in the following Session; bills to the same end were introduced in both Sessions of the foreshortened Second Congress but never made it out of committee. House Proceedings (Dec. 16, 1863) (statement of Rep. Foote), *reprinted in* 50 Southern Historical Society Papers, *supra* note 136, at 65, 68–69; House Proceedings (May 5, 1864), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 29, 31; House Proceedings (Nov. 29, 1864), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 390, 391.

⁵⁰⁴ See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340–42 (1816). See also Representative Garland's speech in the House: "If the judicial power of the Confederate States extends to *all* cases arising under the Constitution, laws and treaties of the Confederate States, the State courts as a matter of course, could not consistently entertain any jurisdiction in those cases without the right of appeal." Robinson, *supra* note 21, at 481.

⁵⁰⁵ See Currie, *The First Hundred Years*, *supra* note 43, at 92–93 (discussing *Martin v. Hunter's Lessee*). The fact that state courts tended to uphold most Confederate measures, it has been suggested, removed much of the pressure for creating a Supreme Court. Brummer, *supra* note 21, at 133; Lee, *supra* note 5, at 109–10; see also Thomas, *supra* note 20, at 195 (arguing that by virtue of that same phenomenon "the Confederate judicial system," while "fragmented in structure," was "centralized in substance"). See generally the various opinions voiced on the subject in the early symposium entitled *Why the Confederate States of America Had No Supreme Court*, 4 Pub. S. Hist. Ass'n 81 (1900).

2004]

Through the Looking-Glass

1377

XII. MOPPING UP

The requirement that a Supreme Court be erected was by no means the only provision of the Confederate Constitution that came to nothing during the brief period of its de facto hegemony. Efforts to implement other constitutional authorizations or directives, more than one of them unknown to the U.S. Constitution, met with no greater success.

A. Claims

Educated by the inefficiency and inaccuracy the U.S. Congress had encountered in attempting to pay claims against the government by private bill, the Confederate Constitution required the establishment of a tribunal to determine “judicially” the “justice” of such claims. The same provision exempted the payment of sums this tribunal found just from the equally novel requirement of a two-thirds majority to enact appropriations the President had not requested.⁵⁰⁶

Making it the constitutional duty of Congress to establish a claims court was an excellent idea. Despite the self-interest of legislators in sparing themselves the unpalatable task of passing upon the validity of private claims, it was not until 1855 that the U.S. Congress had finally attempted to shift the burden, and then half-heartedly.⁵⁰⁷ The mandatory nature of the Southern provision created an additional incentive to accelerate the process in the Confederacy. In addition, the explicit reference to “judicial[]” de-

⁵⁰⁶ Conf. Const. of Mar. 1861, art. I, § 9, cl. 9, *reprinted in* Statutes at Large, *supra* note 5, at 15:

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.

⁵⁰⁷ For the U.S. statute, see Act of Feb. 24, 1855, Pub. L. No. 33-122, 10 Stat. 612 (establishing the Court of Claims). The decrees of the original U.S. Court of Claims, wrote Professor Robinson, “amounted to nothing more than recommendations to Congress.” Robinson, *supra* note 21, at 492; see also Currie, *Democrats and Whigs*, *supra* note 1, 206–27.

termination resolved the ticklish question whether the need for an appropriation to pay claims the tribunal approved deprived its judgments of the finality the U.S. Supreme Court had said was an essential element of any judicial decision.⁵⁰⁸

President Davis, who had reminded Congress of its constitutional duty to establish a Supreme Court as early as February 1862, did not mention the equally requisite Court of Claims. Bills to set up that tribunal were introduced in both Houses during that year, but they made no headway.⁵⁰⁹ Attorney General Watts weighed in with a scathing report castigating Congress for dereliction of its constitutional duty. Existing law, he wrote, required both the Attorney General and the Secretary of State to investigate claims against the Government and advise Congress whether or not to pay them, but neither was in a position to do so effectively. "The establishment of the court contemplated in the constitution," he concluded, "would remedy all the evils from delay and imperfect examination of these claims, and afford safeguards against injustice and fraud on the government."⁵¹⁰

Georgia Senator Benjamin Hill, who had taken the lead in promoting the Supreme Court, promptly offered another bill to establish a Court of Claims, and the Senate passed it in March 1863.⁵¹¹ As initially proposed, the Court was to have jurisdiction over all claims against the Confederate Government, apparently whether based upon legal or moral obligation; Hill himself later had it amended to reach only claims "founded in law and equity."⁵¹² The

⁵⁰⁸ See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410–14 n.(a) (1792).

⁵⁰⁹ See, e.g., 5 *Journal of the Confederate Congress*, supra note 5, reprinted in S. Doc. No. 58-234, at 87 (1904) (Arkansas Sen. Augustus Garland); *House Proceedings* (Sept. 13, 1862) (Court of Claims), reprinted in 46 *Southern Historical Society Papers*, supra note 91, at 132, 135.

⁵¹⁰ See Robinson, supra note 21, at 501 (quoting at length from a report sent to the President Jan 1, 1863, and filed in the Confederate Archives); see also Act of Aug. 30, 1861, ch. 58, Pub. Laws, Provisional Cong., 3d Sess., reprinted in *Statutes at Large*, supra note 5, at 199, 199 (requiring the Attorney General to investigate claims and report his recommendations to Congress).

⁵¹¹ *Senate Proceedings* (Mar. 24, 1863) (Court of Claims), reprinted in 49 *Southern Historical Society Papers*, supra note 426, at 10, 18; Robinson, supra note 21, at 501–03.

⁵¹² 3 *Journal of the Confederate Congress*, supra note 5, in S. Doc. No. 58-234, at 196 (1904); Robinson, supra note 21, at 502.

2004]

Through the Looking-Glass

1379

judges of the Court were to hold office during good behavior;⁵¹³ their decisions were to be reviewable by the Supreme Court; their judgments were to be satisfied out of funds previously appropriated for the purpose.⁵¹⁴

All of this should seem quite familiar to the modern reader, for in most respects the proposed Confederate court looked very much like the U.S. Court of Claims as it stood at the time the Supreme Court recognized its Article III status in 1962.⁵¹⁵ The bill was watered down significantly, however, in its passage through the Senate,⁵¹⁶ and the House, after postponing its consideration until the following session,⁵¹⁷ never took it up again—although one member asserted that without such a tribunal no contested claims could be satisfied at all. The House itself, said Louisiana Representative John Perkins, had refused to consider private bills on the ground that the Constitution required that claims be first heard judicially.⁵¹⁸ If that was so, it was hard to understand, for on its face the provision in question merely made it easier for Congress to appropriate money to pay claims the tribunal had approved; it did not say judicial approval was a prerequisite to the payment of claims.⁵¹⁹

⁵¹³ Senate Proceedings (Mar. 19, 1863) (Court of Claims), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 326, 327.

⁵¹⁴ Senate Proceedings (Mar. 24, 1863) (Court of Claims), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 10, 12 (adopting an amendment requiring congressional appropriations for claims over fifteen thousand dollars). Unless appealed, Professor Robinson wrote, the decrees of the Court of Claims were to constitute “a warrant on the Treasury.” Robinson, *supra* note 21, at 501.

⁵¹⁵ See *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962).

⁵¹⁶ The final version would have required the Court to report its judgments to Congress, which in making appropriations to satisfy them was to “specify the exact amount appropriated in each case.” 3 Journal of the Confederate Congress, *supra* note 5, *in* S. Doc. No. 58-234, at 195–96 (1904); Robinson, *supra* note 21, at 503.

⁵¹⁷ See House Proceedings (Apr. 10, 1863) (Court of Claims), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 116, 120–21.

⁵¹⁸ House Proceedings (Apr. 10, 1863) (statement of Rep. Perkins), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 116, 121 (adding that the Court’s decisions would not be final but only a prelude to Congressional action when the Government was in a position to pay). Alas, this seems to have been true, since the constitutional provision said nothing to impair the normal inference that appropriations were a matter of discretion and the Senate amendment precluded the possibility that Congress would make lump-sum appropriations in advance. See Currie, *The Federalist Period*, *supra* note 23, at 211–17 (discussing the Jay Treaty).

⁵¹⁹ Indeed Confederate Attorneys General spent a goodly portion of their time investigating claims against the Government, presumably with an eye toward ultimate satisfaction of those that were deserving, see Patrick, *supra* note 32, at 304 (describing

In any event, the House gave the Senate bill a cold shoulder. Virginia Representative Charles Russell said he would support a Court of Claims after the war; during the war, it was a dangerous distraction.⁵²⁰ Of his constitutional duty Russell said not a syllable. Bills to establish the court were introduced in both the House and Senate in 1864,⁵²¹ but neither made it out of committee; the Court of Claims was yet another casualty of the Civil War.⁵²²

B. Glancing Toward Parliament

A second constitutional innovation of the Confederacy fell victim not to the priorities of national defense, but (like the Supreme Court) to ideological objections. Alexander Stephens, the opponent of secession who became Vice-President of the Confederate States, was a member of the committee that drafted the Provisional Constitution. He was also an admirer of the British parliamentary system. Influential as he was, he was unable to persuade his colleagues to require that the heads of executive departments be cho-

the work of Attorney General Thomas Hill Watts), and Congress passed a smattering of private bills for the relief of particular claimants, e.g., Act of Apr. 19, 1862, ch. 2, Private Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, *supra* note 5, at 6, 6 (directing payment of arrearages to the legal representative of a soldier killed in the Battle of Manassas); Act of Apr. 29, 1863, ch. 2, Private Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 10, 10 (directing payment to Lieutenant Thomas T. Kirkland for disbursements made to clothe his regiment); Act of May 1, 1863, ch. 3, Private Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 10, 10 (directing repayment of duties on railroad cars entered at the port of New Orleans).

⁵²⁰ House Proceedings (Apr. 10, 1863) (statement of Rep. Russell), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 116, 121.

⁵²¹ House Proceedings (May 4, 1864) (Court of Claims), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 16, 19–20; House Proceedings (May 6, 1864) (Court of Claims), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 37, 39.

⁵²² See Robinson, *supra* note 21, at 493–99 (observing that the Board of Sequestration Commissioners, created with an eye to compensating citizens whose property had been confiscated by the United States out of funds taken from alien enemies in the Confederacy, functioned as “a provisional court of claims” based on the weak U.S. model, which allowed the tribunal only to recommend claims for Congressional approval). For the relevant statutory provisions, see Act of Aug. 30, 1861, ch. 61, § 14, Pub. Laws, Provisional Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 201, 205.

2004]

Through the Looking-Glass

1381

sen from the legislature.⁵²³ The Provisional Constitution reflected his efforts, however, by conspicuously omitting the incompatibility provision that *precluded* executive officers in the United States from serving concurrently in Congress,⁵²⁴ and several Cabinet ministers (as well as Stephens himself) did so while that Constitution remained in force.⁵²⁵

The permanent Constitution reinstated the incompatibility clause: No one could be a member of Congress and an officer of the Confederate States at the same time.⁵²⁶ Stephens's predilection

⁵²³ 2 Stephens, *supra* note 19, at 338–39 (“I wanted the President to be required to appoint his Cabinet Ministers from Members of one or the other Houses of Congress. This feature in the British Constitution, I always regarded as one of the most salutary principles in it.”).

⁵²⁴ See Yearns, *supra* note 5, at 25 (“The Constitution failed to make this mandatory, but left the way open for both it and for Congressmen to serve in the army by omitting the United States ban on plural office-holding.”); cf. U.S. Const. art. I, § 6.

⁵²⁵ See Patrick, *supra* note 32, at 45–46 (noting that several Cabinet members also served as representatives to Congress from their respective states, without “their dual capacities” placing “any limitation upon their legislative activities”); see also Lee, *supra* note 5, at 71, 86, 96–97 (describing the effects of the Provisional Constitution's failure to prohibit Congressmen from holding other federal offices). The lack of an incompatibility provision also permitted members of the Provisional Congress to serve as military officers, although it was as difficult for them as for anyone else to be in two places at one time. See 2 Stephens, *supra* note 19, at 464–65 (noting the absence of numerous members who had joined the Army without resigning their seats—including the President of the Provisional Congress, Howell Cobb).

⁵²⁶ Conf. Const. of Mar. 1861, art. I, § 6, *reprinted in* Statutes at Large, *supra* note 5, at 13. In early 1862 the House absently granted Virginia Representative Roger Pryor leave to join his regiment while Congress was in Session, only to think better of it on reflection; a divided committee reported that no one could be a member of Congress while serving as an army officer, and the House voted 61-21 that Pryor could serve only if he resigned from the House, which he did. House Proceedings (Mar. 12, 1862) (statement of Rep. Garnett), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 150, 152; House Proceedings (Mar. 22, 1862), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 192, 195–96; House Proceedings (Mar. 24, 1862), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 198, 198; 5 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 82–84 (1905); Warner & Yearns, *supra* note 29, at 197–98. U.S. precedent supported the conclusion that the two positions were incompatible but suggested that Pryor should lose his seat in the House, not his military commission. See Currie, *The Jeffersonians*, *supra* note 23, at 71–75 (discussing the case of Representative John Van Ness); Currie, *Democrats and Whigs*, *supra* note 1, at 228–49; see also the subsequent House resolution, 5 Journal of the Confederate Congress, *supra* note 5, in S. Doc. No. 58-234, at 136–38 (1905), declaring that the incompatibility clause applied regardless of whether the officer held his commission from the Confederacy or from a state.

for parliamentary practice, however, was reflected in the following novel provision:

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.⁵²⁷

Cabinet officers were not to be members of the legislature, but Congress might permit them to take part in its deliberations.

As President Davis wrote in his memoir, the presence of executive officers on the floor of Congress bade fair to promote communication between the two branches and avoid costly misunderstandings.⁵²⁸ Texas Senator Louis Wigfall elaborated on these advantages in urging adoption of an 1863 bill to implement the constitutional provision: Ministers might make valuable suggestions and facilitate the enactment of wise legislation.⁵²⁹

Stephens's parliamentary hopes, however, were not to be realized. One House member, without recorded reasons, expressed "unutterable repugnance" for an 1862 proposal to seat Cabinet members in Congress;⁵³⁰ a Senate committee that was charged with investigating the matter recommended against implementing the constitutional provision.⁵³¹ Such a practice might work well enough in England, said Senator Clark when the question was raised again the following year, but it was incompatible with the Confederate

⁵²⁷ Conf. Const. of Mar. 1861, art. I, § 6, *reprinted in* Statutes at Large, *supra* note 5, at 13.

⁵²⁸ See 1 Davis, *The Rise and Fall of the Confederate Government*, *supra* note 34, at 259–60. At the time of the state ratifying convention, Alabama Delegate Robert H. Smith had justified the constitutional provision in terms of a "want of facility of communication between the Executive and Legislature." Smith, *Address to the Citizens of Alabama*, *supra* note 5, at 200; see also Curry, *supra* note 12, at 81–82 (lamenting "an injurious lack of sympathizing intercourse").

⁵²⁹ Senate Proceedings (Mar. 11, 1863) (statement of Sen. Wigfall), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 288; see also Senate Proceedings (Mar. 11, 1863) (Statement of Sen. Orr), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 288–89 (adding that the presence of the Cabinet would prevent uninformed legislation).

⁵³⁰ House Proceedings (Feb. 26, 1862) (statement of Rep. Pryor), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 54, 60.

⁵³¹ Senate Proceedings (Mar. 31, 1862) (statement of Sen. Hill), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 36, 36.

system.⁵³² Its disadvantages had been shown during the Provisional Congress, Senator Oldham added, where whatever the ministers advocated was adopted; the presence of executive officers endangered the independence of Congress.⁵³³ Senator Haynes moved to amend the bill by excising the provision permitting Cabinet members to speak on matters affecting their departments.⁵³⁴ Proponents objected that the amendment would kill the bill, and it did; the whole point of seating executive officers in Congress was to profit from their input in the legislative process.⁵³⁵

It was probably just as well. Stephens to the contrary notwithstanding, Confederate lawmakers seem to have drawn the right conclusion from President Washington's abortive effort to participate in legislative deliberations: For those who believe in the separation of powers, executive officers have no place on the floor of Congress.⁵³⁶

⁵³² Senate Proceedings (Mar. 11, 1863) (statement of Sen. Clark), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 288.

⁵³³ Senate Proceedings (Mar. 11, 1863) (statement of Sen. Oldham), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 288; see also Senate Proceedings (Mar. 11, 1863) (statement of Sen. Yancey), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 289.

⁵³⁴ Senate Proceedings (Mar. 11, 1863) (statement of Sen. Haynes), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 287–88.

⁵³⁵ Senate Proceedings (Mar. 11, 1863) (statement of Sen. Wigfall), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 288; Senate Proceedings (Mar. 11, 1863) (statement of Sen. Sparrow), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 290. The debilitating amendment was approved 14–8, and on Sparrow's motion the bill was indefinitely postponed. *Id.*; see also Patrick, *supra* note 32, at 46–47 (describing the issue in the Senate and the House). A final effort to implement the constitutional provision in 1864 never made it out of committee. See House Proceedings (Nov. 9, 1864) (statement of Rep. Russell), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 285, 288.

⁵³⁶ See Lee, *supra* note 5, at 98 (“Congress determined to maintain the independence of the legislative branch of government.”). For President Washington's experience, see Currie, *The Federalist Period*, *supra* note 23, at 24–26. Senator Orr's argument for the proposal, which might equally have served as an argument against it, suggested that the threat to independence ran in both directions: It would be a good thing, he said, if Senators could look a Secretary in the eye and demand an explanation of why he had not complied with the senatorial will. Senate Proceedings (Mar. 11, 1863) (statement of Orr), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 285, 290; see also Lee, *supra* note 5, at 97 (suggesting that having Ministers on the floor of Congress would provide the legislature with “a closer check upon the executive”).

Still more destructive of executive independence was Representative Foote's 1862 suggestion that Cabinet members should be required to resign when “voted down” by

C. Snippets

In accord with their other efforts to strengthen the position of the states vis-à-vis the central government, the Framers of the Confederate Constitution empowered individual states to impeach Confederate officers serving within their borders:

The House of Representatives . . . 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.⁵³⁷

This did not mean that the states could actually *remove* federal officers; the Confederate Senate had sole authority to try individuals who might be impeached, whether by the states or by the House.⁵³⁸

Congress, as in England. House Proceedings (Feb. 25, 1862) (statement of Rep. Foote), *reprinted in* 44 Southern Historical Society Papers, *supra* note 218, at 48, 51. This proposal was flatly unconstitutional; the Confederate Constitution, like that of the United States, required the commission of “high crimes and misdemeanors” and a two-thirds vote of the Senate to remove an executive officer. Conf. Const. of Mar. 1861, art. I, § 3, cl. 6; art. II, § 4, *reprinted in* Statutes at Large, *supra* note 5, at 12. In 1864 Foote introduced a resolution in the House seeking removal of Treasury Secretary Christopher Memminger, which allegedly was “on the verge of passing” when Memminger announced his intention to resign. 7 Journal of the Confederate Congress, *supra* note 5, *in* S. Doc. No. 58-234, at 110 (1905); Foote, War of the Rebellion, *supra* note 34, at 357–58; Yearn, *supra* note 5, at 229–30. A charitable reading suggests the resolution was either a request to the President or an initial step toward impeachment rather than another improper effort to make the Cabinet responsible to Congress. In 1865, however, when the Virginia delegation informed the President that the House was prepared to pass a resolution of no confidence in the Cabinet, Davis took the occasion of War Secretary James A. Seddon’s resignation to remind Congress that he could not “admit the existence of a power or right in the Legislative Department of the Government or in any part or branch of it, to control the continuance in office” of the principal officer of any executive department. Representative Bocock hastily denied that he or his colleagues had any such pretension. See Letter from Jefferson Davis to James A. Seddon (Feb. 1, 1865), *in* 6 Jefferson Davis, Constitutional-ist, *supra* note 32, at 458, 459; Patrick, *supra* note 32, at 70–74; Yearn, *supra* note 5, at 231–32. Note also the rejection of Senator Johnson’s 1863 bill to limit Cabinet members’ tenure to two years, after objections that it would make them too dependent on the Senate. See *supra* note 392.

⁵³⁷ Conf. Const. of Mar. 1861, art. I, § 2, cl. 5, *reprinted in* Statutes at Large, *supra* note 5, at 12.

⁵³⁸ Conf. Const. of Mar. 1861, art. I, § 3, cl. 6, *reprinted in* Statutes at Large, *supra* note 5, 12; see also Smith, Address to the Citizens of Alabama, *supra* note 5, at 211 (“It is but the inquest of the grand jury which is given to the State.”).

2004]

Through the Looking-Glass

1385

However, the Senators (like their U.S. counterparts at the time) were chosen by the states,⁵³⁹ and one commentator has suggested that the prospect of impeachment at state hands might place a judge forced to arbitrate between state and Confederate interests in “a precarious position.”⁵⁴⁰ Federal judges, said one member of the Confederate Convention, had been *too* independent: “The entire freedom of the inferior judiciary of the United States from State influence, and virtually from that of the general government, served to render the provision necessary.”⁵⁴¹ The historian of the Confederate courts, buying this argument, termed the provision for state impeachment “a wholesome check upon the misuse of federal power.”⁵⁴² Most of us, I trust, would be inclined to disagree. In any event, nothing concrete came of this innovation, although it may have deterred some officers from aggressive exercise of their authority; no Confederate officer was ever impeached either by a state or by the House of Representatives.⁵⁴³

Again reflecting their pervasive principle of enhancing the position of the states, the Confederate Fathers also made it easier for them to amend the Constitution:

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 rati-

⁵³⁹ Conf. Const. of Mar. 1861., art. I, § 3, cl. 1, *reprinted in* Statutes at Large, supra note 5, at 12; U.S. Const. art. I, § 3; see DeRosa, supra note 36, at 42. As President Clinton could tell you, defending yourself before the Senate is no picnic, even if you are ultimately acquitted.

⁵⁴⁰ Lee, supra note 5, at 91–92.

⁵⁴¹ Smith, Address to the Citizens of Alabama, supra note 5, at 211.

⁵⁴² Robinson, supra note 21, at 42.

⁵⁴³ State impeachment “was often discussed,” however, “in relation to conscript and impressment officers,” whose activities were found especially offensive. Yearn, supra note 5, at 28.

fication may be proposed by the general convention—they shall thenceforward form a part of this Constitution.⁵⁴⁴

To call a constitutional convention thus required only three states, not the two-thirds demanded in the United States; to adopt its proposals required only two-thirds and not three-fourths of the states.⁵⁴⁵

The U.S. Constitution, the same delegate explained, was too hard to amend:

The restrictions thrown around amendments to the organic law by the Constitution of the United States proved to be a practical negation of the power to alter the instrument [W]ithout a concurrence of [two-thirds of each House or two-thirds of the state legislatures] no body could be assembled even to consider the complaints of members of the Union.⁵⁴⁶

But the Confederate provision did not stop at facilitating amendment by the states; it also deprived Congress of its initiative in the matter entirely. No longer was Congress empowered to propose amendments for state consideration, as in the United States; Congress's role was reduced to the ministerial one of convoking the convention the states had ordained.⁵⁴⁷ Consequently, when Georgia Senator Herschel Johnson introduced a resolution looking toward a constitutional amendment to codify South Carolina's notorious Nullification Doctrine in 1863, it was only two days before he recognized he was addressing the wrong forum and withdrew his amendment with unanimous consent.⁵⁴⁸

⁵⁴⁴ Conf. Const. of Mar. 1861, art. V, *reprinted in* Statutes at Large, *supra* note 5, at 21.

⁵⁴⁵ Cf. U.S. Const. art. V.

⁵⁴⁶ Smith, *Address to the Citizens of Alabama*, *supra* note 5, at 205.

⁵⁴⁷ Resolving an issue left dangling by the U.S. Constitution, the Confederate version, by limiting the authority of the Convention to pass amendments to those amendments that the states might unanimously propose, undertook to deal with the persistent fear of a runaway convention, a fear which has allegedly inhibited invocation of the comparable provision in the United States.

⁵⁴⁸ Senate Proceedings (Feb. 5, 1863) (statement of Sen. Johnson), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 57, 59–60; Senate Proceedings (Feb. 7, 1863) (statement of Sen. Johnson), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 79, 80; Except From the Autobiography of Herschel V. Johnson, 1856–1867, 30 *Am. Hist. Rev.* 311, 331 (1925). I have already noted that the Confederate Constitution said nothing about secession. See *supra* note 39. As John-

2004]

Through the Looking-Glass

1387

Why did the Confederate Fathers deny Congress the right to propose constitutional amendments? Presumably out of fear lest the Constitution be amended to add to the list of congressional powers; apparently the fact that amendments had to be ratified by the states themselves was not considered sufficient to prevent them from giving away the store.⁵⁴⁹ The abrupt demise of the Confederacy kept us from finding out how these innovations would work in practice; the permanent Constitution was never amended.⁵⁵⁰

The Confederate Congress flirted with adoption of a system of weights and measures⁵⁵¹ and with legislation to authorize the quar-

son's proposal indicated, it said nothing about nullification either. President Davis, who had sharply distinguished between secession and nullification in his farewell speech to the U.S. Senate, appeared to endorse the latter in an 1862 letter to Governor Brown, denying he had said that Congress was the ultimate judge of constitutionality and reaffirming the right of each state to determine the legality of conscription for itself. Two months later, however, he made clear the limits of his concession: For South Carolina to exempt its citizens from the "admitted[ly]" constitutional conscription laws was "tantamount to a denial of the right of the Confederate Government to enforce the exercise of any delegated power and would render a Confederacy an impracticable form of Government." Daniel Webster would have been pleased. See Letter from Jefferson Davis to Joseph E. Brown (July 10, 1862), *in* 5 Jefferson Davis, *Constitutionalist*, supra note 32, at 292, 292–93; Letter from Jefferson Davis to the Governor and Executive Council of South Carolina (Sept. 3, 1862), *in* 5 Jefferson Davis, *Constitutionalist*, supra note 32, at 334, 335. For Webster's views, see Currie, *Democrats and Whigs*, supra note 1, at 116–21.

⁵⁴⁹ They had never done so in the United States prior to 1861. Against the objection that such fears were exaggerated, however, one might cite the later example of the Federal Republic of Germany, where the constituent states have repeatedly voted in the *Bundesrat* to transfer additional powers to the central government. See Currie, supra note 316, at 30, 42.

⁵⁵⁰ A minor amendment to the Provisional Constitution, made by a two-thirds vote of the Provisional Congress as that document provided, authorized Congress to create multiple judicial districts within individual states. See Provisional Conf. Const. of Feb. 1861, art. III, *reprinted in* Statutes at Large, supra note 5, at 9; Robinson, supra note 21, at 24–25 (explaining that admission of the large states of Texas and Virginia had demonstrated the need for more than one district in a single state); see also *id.* at 299–300 (describing the erection of a special admiralty court at Key West, Act of Mar. 11, 1861, ch. 39, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 60, 60–61, as "a plain evasion" of the original constitutional provision but praising it as "a happy solution" because the Provisional Constitution placed no limit on Congress's power to establish tribunals other than District Courts).

⁵⁵¹ Conf. Const. of Mar. 1861, art. I, § 8, cl. 5, *reprinted in* Statutes at Large, supra note 5, at 14; House Proceedings (Apr. 9, 1862), *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 106, 107–08.

tering of troops,⁵⁵² as contemplated by what in the United States was the Third Amendment.⁵⁵³ The U.S. Congress had done nothing much in either regard during its first seventy-two years,⁵⁵⁴ and the Confederate efforts fizzled as well. There was no attempt to exercise the bankruptcy power, and only a presidential veto prevented repeal of the naturalization law inherited from the United States.⁵⁵⁵ Senator Oldham later argued that only the states could confer citizenship,⁵⁵⁶ but he seems to have got it backwards. Confederate authority to adopt “uniform laws of naturalization” was express,⁵⁵⁷ and the *Federalist* had explained that this authority had been given to the central government to prevent individual states from foisting off undesirables on other parts of the country.⁵⁵⁸

Ignoring the embarrassments that had attended the elevation of John Tyler to the Presidency or to its duties, the Confederate States copied without material alteration the defective U.S. provi-

⁵⁵² Conf. Const. of Mar. 1861, art. I, § 9, cl. 14, *reprinted in* Statutes at Large, *supra* note 5, at 16; House Proceedings (Apr. 10, 1862) (statement of Rep. Smith), *reprinted in* 45 Southern Historical Society Papers, *supra* note 81, at 112, 113.

⁵⁵³ Behind the former proposal, it has been suggested, lay a desire to abandon traditional “Yankee” measures in favor of the metric system, which Jefferson himself had favored. See Coulter, *supra* note 35, at 58.

⁵⁵⁴ For U.S. efforts regarding weights and measures, see Currie, *The Jeffersonians*, *supra* note 23, at 308–09.

⁵⁵⁵ Message to the Congress of the Confederate States (Feb. 4, 1862), *in* 1 *The Messages and Papers of Jefferson Davis and the Confederacy*, *supra* note 20, at 165, 165–66. The message notes, *inter alia*, that although Congress was not expressly required to pass naturalization laws, the Constitution seemed to contemplate their existence; and that without them there was no way the states could permit foreigners to vote. For the Confederate Constitution tied voting rights to citizenship. Conf. Const. of Mar. 1861, § 2, cl. 1, *reprinted in* Statutes at Large, *supra* note 5, at 11. As Robert Smith wrote, “whatever probation is necessary to fit a man for the rank of citizen is essential to his wisely exercising *the high privilege of voter*.” Smith, *Address to the Citizens of Alabama*, *supra* note 5, at 206.

⁵⁵⁶ See Senate Proceedings (Apr. 28, 1863) (statement of Sen. Oldham), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 229, 231–32.

⁵⁵⁷ Conf. Const. of Mar. 1861, art. I, § 8, cl. 4, *reprinted in* Statutes at Large, *supra* note 5, at 14.

⁵⁵⁸ See *The Federalist* No. 42 (James Madison). Chief Justice Taney had given the same explanation in the *Dred Scott* case. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857); see also DeRosa, *supra* note 36, at 73–74 (arguing that by giving Congress authority to enact “uniform laws” of naturalization, rather than “a uniform rule” as in the United States, the Framers of the Confederate Constitution intended to make clear that “all the states” would have a say in determining who would be entitled to the privileges and immunities of citizens within their borders).

2004]

Through the Looking-Glass

1389

sion respecting presidential succession.⁵⁵⁹ Apparently accepting the once controversial U.S. interpretation of “officer[s]” who might be designated to “act as President” when neither that individual nor the Vice-President was available, the Confederate Congress named the Senate President pro tempore and the Speaker of House, in that order—wisely departing from the U.S. model to ensure that the surrogate continue to function until a new President was inaugurated, not merely elected.⁵⁶⁰ The U.S. provision for a special election to fill the vacancy was omitted after constitutional objections were raised: The Constitution, said Alabama Senator Clement C. Clay, provided only for regular elections and for a statutory substitute to complete the unexpired term.⁵⁶¹

As in the United States, there was some difficulty over the President’s remuneration. As Treasury notes fell precipitously in value, Davis’s \$25,000 salary became hopelessly inadequate. Yet the Confederate Constitution, again mirroring that of the original Union, not only forbade alteration of the President’s “compensation” during his term but also denied him the right to receive any additional “emolument” during that time either from the central Government or from any state.⁵⁶²

⁵⁵⁹ Conf. Const. of Mar. 1861, art. II, § 1, cl. 8, *reprinted in* Statutes at Large, supra note 5, at 18. For the vicissitudes of Mr. Tyler, see Currie, *Democrats and Whigs*, supra note 1, at 199–203.

⁵⁶⁰ Act of Apr. 19, 1862, ch. 60, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 46, 46–47.

⁵⁶¹ See Senate Proceedings (Mar. 11, 1862) (statement of Sen. Clay), *reprinted in* 44 Southern Historical Society Papers, supra note 218, at 135, 135–36; Senate Proceedings (Mar. 29, 1862) (statement of Sen. Clay), *reprinted in* 45 Southern Historical Society Papers, supra note 81, at 24, 25–26. For the U.S. provisions and the debate over their adoption, see Currie, *The Federalist Period*, supra note 23, at 139–46. Speaking of the President pro tem, the Confederate Senate anticipated its Northern counterpart in respect to that officer in 1862, sensibly resolving an ambiguity in the relevant constitutional provision to permit its provisional President to retain his position until the next Congress met and his successor was elected, as its new rule ordained. The U.S. Senate would not adopt this position until 1890. See 2 *Journal of the Confederate Congress*, supra note 5, in S. Doc. No. 58-234, at 113 (1904); Currie, *Democrats and Whigs*, supra note 1, at 204–05.

⁵⁶² Conf. Const. of Mar. 1861, art. II, § 1, cl. 9, *reprinted in* Statutes at Large, supra note 5, at 18. The President’s salary had been set by statute. Act of Apr. 3, 1862, ch. 15, Pub. Laws, 1st Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 7, 7. For the earlier episode, see Currie, *The Federalist Period*, supra note 23, at 32–34.

The debate began in June 1864, when Louisiana Senator Edward Sparrow reported a bill to furnish President Davis with fuel and light for his house and forage for his horse.⁵⁶³ Orr and Wigfall protested at once: The Constitution forbade increases in the President's salary.⁵⁶⁴ Benjamin Hill of Georgia creatively argued that the original compensation provision had been set with reference to the gold standard; to pay him in depreciated paper was to *reduce* his guaranteed salary.⁵⁶⁵ Semmes's argument was more orthodox, and it had prevailed in an earlier controversy involving President Washington: Forage for the President's own horse might be a forbidden emolument, but the fuel and lights were costs of operating a government building.⁵⁶⁶

The Judiciary Committee, to which the bill at this point was referred, decided to take the hard road. Abandoning his own straightforward distinction between salary and expenses, Semmes on behalf of the Committee proposed to offer the President \$50,000 in depreciated notes in lieu of his abstract right to half that amount in "constitutional currency."⁵⁶⁷ Building on Hill's premise that the President's initial compensation was to be paid in gold (and nothing but precious metals, after all, had been made legal tender), this scheme was cleverly designed to avoid Scylla as well as Charybdis. The amended bill would not decrease the President's pay, since he had the option of refusing to accept the proffered notes; nor would it increase his compensation, since the alternative he was offered was worth less than the immutable \$25,000 in gold.⁵⁶⁸

⁵⁶³ Senate Proceedings (June 6, 1864) (statement of Sen. Sparrow), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 190, 192.

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.* at 192–93. The U.S. Court of Claims would reject a similar argument with respect to judges a century or so later. *Atkins v. United States*, 556 F.2d 1028, 1040–57 (Ct. Cl. 1977).

⁵⁶⁶ Senate Proceedings (June 6, 1864) (statement of Sen. Semmes), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 190, 193.

⁵⁶⁷ Senate Proceedings (June 7, 1864) (statement of Sen. Semmes), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 205, 206.

⁵⁶⁸ Attorney General George Davis had recently approved a similar option offered to Confederate judges notwithstanding the comparable ban on reducing judicial salaries in Article III, § 1. In the *Matter of the Salary of the District Judge of the Confederate States, for the Eastern District of Virginia* (Feb. 21, 1864), *in* *Opinions of the Confederate Attorneys General*, *supra* note 31, at 370, 375. Nagging constitutional

For reasons that do not appear in the published debates, this stratagem too was rejected in favor of a simple proposal to pay President Davis \$2000 of his salary in gold, which the Senate finally adopted.⁵⁶⁹ If this was intended as a substitute for the larger sum the Constitution guaranteed, it could apparently be sustained only if \$2000 in gold was the equivalent of \$25,000 in notes, and if the statute did not contemplate payment in specie. The evident purpose of the bill, however, was to give him *more* than he would have received if he had been paid in current paper; the amendment can perhaps best be understood as an effort to pay a first installment on a constitutional obligation of \$25,000 in gold.

All this agonizing produced nothing, as the bill never passed the House. The ever pesky Henry Foote professed inability to believe that President Davis would “dishonour himself” by accepting gold (when ordinary citizens, one may add, were being castigated for refusing to accept paper), and the bill was tabled by an overwhelming margin.⁵⁷⁰ The prohibition of increases in presidential compensation, we may conclude, was surely well-intentioned; but it was plainly not designed with rampant inflation in mind.⁵⁷¹

doubts nevertheless remained. Congressional reservations had convinced President Washington he had no right to refuse his salary; a President who reduces himself to penury reduces his independence as well. See Currie, *The Federalist Period*, supra note 23, at 33; see also Letter to the Secretary of the Treasury (May 3, 1864), in *Opinions of the Confederate Attorneys General*, supra note 31, at 443, 443–45 (concluding, in an opinion letter written by Attorney General Davis, that a general income tax could not be applied to Confederate judges because it effectively reduced their compensation in violation of Article III). The U.S. Supreme Court would later agree, *Evans v. Gore*, 253 U.S. 245, 264 (1920), only to change its mind in recognition of the fact that a tax applicable to everyone’s earned income could scarcely impair the underlying principle of judicial independence, *O’Malley v. Woodrough*, 307 U.S. 277, 282 (1939) (dictum).

⁵⁶⁹ Senate Proceedings (June 13, 1864), reprinted in 51 *Southern Historical Society Papers*, supra note 27, at 246, 247.

⁵⁷⁰ House Proceedings (June 14, 1864) (statement of Rep. Foote), reprinted in 51 *Southern Historical Society Papers*, supra note 27, at 255, 261. A final effort in the last Session of Congress also failed, although a bill to pay for the President’s fuel passed the House in February 1865. See Senate Proceedings (Dec. 22, 1864) (statement of Sparrow), reprinted in 52 *Southern Historical Society Papers*, supra note 166, at 39, 40; House Proceedings (Feb. 2, 1865) (statement of Rep. Baldwin), reprinted in 52 *Southern Historical Society Papers*, supra note 166, at 283, 287–88.

⁵⁷¹ Despite the refractory constitutional language, which the Confederate Fathers had neglected to correct, Southern Attorneys General adhered to the consistent position of their Union forebears that the President could make recess appointments to fill vacancies that had arisen while the Senate was in Session. Letter to Jno. Reagan

The reported debates reveal no significant controversies over congressional elections, which (as in the United States) each House was expected to resolve.⁵⁷² Alabama Representative Williamson Cobb, “a confessed reconstructionist,” was expelled for consorting with the enemy,⁵⁷³ the irrepressible Henry Foote, apprehended while attempting to cross enemy lines in a quixotic effort to negotiate a private peace, was initially spared and merely censured after a colleague argued that although his actions were indiscreet his motives were pure.⁵⁷⁴ The Confederate Constitution, like its prede-

(May 8, 1863), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 261, 264–65 (arguing, in an opinion-letter by Attorney General Watts, for acceptance of the settled interpretation of a text adopted verbatim); Letter to the Secretary of the Treasury (Mar. 5, 1864), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 387, 387–89 (relying upon the underlying purpose of ensuring effective execution of the laws). Following another U.S. precedent, however, Watts ruled that the President could make no recess appointment to a new position that had never been filled before: In such a case, despite the ambiguity of the language and the plain purpose of the provision, there was no “vacancy” to be filled. Letter to S.R. Mallory, Secretary of the Navy (May 6, 1862), *in* Opinions of the Confederate Attorneys General, *supra* note 31, at 85, 86. For the U.S. precedents, see Currie, *The Jeffersonians*, *supra* note 23, at 187–89; Currie, *Democrats and Whigs*, *supra* note 1, at 187–88.

⁵⁷² Conf. Const. of Mar. 1861, art. I, § 5, cl. 1, *reprinted in* Statutes at Large, *supra* note 5, at 13. The sole reported election contest, which came from Arkansas, turned on the factual question of which candidate had received the greater number of votes and was dismissed for lack of proof. See House Proceedings (Sept. 22, 1862), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 205, 210; 5 Journal of the Confederate Congress, *supra* note 5, *in* S. Doc. No. 58-234, at 112–14 (1905); 6 *Id.* at 31 (1905). The prevailing party was Augustus H. Garland, better known as the complainant in a judicial challenge to the constitutionality of a post-Civil War loyalty oath, in which he also prevailed. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1867); Currie, *The First Hundred Years*, *supra* note 43, at 292–96.

⁵⁷³ Yearns, *supra* note 5, at 55. See House Proceedings (Nov. 15, 1864), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 309, 310–11; House Proceedings (Nov. 17, 1864), *reprinted in* 51 Southern Historical Society Papers, *supra* note 27, at 315, 316–18. Henry Foote, soon to encounter comparable difficulties of his own, argued that Cobb could not be expelled since he had never taken his seat, but the vote to expel was unanimous. *Id.* at 318.

⁵⁷⁴ See House Proceedings (Jan. 13, 1864), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 144, 144. The vote to expel was 51-25, which was more than two-thirds of those voting but less than two-thirds of the whole House, which the Confederate Constitution (resolving an ambiguity in the U.S. model) expressly required. House Proceedings (Jan. 20, 1865), *reprinted in* 52 Southern Historical Society Papers, *supra* note 166, at 213, 215–17; see Conf. Const. of Mar. 1861, cl. 2, *reprinted in* Statutes at Large, *supra* note 5, at 13. As to the purity of Foote’s motives there may have been some little doubt; letters written to U.S. Secretary of State William Seward and to his own former constituents after he had sought exile in England suggested he had been prepared to lead a “counter-revolution” against the Confederacy, which

2004]

Through the Looking-Glass

1393

cessor, was silent as to the permissible grounds of expulsion; there seems no doubt that both Cobb and Foote were fair game under the relevant provision.⁵⁷⁵

D. Symbols

As Confederate armies melted away and huge swaths of Southern soil fell into Yankee hands, a Congress too busy to fulfill its constitutional duty to establish a claims tribunal devoted much of its energy to the details of a flag and a seal. Occasional voices were heard to question whether this was a sensible use of legislative time,⁵⁷⁶ but apparently not to doubt legislative power. All countries had flags and seals; the U.S. Congress had had no qualms about adopting them, though no one had identified the source of its authority.⁵⁷⁷ Perhaps the power was inherent in any government, though one could imagine a constitution that withheld it; perhaps it was necessary and proper to the exercise of one or another Confederate function, as the Secretary of War seemed to suggest.⁵⁷⁸ A battle flag, like a uniform, was handy for distinguishing friends from foes in the field;⁵⁷⁹ the law required numerous documents to

sounds like treason. The letters are printed as an appendix to his postwar apology. Foote, *War of the Rebellion*, supra note 34, at 376–417. In any event, private diplomacy was a crime in the Confederacy under the Logan Act, which had been adopted along with other federal statutes in 1861, as it remains in the United States today. Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (codified at 18 U.S.C. § 953 (2000)); Act of Feb. 9, 1861, ch. 1, Pub. Laws, Provisional Cong., 1st Sess., *reprinted in* Statutes at Large, supra note 5, at 27, 27. Foote was finally expelled after his second departure from the Confederacy in early 1865. See 7 *Journal of the Confederate Congress*, supra note 5, *reprinted in* S. Doc. No. 58-234, at 659–60 (1905).

⁵⁷⁵ See the discussion of the cases of Matthew Lyon and William Blount in Currie, *The Federalist Period*, supra note 23, at 263–66, 275–76. Compare the impeachment and removal of U.S. District Judge West H. Humphreys for (among other things) accepting appointment to a Confederate court in 1862, discussed in Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* 115–24 (1992).

⁵⁷⁶ See Senate Proceedings (Sept. 24, 1862) (statement of Sen. Brown), *reprinted in* 46 *Southern Historical Society Papers*, supra note 91, at 222, 228.

⁵⁷⁷ See Currie, *The Federalist Period*, supra note 23, at 204–05.

⁵⁷⁸ A seal, the Secretary argued, was indispensable. See Senate Proceedings (Sept. 24, 1862) (statement of Sen. Semmes), *reprinted in* 46 *Southern Historical Society Papers*, supra note 91, at 222, 228.

⁵⁷⁹ Representative Miles reported at one point that the Provisional Congress had approved a battle flag so similar to that of the enemy as to cause serious confusion at Manassas. House Proceedings (May 1, 1863) (statement of Rep. Miles), *reprinted in* 49 *Southern Historical Society Papers*, supra note 426, at 271, 272.

be sealed. No matter; Congress assumed it was within its rights in adopting the usual symbols of power. The burning question was what they should be.

The Senate, not without bickering, passed a bill to define the seal in September 1862. Senator Yancey professed to like the idea of putting a woman's picture on the seal, since as Semmes had said women had played an unprecedentedly prominent part in the Confederate struggle. He hoped, however, that the attitude of the proposed image could be improved, for as drafted her hair was disheveled, and she appeared to be running away.⁵⁸⁰ The House amended the bill to substitute a design of its own, together with the stirring motto "[p]ro avis et focus," which to those whose Latin is weak seems to suggest with much justice that the entire project was for the birds.⁵⁸¹

The Senate spurned the House amendment, and the lawmakers went back to their drawing boards. Since neither House was prepared to yield to the other, a third option was brought forward. The seal, said Senator Clay, should present the figure of George Washington on a horse, as the Confederacy was "a nation of horsemen."⁵⁸² To the apparent satisfaction of everyone a committee chaired by Virginia Representative Alexander Boteler duly reported a joint resolution to that effect, conveniently incorporating the equestrian statute that stood just outside the Virginia State Capitol in which Congress sat. There was further disagreement, however, over the accompanying motto. "*Deo duce vincemus*" sounded too bloodthirsty, said Representative Conrad. It was demeaning to God, ranted Senator Semmes in a diatribe that con-

⁵⁸⁰ Senate Proceedings (Sept. 24, 1862) (statement of Sen. Yancey), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 222, 227. Senator Wigfall complained that the woman was depicted without a hat and "looked as if she had just escaped from bedlam." Senate Proceedings (Sept. 24, 1862) (statement of Sen. Wigfall), *reprinted in* 46 Southern Historical Society Papers, *supra* note 91, at 222, 228.

⁵⁸¹ House Proceedings (Oct. 11, 1862) (statement of Rep. Boteler), *reprinted in* 47 Southern Historical Society Papers, *supra* note 72, at 104, 105. In fact the reference was to human forebears rather than feathered friends; the motto might be translated "for our ancestors and our homes."

⁵⁸² Senate Proceedings (Feb. 12, 1863) (statement of Sen. Clay), *reprinted in* 48 Southern Historical Society Papers, *supra* note 90, at 102, 102. Clay added proudly that, while the Yankees traced their ancestry to Roundheads, "[t]he people of the South descended from the old cavaliers." *Id.*

2004]

Through the Looking-Glass

1395

sumed five pages.⁵⁸³ I don't know what it means, protested Representative Jones of Tennessee; the motto should be written in English, so that everyone can comprehend it. Latin was better, Boteler countered, precisely because it was a dead language; people would understand it abroad.⁵⁸⁴

Reducing the House's handiwork to an economical but equally belligerent "*Deo Vendice*," the Senate passed an amended resolution.⁵⁸⁵ *Mirabile dictu*, the House acquiesced; the Confederacy could take its rightful place in the community of nations, for it finally had its coveted seal.⁵⁸⁶ The logjam broken, the flag followed in short order. Although the familiar battle flag with its saltier of starred bars had been ridiculed as "looking like a pair of suspenders," Representative Miles observed, he was for it, and both Houses were with him; the battle flag on a white background became the official Confederate symbol.⁵⁸⁷ Congress must have breathed a collective sigh of relief; the Confederate States of America were in full ceremonial order.⁵⁸⁸

⁵⁸³ Senate Proceedings (Apr. 27, 1863) (statement of Sen. Semmes), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 220, 222–27.

⁵⁸⁴ House Proceedings (Apr. 17, 1863), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 163, 164–66. I'm not wedded to the committee's terminology, Boteler begged at one point, but please don't send the bill back to committee, as I'm heartily tired of the whole business. House Proceedings (Apr. 17, 1863) (statement of Rep. Boteler), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 163, 166.

⁵⁸⁵ Senate Proceedings (Apr. 27, 1863), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 220, 227.

⁵⁸⁶ Act of Apr. 30, 1863, Res. 4, Pub. Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 167, 167.

⁵⁸⁷ Act of May 1, 1863, ch. 88, Pub. Laws, 1st Cong., 3d Sess., *reprinted in* Statutes at Large, *supra* note 5, at 163, 163. For Miles's observations, see House Proceedings (May 1, 1863) (statement of Rep. Miles), *reprinted in* 49 Southern Historical Society Papers, *supra* note 426, at 271, 272. The first flag, the so-called "Stars and Bars," had been adopted by the Provisional Congress in March 1861. See 1 Journal of the Confederate Congress, *supra* note 5, *reprinted in* S. Doc. No. 58-234, at 101–02 (1904). Discovering that it was hard to distinguish in the field from the enemy's Stars and Stripes, the War Department adopted a square version of the well-known diagonal cross in October of the same year. See Coulter, *supra* note 35, at 117–19.

⁵⁸⁸ Not quite. The actual seal, "a beautiful affair of silver and ivory" made in England and brought to Richmond in late 1864, was never used, "for the press by which it was to be affixed to documents, consigned by blockade-running freight, was sunk at sea." Henry, *supra* note 58, at 446–47.

E. The End

That was not until May 1, 1863, however, and it was not long afterward that the fortunes of the new commonwealth began to go to pieces in a nonceremonial way. First came Gettysburg and Vicksburg, then Sherman's march to Savannah; soon it was April 1865, and General Lee surrendered his army at Appomattox.

Attorney General George Davis rendered his last official opinion on April 22, and it makes a fitting conclusion to our story. General Joseph E. Johnston, commander of the largest remaining Southern army, had negotiated a capitulation agreement with Sherman: Confederate forces were to be disbanded; the United States would recognize existing state governments when their officers swore to support the Constitution.⁵⁸⁹ What, President Davis asked his Cabinet, ought he to do?⁵⁹⁰

Ratify it, said the Attorney General. The new Government could not be abandoned if there were a reasonable chance it might prevail, but there was not; the military situation was hopeless. It was true, he wrote, that the President had no authority to bind individual states to rejoin the Union or to dissolve the Government they had established. (One might argue that with Senate consent he might, since the extinguishment as well as the creation of nations had sometimes been a subject of treaty.⁵⁹¹) Desperate circumstances, however, overrode all constitutional theory. The President's last duty was to deliver the people from the horrors of

⁵⁸⁹ The agreement is printed in 6 Jefferson Davis, *Constitutionalist*, supra note 32, at 568–69 and in an appendix to 2 Stephens, supra note 19, at 806–07.

⁵⁹⁰ Sherman had earlier put out feelers toward Georgia that raised the question whether a single Confederate state could constitutionally make a separate peace. Governor Brown responded that it could but ought not to do so; President Davis said it could not. Vice President Stephens took an intermediate position: Under Article I, § 10 of the Confederate Constitution, no state could make treaties; before making a separate peace a state would have to secede from the Confederacy. See Schott, supra note 35, at 427–30 (citing, inter alia, an unpublished letter of Stephens to his brother Linton, dated October 15, 1864); cf. Letter from Alexander Stephens to the Public (Nov. 10, 1864), in the Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb, supra note 34, at 654, 654–55 (acknowledging that he had never been a nullifier and that he had always believed that “the reserved Sovereign Powers of the States could be properly resorted to for ultimate protection only by a full resumption of all powers delegated; in other words by secession”).

⁵⁹¹ See Currie, *Descent into the Maelstrom*, supra note 1, at 83–84 (discussing the annexation of Texas).

2004]

Through the Looking-Glass

1397

war. He should disband the Confederate Government, the Attorney General concluded, and resign.⁵⁹²

President Davis approved Johnston's action in signing the Sherman agreement, but his question was mooted when the U.S. Government disowned the proposal,⁵⁹³ as an editorial note curtly observes, "[T]his was the end of the Confederacy."⁵⁹⁴

A noble experiment? Hardly. In attempting to establish the so-called Confederate States of America, Southern zealots broke up a government that Alexander Stephens had said "comes nearer the objects of all good governments than any other on the face of the earth."⁵⁹⁵ and precipitated a war that snuffed out 600,000 lives, all in the unworthy cause of slavery. Yet an experiment it was, an effort to organize a looking-glass variant of the United States as the South understood them—that is, with an emphasis on states' rights and without the "consolidating" tendencies that in their view had perverted the Framers' original design.

One of the great ironies of the Confederate experiment was that, as Henry Foote later observed, war inevitably creates pressure for increased activity by the central government.⁵⁹⁶ Along with other

⁵⁹² Letter to the President (Apr. 22, 1865), in *Opinions of the Confederate Attorneys General*, supra note 31, at 580, 584. For the concurring advice of other Cabinet members, see 6 Jefferson Davis, *Constitutionalist*, supra note 32, at 569–85. For the President's side of the story, see 2 Davis, *The Rise and Fall of the Confederate Government*, supra note 34, at 684–98.

⁵⁹³ See Davis's telegrams of April 24, 1865, to Johnston and to B.N. Harrison, both printed in 6 Jefferson Davis, *Constitutionalist*, supra note 32, at 563.

⁵⁹⁴ Letter to the President (Apr. 22, 1865), supra note 592, at 584 n.30. Unwilling to take action he believed beyond his powers, Davis retreated southward with the announced intention of joining the few remaining troops in Texas and was captured in Georgia. See Patrick, supra note 32, at 349–58. President Andrew Johnson pardoned him in 1868. Proclamation by the President of the United States of America (Dec. 25, 1868), in 6 *A Compilation of the Messages and Papers of the Presidents*, supra note 42, at 708, 708. For the argument that General Johnston's statesmanlike surrender, together with that of Lee before him, prevented years of pointless and poisonous guerrilla warfare, see Jay Winik, *April 1865: The Month that Saved America* xiii–xiv (2001).

⁵⁹⁵ Alexander Stephens, *Speech Against Secession* (Nov. 14, 1860), in *Cleveland*, supra note 19, at 694, 699; see also *Secession Debated: Georgia's Showdown in 1860*, supra note 4, at 59; 2 Stephens, supra note 19, at 285.

⁵⁹⁶ Foote, *War of the Rebellion*, supra note 34, at 340. See Thomas, supra note 20, at 196 ("In the name of wartime emergency, the Davis administration had all but destroyed the political philosophy which underlay the founding of the Southern republic . . . [and] the Confederate Congress sometimes led the way.").

leaders like Vice-President Stephens, former U.S. Senator Robert Toombs, and Georgia Governor Joseph E. Brown, Foote repeatedly denounced President Davis as a military despot because of such measures as conscription, impressment, and the suspension of habeas corpus.⁵⁹⁷ The North, however, resorted to many of the same expedients, and in some cases with arguably less respect for constitutional proprieties; it seems doubtful the South could have held on so long without them.

⁵⁹⁷ “For the last three and a half years of the Confederacy,” it has been said, “Foote kept up a running fire against the administration and ‘never spoke without indulging in denunciatory invective’ against Davis and his Cabinet.” Yearn, *supra* note 5, at 220. For Foote’s own list of the Government’s despotic measures, see Foote, *War of the Rebellion*, *supra* note 34, at 345–46 (arguing that Davis had been “dupe[d]” to exceed his authority and subvert individual freedom).

Even before Joe Brown’s dogged campaign against the Conscription Acts (see *supra* notes 99–134 and accompanying text), Davis had reportedly described the Georgia Governor as “the only man in the seven states who ha[d] persistently thwarted him in every endeavor to carry out the policy of the government.” Letter from Thomas R.R. Cobb (Apr. 29, 1861), *reprinted in* 7 *The Papers of Jefferson Davis*, *supra* note 11, at 147, 147. Brown, it has been said, “found no opportunity for obstruction too petty or too important to ignore.” Coulter, *supra* note 35, at 387; see also Letter from Joseph E. Brown to Alexander H. Stephens (Sept. 1, 1862), *in* *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*, *supra* note 34, at 605, 605 (“It seems military men are assuming the whole powers of government to themselves and setting at defiance constitutions, laws, state rights, state sovereignty, and every other principle of civil liberty . . . I fear we have much more to apprehend from military despotism than from subjugation by the enemy.”). By their dogged resistance to conscription and other essential measures, one scholar concluded, Brown and North Carolina Governor Zebulon Vance “did perhaps as much as Grant and Sherman to destroy the Southern Republic.” Hendrick, *supra* note 73, at 337–38.

As for Stephens, in an 1864 speech to the Georgia legislature he complained that the latest extension of the draft would place “almost all the useful and necessary occupations of life . . . completely under the control of one man,” rhetorically inquired whether “dictatorial powers” could be “more complete” than under the latest act authorizing suspension of habeas corpus, and came within spitting distance of urging nullification: It was for the state legislature to say whether to turn over troops unconstitutionally conscripted under Confederate law. Alexander Stephens, *Speech on the State of the Confederacy, Delivered Before the Georgia Legislature at Milledgeville, Georgia* (Mar. 16, 1864), *supra* note 80, at 766, 782; see also Letter from Robert Toombs to W.W. Burwell (June 10, 1863), *in* *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*, *supra* note 34, at 619, 619 (complaining that President Davis had “greatly outraged justice and the constitution” and vowing to run for Congress in order to oppose “his illegal and unconstitutional course”). Later, it has been said, Toombs went so far as to suggest that Davis be deposed by coup, if necessary, to prevent the erection of a military despotism. See Davis, *supra* note 4, at 410.

2004]

Through the Looking-Glass

1399

Not only did a number of members of the Confederate Congress openly avow an alarming willingness to disregard the Constitution in the interest of the greater good; in wartime, as the examples considered in this study amply demonstrate, virtually everything can be made necessary and proper to military success. Southerners' worst fears of the loss of state rights and individual liberty were realized as the inescapable consequence of establishing a government dedicated to preserving them.

Like Representative Foote, I have no sympathy for the misguided men who brought about this disaster. The materials they left behind, however, provide a rich lode of information respecting the arts of constitution-making and interpretation and of comparative insights that enrich our understanding of our own fundamental law.

I am glad the North prevailed, for it was in the right. As Daniel Webster said, "Liberty *and* Union, now and forever, one and inseparable!"⁵⁹⁸—in the words of the Confederate motto, *pro avis et focis*, for our ancestors and our homes, that is, for ourselves—and, in the words of the Constitution, for our posterity as well.⁵⁹⁹

⁵⁹⁸ 6 Reg. Deb. 80 (1830).

⁵⁹⁹ U.S. Const. pmbl.