Nomination of Jay Richardson to the
U.S. Court of Appeals for the Fourth Circuit
Questions for the Record
June 27, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

   It is never appropriate for a lower court to depart from Supreme Court precedent. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions").

   b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

   While it is never appropriate to depart from Supreme Court precedent, there may be circumstances in which a circuit or district judge may address prior cases in order to raise issues for consideration. For example, lower courts must apply controlling Supreme Court precedent even if that precedent "appears to rest on reasons rejected in some other line of [Supreme Court] decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In such a circumstance, it may be appropriate to flag doctrinal concerns. *Cf. State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997) (overruling the prior Supreme Court decision in *Albrecht* and noting that though the Court of Appeals "aptly described as *Albrecht*'s 'infirmities, [and] its increasingly wobbly, moth-eaten foundations,'" the lower court "was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents").

   c. When, in your view, is it appropriate for a circuit court to overturn its own precedent?

   In the Fourth Circuit, a panel's holding is binding on subsequent panels unless and until it is overruled, modified, or undermined by the Supreme Court or the Fourth Circuit sitting *en banc*. *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc) ("A number of cases from this court have stated the basic principle that one panel cannot overrule a decision issued by another panel.").

   d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

The Supreme Court has given guidance on its application of stare decisis, including most recently *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, — S. Ct —, 2018 WL 3129785 (2018), and *South Dakota v. Wayfair, Inc.*, — S. Ct — , 2018 WL 3058015 (2018). The Supreme Court generally considers whether it thinks the precedent at issue was rightly decided, whether the question at issue is statutory or constitutional, whether the precedent has given rise to significant reliance interests, whether the precedent has been consistently applied, and whether the precedent has been eroded by other related decisions. However, any decision to overturn Supreme Court precedent is for the Supreme Court alone to decide.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016)).

   a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?

   Roe v. Wade, as modified by *Planned Parenthood v. Casey*, has survived challenges and is binding on all lower courts. It does not matter, from the perspective of a lower court judge, what additional descriptions might be applied as all Supreme Court precedents are binding.

   b. Is it settled law?

   Yes, from the perspective of a lower court, all Supreme Court precedent is settled law.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry.

   a. Is the holding in *Obergefell* settled law?

   Yes, from the perspective of a lower court, all Supreme Court precedent is settled law.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

    a. Do you agree with Justice Stevens? Why or why not?

    Justice Stevens' position, as expressed in his dissent, was rejected by the Supreme Court in *Heller*. Lower court judges are bound to faithfully apply the Court's decision in *Heller*.

    b. Did *Heller* leave room for common-sense gun regulation?

    In *Heller*, the Supreme Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also id.* at 626-27 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms"); *id.* at 627 (noting "another important limitation on the right to keep and carry arms" regarding the "the sorts of weapons protected").

    c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

    Heller, which is binding Supreme Court precedent, found that the question presented was "judicially unresolved" by the limited precedent addressing the Second Amendment. *Heller*, 554 U.S. at 625.

5. According to your Senate Judiciary Questionnaire, you are a member of two clubs — the Forest Lake Club and the Palmetto Club — that both have a history of excluding African Americans from membership. You state in your Questionnaire that shortly after you joined the Forest Lake Club, you "wrote a letter to the chair of the membership committee to express my strong desire that the Club actively seek and admit a diverse membership." You also stated that "through conversations and other actions," you "have sought to ensure that the Club not only does not discriminate but makes active efforts to expand the diversity of the membership." (Richardson SJQ at pp. 5-6)

    a. Since you joined the Club, has it changed any policies regarding the diversity of membership or that impact the diversity of membership?

I am not aware of any policy changes since I joined.

b. Since you joined the Club, has it changed any practices regarding the diversity of membership or that impact the diversity of membership?

Since I joined, I believe the Club has continued its efforts to encourage, recruit, and admit a diverse membership.

c. What "other actions" have you taken to try to expand the diversity of the Club's membership? Have these actions expanded the diversity of the Club's membership?

In addition to the letter, I have had numerous conversations with other members about efforts to encourage and recruit a more diverse membership. I have also offered to provide personal assistance and participated with others to provide support for the process of encouraging, recruiting, and admitting a diverse membership.

d. At the time that you joined the Forest Lake Club, were there other country clubs in Columbia, South Carolina that did not have a history of excluding African Americans from membership? If so, why did you not join one of those clubs instead?

I am not aware of the history or practices of other Columbia-area country clubs, though I believe that many, if not most, had a history of discrimination and became diverse only after members sought to change those practices. Forest Lake Club is the closest country club to my house.

e. Please provide to the Senate Judiciary Committee a copy of the letter you wrote to the membership committee expressing your desire for the Club to seek and admit a diverse membership.

I have attached a copy of the handwritten letter I sent.

f. Does the Club now have a more diverse membership than when you joined? If not, why are you still a member of the Club?

I believe it does and continue to believe the best way to ensure that the Club encourages and admits a diverse membership is by being a member that advocates for diversity.

6. In 2015, you represented the government on appeal in *United States v. Parker*. The defendant, Parker, was accused of running a sports gambling business. As part of its case against the defendant, the prosecution relied on the testimony of a witness who was cooperating with the government. However, the prosecution did not disclose to defense attorneys that this same witness was under investigation for illegal activity by the

Securities and Exchange Commission (SEC). Specifically, the SEC was investigating the witness for fraud "designed to profit from the deaths of terminally ill individuals." The Fourth Circuit ultimately determined that the failure to disclose the fact that this witness was under investigation constituted a violation of *Brady v. Maryland*, holding in relevant part that the fact the witness was under investigation was relevant for impeachment purposes — most notably, the witness's character for untruthfulness — and "was material to the outcome of the trial." You argued that the SEC's investigation of the witness was not proper impeachment evidence under Federal Rule of Evidence 608(b) and that the prosecution team had no duty to "uncover" the SEC's investigation. The Fourth Circuit ultimately overturned the conviction of the defendant. (*United States v. Parker*, 790 F.3d 550 (4th Cir. 2015))

a. Please explain how the SEC's investigation into one of the government's key witnesses was not proper impeachment evidence.

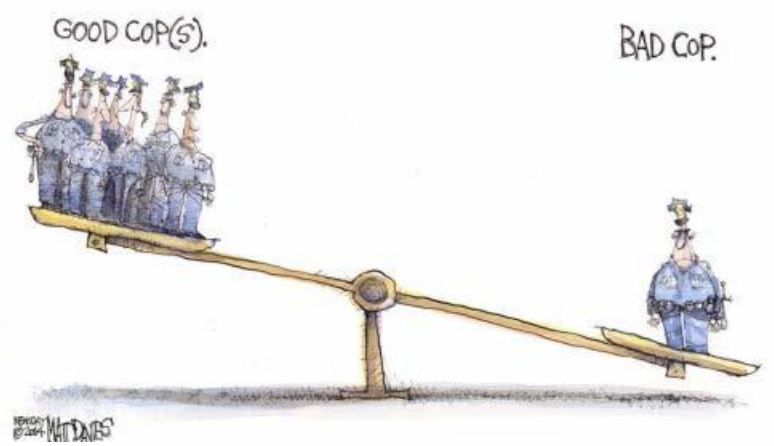
I first became involved after the trial was complete to assist the prosecution team and ultimately argued the case before the Fourth Circuit. The Government argued that the existence of an investigation or the filing of a civil complaint – as distinct from the underlying conduct by the witness about which the Government argued the defendant had knowledge, *see* Government's Brief at 39-43 – was not proper impeachment evidence. *See* Government's Brief at 48 (relying upon *United States v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996) ("The mere filing of a complaint is not 'probative of truthfulness or untruthfulness,' [as required to be inquired into under Rule 608(b)] regardless of whether the allegations in the complaint, if true, would seriously undermine the witness' credibility."); *see also id.* at 35 n.20.

b. Federal Rule of Evidence 608(b) allows the admission of extrinsic evidence if probative of the witness's character for truthfulness or untruthfulness. In what way is an investigation into a witness's alleged fraudulent conduct not probative of that witness's character for truthfulness or untruthfulness?

The Government argued that Rule 608(b), while permitting inquiry into specific instances of conduct, would not permit the admission of extrinsic evidence to rebut the witness's denials. *See* Government's Brief at 37 (relying upon *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) (noting that under Fed. R. Evid. 608(b) a "cross-examiner may inquire into specific incidents of conduct, but does so at the peril of not being able to rebut the witness'[s] denials" and that "[t]he purpose of this rule is to prohibit things from getting too far afield – to prevent the proverbial trial within a trial")); Fed. R. Evid. 608(b) ("extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the Court may, on cross-examination, allow them [*i.e.*, specific instances] to be inquired into if they are probative of the character for truthfulness or untruthfulness of [the witness]."). This argument was made in support of the district court's conclusion that the information was not "material" to the defendant's guilt. *See* Government's Brief at 37. On remand, the defendant was convicted by a second jury on January 26, 2016. While I was not

involved in the retrial either, I understand that the witness's explanation of his business model was not countered with extrinsic evidence.

7. In August 2017, you spoke at an event entitled "Excessive Force Prosecutions." The presentation that you gave at the event included a slide with the image below, without any additional context:



a. What did you say at the event when this slide was shown during your presentation?

While I do not recall precisely what I said, this talk was directed to law enforcement supervisors with the goal of encouraging training, policies, and practices that prevented the excessive use of force by their subordinate officers. In using this slide, I believe I was trying to make the point, in the context of excessive force prosecutions, that the improper use of force by a single officer undermines the commendable actions of the many men and women who honorably protect and serve our communities.

b. What were you trying to convey through use of this image?

Please see my response to Number 7(a) above.

c. How does this image relate to "excessive force prosecutions"?

Please see my response to Number 7(a) above.

8. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

During my June 2017 interview with officials from the White House and the Department of Justice, we discussed an array of legal topics. I do not recall the specific questions or answers about administrative law. As best I recall, we had general discussions about my understanding of some of the Supreme Court's relevant cases on administrative law.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

c. What are your "views on administrative law"?

I am aware of a number of relevant Supreme Court decisions that touch on the area that would be characterized as or related to administrative law, and as in all other areas of law, I would fully and faithfully apply all binding precedents.

9. When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of the statute is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017); *see also Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

10. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

11. Please describe with particularity the process by which you answered these questions.

Upon receiving these questions on Wednesday June 27, 2018, I reviewed the questions, conducted research (including discussions with others such as the lead prosecutor on the *Parker* case discussed above), and drafted answers. I solicited feedback from others, including attorneys with the Department of Justice. I made edits and then authorized the

submission of these responses on my behalf. My answers are my own.

JULIUS NESS RICHARDSON
1441 MAIN STREET, SUITE 500
COLUMBIA, SOUTH CAROLINA 29201

April 19, 2017

Dear Dr. Lemon,

I am very excited to be a part of Forest Lake, and we are already enjoying its benefits. While obviously different in many respects, afternoons spent with Grandaddy at Sweetwater in Barnwell often come to mind.

In reading the newsletter, I learned that you chaired the membership committee. As such, I could not help but write to you personally to convey my sincere hope that FLC will recruit and admit African Americans to join the club. If there is anything that I could possibly do to help in attracting African American members I hope that you will let me know.

Respectfully,

Jay R

Nomination of Julius Ness Richardson to the
United States Court of Appeals
For the Fourth Circuit
Questions for the Record
Submitted June 27, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
    a. Do you agree with Justice Roberts' metaphor? Why or why not?

    As far as a metaphor goes, I agree that the job of a judge is to apply principles (*i.e.*, strike zone) to facts (*i.e.*, pitch location) without regard to result (*i.e.*, which team wins).

    b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

    Practical consequences should be taken into account only where the applicable legal doctrine requires it. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (noting that courts look to whether the disposition required by a statute's text is absurd). Otherwise, practical considerations are more appropriately considered by the political branches.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
    a. What role, if any, should empathy play in a judge's decision-making process?

    Empathy is an important part of everyone's life, including a judge. For example, I was fortunate to witness Chief Justice Rehnquist's empathy which was reflected in the manner in which he treated those around him from the elevator-operator and guards to fellow justices. Although important for a judge's personal life and decision-making, empathy for one party or another may not govern judicial decision-making. *See* 28 U.S.C. § 453. One's view of the relative virtue – or lack of virtue – of an individual cannot affect how the law applies. For this reason, Dylann Roof received the full protections of the law despite his conduct and its contrast with the extraordinary character of those he murdered, those who survived his attack, and those forever impacted by his actions. *Cf.* The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 111th Cong., S. Hrg. 111-1044, at 103 (2010) ("I think it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The

question is – and this is true of constitutional law and it's true of statutory law – the question is what the law requires.").

b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

Please see my response to Question 2(a) above.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

I promise to fully and faithfully apply the law impartially without regard to the size or nature of the litigant and to "do equal right to the poor and to the rich." 28 U.S.C. § 453.

Senate Judiciary Committee
"Nominations"
Questions for the Record
June 20, 2018
Senator Amy Klobuchar

Questions for Jay Richardson, Nominee to the Fourth Circuit Court of Appeals

- In a 2010 speech, you said: "One of the great inventions of the last 20 years at the Supreme Court has been that when they talk about the Constitution, unlike what they did before then, they now look at what the Constitution itself says." In light of those comments, would you describe your judicial philosophy as originalist?

  If confirmed, my approach to constitutional interpretation would be to follow binding precedent of the Supreme Court and the Fourth Circuit. Thus, I would faithfully apply the Supreme Court decisions that have interpreted specific constitutional provisions by discerning their original public meaning. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to keep and bear arms); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment right to confront adverse witnesses). I would also faithfully apply those precedents that interpret specific constitutional provisions differently. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibition on cruel and unusual punishment).

- You have said that the right to bear arms is "not an absolute right." Is it your view that the majority opinion authored by Justice Scalia in *D.C. v. Heller* makes clear that "the right secured by the Second Amendment is not unlimited"—and that there are a number of regulations on firearms that are permissible under the Constitution?

  I would faithfully apply the binding precedent of *Heller*, in which the Supreme Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also id.* at 626-27 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms"); *id.* at 627 (noting "another important limitation on the right to keep and carry arms" regarding the "the sorts of weapons protected").

Nomination of Julius Ness Richardson,
to be United States Circuit Judge for the Fourth Circuit
Questions for the
Record
Submitted June 27,
2018

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   I would apply the framework set forth in the numerous Supreme Court decisions assessing these questions, from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Yes, as required by Supreme Court precedent.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Yes, as required by Supreme Court precedent. This inquiry would look at such sources as the historical practice under the common law and in the American colonies, the history of state statutes and judicial decisions, and any long-established traditions. *See Washington v. Glucksberg*, 521 U.S. 702, 710-16 (1997).

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

      I would be bound to faithfully apply all relevant Supreme Court and Fourth Circuit precedent and would give respectful consideration to precedent from other circuit courts of appeal.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

      Yes.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

As *Casey* and *Lawrence* are binding precedents, I would consider and apply the holding and rationale of those cases along with other relevant precedents

f. What other factors would you consider?

I would consider any other factors that are relevant under Supreme Court and Fourth Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Equal Protection Clause mandates heightened scrutiny for gender-based classifications as well as for race-based classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 170 (1976).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Any academic question about the intent of those that passed the Fourteenth Amendment would not impact the binding precedent mentioned above.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I am unaware why the Virginia litigation was not filed until 1990 and why the issue was judicially unresolved for a long time. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (noting that the meaning of the Second Amendment had been "judicially unresolved" for a long period of time just as other provisions of the Bill of Rights had remained unilluminated for lengthy periods).

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Supreme Court has held that the Fourteenth Amendment prohibits states from "bar[ring] same-sex couples from marriage on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). The extent to which the Fourteenth Amendment prohibits discrimination based on sexual orientation in other contexts is pending or impending in courts; accordingly, Canon 3(A)(6) of the Code of Conduct for

United States Judges prevents me from commenting on the issue.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

As this issue is an impending or pending matter, I am barred from making public comment as a judicial nominee. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court recognized such in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). I would faithfully follow those and all other Supreme Court precedent.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court recognized such in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). I would faithfully follow those and all other Supreme Court precedent.

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court recognized such a constitutional privacy right in *Lawrence v. Texas*, 539 U.S. 558 (2003). I would faithfully follow this and all other Supreme Court precedent.

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

N/A

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing

their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

In some cases, such as *United States v. Virginia*, *Obergefell v. Hodges*, and *Roper v. Simmons*, the Supreme Court has looked to current views. I would faithfully follow those and all other Supreme Court precedent.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Consideration of such evidence has a role when it is relevant to a disputed issue and reliable. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The Federal Judicial Center publishes an extensive reference guide to assist judges in addressing complex scientific and technical evidence. *See Reference Manual on Scientific Evidence* (2011).

5. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not had occasion to study this question, which is academic in light of the Supreme Court's holding in *Brown*. I would faithfully follow *Brown* and all other Supreme Court precedent.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic- constitutionalism (last visited June 18, 2018).

While I have not studied this particular white paper, it appears to reflect that determining a provision's original public meaning can be difficult. This can be

particularly true, for example, in the context of technological advancements. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011); *Kyllo v. United States*, 533 U.S. 27 (2001).

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court has applied the original public meaning of certain constitutional provisions. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to keep and bear arms); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment right to confront adverse witnesses).

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Yes, in some circumstances. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to keep and bear arms); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment right to confront adverse witnesses).

e. What sources would you employ to discern the contours of a constitutional provision?

I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent that delineate the appropriate sources to use in discerning the contours of constitutional provisions.

6. In *U.S. v. Parker*, 790 F.3d 550 (4th Cir. 2015), the Fourth Circuit held that the U.S. Attorney's office violated *Brady* by failing to disclose that one of the prosecution's witnesses was under federal investigation.

a. Please describe your role in *Parker* and explain any role that you played in the decision not to disclose this evidence to the defense.

I first became involved after the trial was complete to assist the prosecution team and ultimately argued the case before the Fourth Circuit. I had no role in the disclosures made.

b. What did you learn from your involvement in *Parker*?

My work on *Parker* reaffirmed the importance of prosecution teams working together to identify and disclose all possible *Brady* information.

c. After *Parker*, did you make any recommendations to the U.S. Attorney's office for ways to avoid *Brady* violations in the future?

Yes, following *Parker* we had discussions about how to improve communication and have conducted extensive training on discovery, including seeking, identifying, and disclosing all possible *Brady* information.

d. Were you ever accused of or have you ever committed any *Brady* violations in other cases?

To the best of my recollection, I have neither committed nor been accused of having committed any *Brady* violations.

Senator Mazie K. Hirono
Questions for the Record for Julius Ness Richardson

1. In your Senate Judiciary Questionnaire, you noted, as part of your pro bono work, that you spent substantial time representing "an individual on issues that are not yet public" while you were in private practice from 2006 to 2009.

   What was the nature of the services you provided?

   I assisted in providing legal advice and counsel for an individual under investigation by the Department of Justice.

2. You disclosed in your Senate Judiciary Questionnaire that you have significant financial holdings and investments.

   a. How will you ensure that you properly check for conflicts of interest?

   First, should I be so fortunate to be confirmed, I plan to significantly reduce the potential for conflicts of interests by transitioning to alternate holdings consistent with Canon 4(D)(3) of the Code of Conduct for United States Judges. Second, I will actively screen cases to comply with 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing conflicts and recusal. Third, I will utilize the Fourth Circuit's formal system for identifying conflicts as well as my own review to ensure compliance with all laws, rules, and practices governing conflicts and recusal.

   b. Will you recuse yourself in any matter involving any of the companies in which you have a financial interest?

   I will recuse myself anytime I, or anyone in my household, has a financial interest in the subject matter of the controversy, in a party to the proceeding, or in any other interest that could be substantially affected by the outcome. *See* 28 U.S.C. § 455(b)(4).

3. A news article noted that you wrote a paper about the Confederate Constitution while you were in law school.

   a. What were the arguments you made in your paper?

   While at the University of Chicago Law School, I had the pleasure to get to know and work with Professor David Currie, who wrote several well-known books surveying the history of constitutional interpretation in the Supreme Court and in Congress. *See* David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (1985); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (1990); David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* (1997); David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829* (2001); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829-1861* (2005); David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829-1861* (2006). At the time I attended law school, Professor Currie was

working on the last two Constitution in Congress books, addressing the years leading up to the Civil War. He suggested that, as part of a small law school seminar, I write a paper addressing the differences between the Confederate Constitution and the United States Constitution. I agreed to do so. The Law School ultimately gave me the Casper Platt Award for this work done under his guidance and tutelage in which I attempted to imitate, however poorly, his historically descriptive approach. The paper and a variety of conversations apparently encouraged Professor Currie's thoughts on the Confederate Constitution, which he wrote about in an article published by the University of Virginia Law Review. *See* David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865*, 90 Va. L. Rev. 1257, n.* (2004) (thanking me for a seminar paper that stimulated his thinking and for informed comments on his Article); *id.* at 1260 (noting that the Confederate Constitution, based "on the U.S. Constitution, with alterations designed to reflect the Southern point of view, [] 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").

b. Please provide a copy the paper to the Committee.

I have attached what I believe to be the final draft of the seminar paper submitted to Professor Currie. Despite my search through floppy disks and emails, I have been unable to locate a copy of the referenced appendix, which merely re-printed the constitutions in columns.

4. In your Senate Judiciary Questionnaire, you stated that you joined the Forest Lake Club in 2017, despite its long history of discrimination. You explained that you joined to advocate for diversity and "[i]mmediately upon admission," you "wrote a letter to the chair of the membership committee to express [your] strong desire that the Club actively seek and admit a diverse membership."

a. Please provide a copy of this letter to the Committee.

I have attached a copy of the handwritten letter.

b. What specific steps have you taken, beyond this letter, to ensure that the Forest Lake Club diversifies its membership?

In addition to the letter, I have had numerous conversations with other members about efforts to encourage and recruit a more diverse membership. I have also offered to provide personal assistance and participated with others to provide support for the process of encouraging, recruiting, and admitting a diverse membership.

c. Of the Forest Lake Club's membership how many are minorities?

At least one minority member has been publicly reported. I do not know the specific numbers of minority members.

d. Will you continue to remain a member of the Forest Lake Club and the Palmetto Club, if you are confirmed? If you choose to remain a member, will you recuse yourself from any cases involving a member of the Forest Lake Club or the Palmetto Club?

Yes, I plan to remain a member of both clubs. For recusal, I am currently unaware of any requirement to recuse myself from any case involving a fellow member of a club based on that single fact alone. However, I will actively screen cases to comply with 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing conflicts and recusal.

5. In *Laird v. Tatum*, 409 U.S. 824 (1972), then-Justice Rehnquist stated the following:

> "Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.
>
> "It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

In the above statements, Chief Justice Rehnquist acknowledges that the notions and experiences that judges have developed over the course of their lives influence their interpretation of the Constitution.

a. Do you agree with Chief Justice Rehnquist's observations? Do you believe that there will be times on the bench that a judge will bring personal experiences and views to bear on their decisions?

I agree that individuals nominated to the bench have "some tentative notions which would influence them in their interpretation." These notions for any judge should include respect for the rule of law, precedent, independence, and impartiality. As I mentioned in the hearing, should I be so fortunate to be confirmed, then I would also bring with me the notion that process and reason must drive results, and not vice versa. Judges take an oath that requires them to decide cases presented faithfully and impartially without regard to any personal opinions or views.

b. If judicial nominees have set forth legal inclinations and interpretations in their work, do you believe that this naturally has to have a bearing on what they would do as a judge, and how they would apply the law?

Please see my response to Question 5(a) above.

c. What does Justice Rehnquist's observation suggest about reassurances from judicial nominees that they will simply apply precedent, particularly in areas where many have strong convictions, or in circumstances where the facts of a case do not line up precisely with a precedent and a judge has discretion in what precedent to apply and how it would apply?

Please see my response to Question 5(a) above.

6. You indicated that you have been a member of the Federalist Society since 2017. The President has essentially outsourced the judicial selection process to two organizations with strong, ideologically-driven agendas – the Federalist Society and Heritage Foundation. The Federalist Society, for example, describes itself as "a group of libertarians and conservatives dedicated to reforming the legal order."

Do you think it is proper for the President to outsource the judicial selection process to outside organizations?

The manner in which judges are selected for nomination by the President is a political issue on which on which I am prohibited from commenting. *See* Canon 5, Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

The Confederate Constitutions: States' Rights as a Means of Protecting Slavery and as an End in Itself

Julius Ness Richardson

INTRODUCTION

The greatest crisis in America's two hundred and twenty five year existence is the Southern States' secession and the resulting Civil War. It defined governmental power and democratic responsibility and continues to influence today's conception of federalism and governmental structure.[1] "Prior to 1861, people said 'the United States are.' But after 1865, the admittedly ungrammatical usage 'the United States is' symbolized a fundamental shift."[2] Secession and the Civil War have been extensively studied, but despite the extensive historical work, the Confederate Constitutions have received little analysis. The Confederate founders drafted provisional and permanent constitutions that embodied many of the political and social differences of this crisis—from States' rights to slavery. The Permanent Constitution was based upon the U.S. Constitution, and the divergences therefrom aid in understanding the constitutional ideas of the Confederate founders.[3] Before turning to the Confederate Constitutions, a brief summary of the interrelationship between the Confederacy and the central themes of slavery and federalism is necessary to any understanding of this period.

Neither the pro-Union nor the pro-Confederacy literature fully explains the extraordinary national crisis of secession and the formation of the Confederate States of America.[4] Victors write the history books and are displayed as agents of good who vanquished those who strayed to the dark side. The Civil War is no different, and as a result of slavery this depiction of the Confederacy as pure evil is particularly strong.[5] There is a countervailing literature, beginning with Alexander Stephens and Jefferson Davis following the war and continuing to the present, which attempts to frame secession

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[1] See, for example, George P. Fletcher, Our Secret Constitution: How Lincoln Redefined American Democracy (Oxford 2001) (arguing that the Civil War marked the turning point from a federated constitutional system of government to a nationalistic constitutional system).

[2] Andrew Curry, The Better Angels: Why we are still fighting over who was right and who was wrong in the Civil War, US News & World Report 59 (Sept 30, 2002); see Gary Wills, Lincoln at Gettysburg: The Words that Remade America (Simon & Schuster 1992).

[3] Note that the federalists in the Philadelphia Convention were working to construct a national regime from a loose confederation, while the Confederate founders, seventy years later, were attempting to restrain a growing national regime.

[4] See Curry, The Better Angels at 58–59 (cited in note 2).

[5] See, for example, Slaughter-House Cases, 83 US (16 Wall) 36, 68 (1872).

> The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

Note that Georgia is still plagued by the association of the Confederacy with evil and has attempted to distinguish its Confederate past from slavery and racial oppression by adopting a state flag that bears the Confederacy's original Stars and Bars in place of the Confederate battle flag that is associated with groups such as the Klu Klux Klan. See David M. Halbfinger, Georgia Lawmakers Drop Rebel Cross From the Flag, NY Times § 1: 28 (Apr 27, 2003).

from a Confederate perspective.[6] This literature attempts, for the most part, to portray the Confederacy as a movement not for slavery but for States' rights.[7] This literature's failure to recognize the horror and centrality of slavery significantly undermines its legitimacy.[8]

There can be little doubt that slavery was a primary cause of the Civil War.[9] The Confederate rhetoric itself supports the view that slavery was central to Southern secession. The Confederacy's Vice-President, Alexander Stephens, stated that "[slavery] was the immediate cause of the late rupture and present revolution. . . . [the Confederate government's] foundations are laid, its cornerstone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his normal condition."[10] More difficult than determining slavery's absolute importance is determining whether slavery was the *sole* cause of secession as many historians have argued.[11] Jeffersonian principles of a limited federal government held in check by sovereign States were also at the heart of secession. Slavery animated and placed tangible importance on the abstract principles of republicanism and States' rights but slavery's importance does not eliminate the role of Jeffersonian ideals.[12]

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[6] See, for example, Alexander H. Stephens, A Constitutional View of the Late War Between the States: Its Causes, Character, Conduct and Results (National 1868); Jefferson Davis, The Rise and Fall of the Confederate Government (Garrett and Massie 1881); Marshall L. DeRosa, The Confederate Constitution of 1861: An Inquiry into American Constitutionalism (Missouri 1991); James Ronald Kennedy and Walter Donald Kennedy, Was Jefferson Davis Right? (Pelican 1998).

[7] See, for example, Stephens, A Constitutional View at 353 (cited in note 6); DeRosa, The Confederate Constitution of 1861 (cited in note 6). Forty years after the Civil War, Texas dedicated a memorial to the Confederate dead on the steps of the statehouse steps which read: "Died for States' Rights guaranteed under the Constitution. The people of the South, animated by the spirit of 1776, to preserve their rights, withdrew from the federal compact in 1861. The North resorted to coercion. The South, against overwhelming numbers and resources, fought until exhausted." See Sanford Levinson, Written in Stone: Public Monuments in Changing Societies (Duke 1998).

[8] The pro-Southern literature is often more polemical and biased than the pro-Northern literature. Cf Jabez Lamar Monroe Curry, Civil History of the Government of the Confederate States of America With Some Personal Reminiscences (Johnson 1901). Curry denies that any Confederate leaders advocated re-opening the African slave trade even though the Confederate records clearly establish that the South Carolina delegation advocated such a measure on several occasions.

[9] Dwight Lowell Dumond, Antislavery Origins of the Civil War in the United States 3 (Michigan 1939) ("All historians are agreed that there would have been no civil war if there had been no American Negro slavery.").

[10] Alexander H. Stephens, Cornerstone Address, Mar 21, 1861, reprinted in The Rebellion Record: A Diary of American Events with Documents, Narratives, Illustrative Incidents, Poetry, etc., 1: 44–46 (O.P. Putnam 1862) (Frank Moore, ed); see also Robert Hardy Smith, An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America, Mar 30, 1861 16, 19 (Mobile Daily Register Print 1861) ("The question of negro slavery has been the apple of discord in the government of the United States since its foundation. The strife has now and then lulled, but has not ceased. All observing men must have felt, for at least ten years that this fanatical agitation was the death knell of the Union. . . . We have dissolved the late Union chiefly because of the negro quarrel.").

[11] See James Ford Rhodes, Lectures on the American Civil War, in Kenneth M. Stampp, The Causes of the Civil War 109 (Prentice 1965) (suggesting that "of the American Civil War it may safely be asserted that there was a single cause, slavery."); Compare Kenneth M. Stampp, America in 1857: A Notion on the Brink 15–45 (Oxford 1990) (pointing out the various sectional differences), with id at 110 (pointing out the "centrality of the slavery issue in the sectional conflict").

[12] See James M. McPherson, What They Fought For 1861–1865 9–26, 54, 51 (LSU 1994) (exploring why

The Confederate founders were willing to sacrifice the mantle of States' rights in order to protect slavery as evidenced by the expansions of national power to protect the peculiar institution in Article I, Section 8 and in various provisions of Article IV.[13] However, the principles of States' rights drove changes in the Confederate Constitution even though the Confederate Constitution explicitly protected slavery in Article I, Section 9, Clause 4.[14] The founders' expansions of States' rights, in addition to the explicit protection of slavery, indicates that States' rights was more than a rationalization for preserving slavery; States' rights was an additional end desired by secessionists and the Confederate founders. Regardless, it seems clear that without the concrete "peculiar institution," the abstract principles of the Confederate founders might have remained just that—abstract.

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the Confederate soldiers fought in the war based on personal letters and diaries). Even if secession itself was not motivated by republican principles and States' rights, those who fought justified the war on those grounds:

> The people who will not fight for ideas will never retain the spirit to fight for anything. . . . A man's belief is the man. . . . Therefore, we say, for this idea of State honor—for this abstract principle of not batting her just claims upon the threat of coercion—we would convulse this Union from centre to circumference.

The Review (Charlottesville, VA), Jan 25, 1861, in Dwight L. Dumond, ed, Southern Editorials on Secession 415 (1931); see Daily Missouri Republican, Apr 19, 1861, in Dumond, ed, Southern Editorials on Secession at 500–501:

> Has it come to this that the Union is an entity, distinct from the States which compose it? . . . Once admitted, American freedom will too stand trembling before the Presidential throne. The States are the true guardians of our freedom and our rights, and when their power is gone, the master at the Federal Capital is the ruler over subject millions—an emperor, elected or self-appointed, as the times determine.

See also Gov Isham G. Harris to the Legislature of Tennessee, Jan 7, 1861, reprinted in The Daily True Delta (New Orleans) (Jan 13, 1861):

> Widely as we may differ with some of our sister Southern States as to the wisdom of their policy . . . the question at last, is one which each member of the Confederacy must determine for itself; and any attempt upon the part of the others to hold, by means of military force, an unwitting sovereignty as a member of a common Union, must inevitably lead to the worst form of internecine war, and if successful, result in the establishment of a new and totally different government from the one established by the Constitution—a Constitutional Union being a Union of Consent and not of force, of peace and not of blood—composed of sovereignties, free, and politically equal. But the new and coercive government, while it would 'derive its powers' to govern a portion of the States 'from the consent of the governed' would derive the power by which it governed the remainder from the cannon and the sword, and not from their consent—a Union, not of equals, but of the victors and the vanquished pinned together by the bayonet and congealed in blood.

But see Arthur Meier Schlesinger, The States' Right Fetish, in Arthur Meier Schlesinger, New Viewpoints in American History 243 (Macmillan 1922):

> The States' rights doctrine has never had any real vitality independent of underlying conditions of vast social, economic, or political significance. The groups advocating States' rights at any period have sought its shelter in much the same spirit that a western pioneer seeks his storm-cellar when a tornado is raging. The doctrine has served as a species of protective coloration against the threatening onslaughts of a powerful foe.

[13] See Part IV.

[14] See notes 241–244 and accompanying text.

Whether or not one accepts that States' rights was a desired end (in addition to protecting slavery), the Confederate Constitutions make clear that the Confederate founders used principles of States' rights as one means of achieving the end of protecting slavery.[15] The means-to-end relationship is not necessarily unique to the Confederate cause. For example, one may believe that Thomas Jefferson's primary aim was protecting individual liberty and that his support for States' rights is best understood as a means of protecting individual liberty.[16] Similarly, the American Revolutionary movement could be characterized as using the means of representation and republicanism to reach the end of reduced taxes and better economic prospects. Was the American Revolution about tea and taxes or liberty and representation? The answer probably lies in some combination thereof in which tea and taxes made the abstract ideals of liberty and representation important to the colonists. While slavery is not so laudable a goal as liberty and representation, the relationship between the concrete (for example, tea, taxes, and slavery) and the abstract (for example, liberty, representation, and States' rights) remains the same.[17]

The debate over States' rights (begun before the Philadelphia Convention and alive today[18]), as both a means and an end, is animated by the Confederate Constitutions. This

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[15] Compare David P. Currie, The Constitution in Congress: The Jeffersonians 1801–1829 347 (Chicago 2001) (pointing out that many Southern stances in opposition to various federal powers (e.g., internal improvements and tariffs) were based upon the belief that a Congress that could so act could also emancipate slaves).

[16] See James Schouler, History of the United States of America, Under the Constitution 436 (Dodd & Mead 1894) (discussing the Kentucky resolutions and arguing that Jefferson's role in drafting should be viewed in light of the threat posed to personal liberty). Compare Jefferson to Archibald Stuart, Dec 23, 1791, in The Papers of Thomas Jefferson 7: 356 (Princeton 1974) (Julian P. Boyd et al, eds) ("incroachments [sic] of the state governments will tend to an excess of liberty . . . while those of the general government will tend to monarchy . . . . I would rather be exposed to the inconveniencies attending to too much liberty than those attending too small a degree of it."); see also Jefferson to A.L.C. Destutt de Tracey, Jan 26, 1811, in Paul Leicester Ford, ed, The Writings of Thomas Jefferson 9: 309 (Putnam 1892–99) (WTJ).

[17] Compare Charleston Mercury, Nov 8, 1860 ("Yesterday, November 7 [the day of Lincoln's election], will long be a memorable day in Charleston. The tea has been thrown overboard . . . .").

[18] Compare Jack N. Rakove, Original Meaning: Politics and Ideas in the Making of the Constitution (Vintage 1996); Kenneth R. Bowling, Politics in the First Congress, 1789–1791 (Garland 1990) (examining the historical origins of Hamilton's Federalist and Jefferson's Republican parties, including their relationships to divisions between the Federalists and Anti-Federalists), with Ralph Michael Stein, The South Won't Rise Again But It's Time to Study the Defunct Confederacy's Constitution, 21 Pace L Rev 395, 408 (2001) ("We soon may have a majority of the Supreme Court who, although not sympathetic, of course, to either racial prejudice or disunion, may subtly, yet significantly, reinvigorate some of the Jeffersonian and antebellum theories doomed by combat and forgotten by most who teach."). For examples of the debate in modern America see, for example, US Term Limits, Inc v Thornton, 514 US 779, 845 (1995) (Thomas dissenting) (seemingly accepting, in apparent contradiction to McCulloch v Maryland, 17 US (4 Wheat) 316 (1819), that the U.S. Constitution was formed by the States and not the people); id at 846:

> The ultimate source of the Constitution's authority is the consent of the people of *each individual State*, no the consent of the undifferentiated people of the Nation as a whole. . . . In Madison's words, the popular consent upon which the Constitution's authority rests was 'given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.' [The Federalist No 39, 243 (New America 1861) (C. Rossiter, ed)].

See also Alden v Maine, 527 US 706, 751 (1999) (Justice Kennedy joined by the four US Term Limits

paper focuses on the ambiguities of the U.S. Constitution's federalism that were resolved by the Permanent Confederate Constitution in favor of Jeffersonian ideals, and thereby, will hopefully help the reader inform her own Constitutional ideas. Part I first provides a brief account of Jefferson as the intellectual forebear of the Confederacy and then traces the path to secession. Part II examines the Confederate Convention and the drafting of the Provisional and Permanent Constitutions. Part III looks at the departures from the U.S. Constitution in the Permanent Constitution that illustrate the Confederate devotion to Jeffersonian principles. Part IV argues that the Confederate founders were willing to expand national power and limit States' rights in the Constitution in order to protect slavery. Part V discusses why, given the alleged States' rights aim, the Confederate Constitution remained so similar to the U.S. Constitution.

I. STATES' RIGHTS: FROM JEFFERSON TO SECESSION

The Declaration of Independence signaled the colonies' separation from the British Crown, claiming they were "free and independent States." The States then joined in the Articles of Confederation, which formed a loose confederation of the thirteen States. However, recognizing the problems with the Articles of Confederation,[19] the States sent delegates to Philadelphia to amend them. Instead of fixing the Articles, those delegates drafted a new constitution. Contrasting the strong central government of Great Britain with the failed loose association of the Articles of Confederation, the drafters of the U.S. Constitution attempted to find a balance of power between the national government, the States, and the People.[20] The specifics of the inter-relationships among the federal and state governments were left sufficiently ambiguous in the Constitution of 1787 that both nationalists and States' rightists would be able to point to the document in their fight to shape the young republic.[21] This debate over the extent of federal power, which began

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dissenters) (states retain "a residuary and inviolable sovereignty" which is "the dignity, though not the full authority, of sovereignty"); Printz v United States, 521 US 898, 918–22 (1997) (apparently reviving the Jeffersonian concept of dual sovereignty in order to deny the federal government the authority to impose requirements on state and local law enforcement officers but citing Hamilton for this seemingly Jeffersonian proposition).

[19] See note 44; see also Jefferson to James Madison, July 1, 1784, in Papers of Jefferson at 7: 356 (cited in note 16) ("nothing can preserve our Confederacy unless the band of the Union, their common council, be strengthened"); Jefferson to John Blair, Aug 13, 1787, in id at 12: 28 ("My idea is that we should be made one nation in every case concerning foreign affairs, and separate ones in whatever is merely domestic . . . and some peaceable means of enforcement devised for the federal head over the States.").

[20] Most significantly, the U.S. Constitution added the federal power to tax directly and regulate interstate commerce. See US Const, Art I, § 8, cls 1, 3.

[21] Publius noted that "there are three sources of vague and incorrect definitions: indistinctness in the object, imperfection of the object of conception, and inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between federal and state jurisdictions, must have experienced the full effect of all of them." The Federalist No 37 (Madison) (cited in note 18). See Rakove, Original Meanings at 161–202 (cited in note 18):

> Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both the Federalist and the Antifederalist were right in predicting how tempered or potent a government the Convention had proposed . . . Whether the politics of the American republic would prove more

during the adoption of the U.S. Constitution, continued through the nullification crisis (in the 1830s) to secession. Subpart A scans Jefferson's ideals and Subpart B then looks at the impact of Jeffersonian thought on the path to secession.

A. Jefferson

Nationalist Alexander Hamilton and, by proxy, Jefferson began as political adversaries during the Philadelphia Convention, and their legacies continued through the Civil War.[22] Hamilton's most profound victory over Jefferson was the Civil War.[23] The Civil War marked the beginning of the great expansion of the central government that has resulted in our present national government.[24] Confederate founders saw their cause as one that followed in the great Jeffersonian tradition of States' rights. Although the North may have used Jefferson's expressed condemnation of slavery, ultimately it adopted (perhaps unknowingly until after the war) the saber of Hamiltonian nationalism.[25]

If the Confederate cause, and therefore the Confederate Constitution, has substance and value beyond the mere protection of a socio-economic system rooted in slavery, then the movement, in part, gets its genesis from Thomas Jefferson.[26] The political philosophy of Thomas Jefferson, as well as the man himself, is difficult, if not impossible, to integrate into a single, coherent scheme. As a result, Jefferson's life and ideas have been

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> 'federal' or 'national' . . . was a function neither of the language of the Constitution nor of any grand principles that the framers implanted in their regime but of the various ways in which Americans weighed the advantages and disadvantages of pursuing their interests within the compound federal structure that Constitution both created and acknowledged.

[22] Hamilton was integrally involved in the drafting of the U.S. Constitution; while Jefferson was abroad as an ambassador, his thoughts and beliefs were relayed through James Madison. Both the North and the South invoked the spirit of Jefferson and, to a lesser degree, Hamilton around the time of the Civil War. See George P. Fletcher, Our Secret Constitution: How Lincoln Redefined American Democracy (Oxford 2001).

[23] See Merrill D. Peterson, The Jefferson Image in the American Mind 223–24 (Virginia 1998) (discussing the view that the Civil War was Hamilton's vindication); id at 223 ("[The nationalists following the Civil War] tended rather to make Hamilton the architect of the Constitution itself, to read into it all those elements of force and unity the fathers had rejected but Appomattox affirmed, to hail the triumph of arms the triumph of the true Hamiltonian Constitution.").

[24] George Will states: "There is an eloquent memorial in Washington to Jefferson, but none to Hamilton. However, if you seek Hamilton's monument, look around. You are living in it. We honor Jefferson, but live in Hamilton's country." George F. Will, Restoration: Congress, Term Limits, and the Recovery of Deliberative Democracy 167 (Free Press 1992). See also Keith E. Whittington, Dismantling the Modern State? The Changing Structural Foundations of Federalism, 25 Hastings Const L Q 483, 489–503 (1998) (finding that the progressive reform movement, Great Depression, two world wars, and the civil rights movement set the United States on the path to more nationalistic government).

[25] See, for example, C.J. Riethmüller, Alexander Hamilton and His Contemporaries; or, The Rise of American Constitutionalism (Bell and Daldy 1864).

[26] Jefferson, early in his political career, opposed slavery and pushed for its gradual abolition. See Garry Wills, Inventing America: Jefferson's Declaration of Independence 71–75 (Doubleday 1978); Jefferson, Third Draft of the Virginia Constitution [before June 13, 1776], in Papers of Jefferson at 1: 363–64 (cited in note 16). Later in life, he supported a State's right to resolve that question. John C. Miller, The Wolf by the Ears: Thomas Jefferson and Slavery 221–52, 279 (Free Press 1977). Much has been written about Jefferson's dealings with slavery and slaves; his true feelings are not relevant in this context and are, in any regard, likely indeterminable. See generally id at 3, 7, 16, 221–52, 279.

interpreted in a plethora of ways.[27] However, Jefferson's view of the role of the federal government vis-à-vis state governments is clear: the federal government's energy should be limited in order to control its power.[28]

Jefferson was the initial drafter of the Kentucky Resolutions of 1798[29] that, slightly amended, were adopted by the Kentucky legislature in response to the Alien and Sedition Laws.[30] The first resolution establishes the understanding critical to the conception of the power allocation in the federal system held both by Jefferson in 1798 and the Confederacy in 1861:

> That the several States composing the United States of America; are not united on the principle of unlimited submission to their General Government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a General Government for special purposes,—delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: that to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: that the government created by the compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge for itself, as well of infractions as of the mode and measure of redress.[31]

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[27] See, for example, Joseph J. Ellis, American Sphinx: The Character of Thomas Jefferson (Knopf 1997); Peterson, The Jefferson Image (cited in note 23).

[28] Jefferson remarked to Madison on December 20, 1787 that "I own that I am not a friend to a very energetic government. It is always oppressive." Merrill D. Peterson, ed, The Portable Thomas Jefferson 431 (Viking 1975) (PTJ).

[29] PTJ at 281–89 (cited in note 28). Jefferson's authorship of the Kentucky Resolutions was kept secret until 1821, and his unamended draft was first published in 1832. See id at 281 n 1.

[30] The Kentucky Resolutions of 1798 represent the most extreme account of Jefferson's support for States' rights. The Resolutions may have been extreme to make a political point and may not truly represent Jefferson's beliefs. See Merrill D. Peterson, Thomas Jefferson and the New Nation 615 (Oxford 1997) ("In the final analysis it is impossible to say precisely what Jefferson's theory was in the Resolutions of '98. They were not conceived in the oracular realm of constitutional law but in a desperate struggle for political survival . . . . [Jefferson] pursued 'a political resistance for political effect[.]'"). In light of Jefferson's earlier petition to the Virginia legislature opposing the presentment against a congressman for seditious libel, see Jefferson, Petition to the Virginia House of Delegates, Aug 1797, in WTJ at 7: 158–64 (cited in note 16); Jefferson to Monroe, Sept 7, 1797, in id at 7: 173, the Kentucky Resolutions may be a statement of true belief and less of a purely political statement. Nevertheless, Jefferson did believe in strong States' rights. See, for example, Jefferson to Elbridge Gerry, Jan 26, 1799, in Merrill D. Peterson, ed, Thomas Jefferson: Writings 1055-62 (America 1984) (TJW); Jefferson to Madison, Dec 24, 1825, in WTJ at 10: 350 n1 (cited in note 16); Jefferson to Gideon Granger, Aug 13 1800, in id at 7: 451; Jefferson to Edward Livingston, Apr 4, 1824, in id at 10: 300; Jefferson to A.L.C. Destutt de Tracy, Jan 26, 1811, in id at 9: 309; Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, Feb 15, 1791, in Papers of Jefferson at 19: 275 (cited in note 16).

[31] TJW at 455 (cited in note 30).

Jefferson continues in the eighth resolution, "free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obligated to trust with power."[32] The Kentucky Resolutions illustrate Jefferson's distaste for and distrust of a powerful national government and a willingness to adopt an extreme version of state sovereignty to guard against the expansion of federal power that he feared would impinge upon the liberty of the people.

Jefferson believed the power of the central government came from the people as citizens of their respective States rather than from the sovereignty of the people of the United States as a whole.[33] Partly for this reason, Jefferson considered the Tenth Amendment to be the "foundation" of the U.S. Constitution and operated with a strong presumption that the federal government's power was limited.[34] Jefferson's theory of Constitutional interpretation is apparent in his opinion written to President Washington on the constitutionality of Hamilton's proposed national bank.[35] Jefferson argued that the legislative powers must be limited to those enumerated by the Constitution.[36] The power to establish a national bank, Jefferson argued, was neither "among the powers specifically enumerated" nor "within either of the general phrases" of Article I.[37] The first general phrase, the General Welfare Clause, Jefferson interpreted to provide a purpose or limitation on the power to tax and not to grant an independent power.[38] The second

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[32] Id at 453. In Jefferson's First Inaugural Address (1801), he restated these beliefs in more palatable terms with which even his opponents would generally agree. He stated as one of the

> essential principles of our Government . . . the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor as the sheet anchor of out peace at home and safety abroad.

Id at 494. The generality does not answer the interesting question of where the line between the "rights of States" and the federal government's "constitutional vigor" lies. Jefferson's First Inaugural Address simply restated his deeply held views at a higher level of generality. Compare James H. Read, Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson (Virginia 2000) (claiming Jefferson's talent was in presenting bipolar issues of power and liberty in clear, eloquent, and comfortably general terms).

[33] Compare Jefferson, The Solemn Declaration and Protest of the Commonwealth of Virginia on the Principles of the Constitution of the United States of American and on the Violation of them (1825), reprinted in E. Dumbauld, ed, The Political Writings of Thomas Jefferson 167, 167–69 (Bobbs-Merrill 1955). See also Thomas Jefferson to Edward Everett (Apr 8, 1826), reprinted in Political Writings at 151, 151; Jefferson to James Madison, Dec 24, 1825, in WTJ at 10: 350 (cited in note 16); Jefferson to Gideon Granger, Aug 13, 1800, in id at 7: 451–52; Jefferson to Edward Livingston, Apr 4, 1824, in id at 10: 300.

[34] David N. Mayer, The Constitutional Thought of Thomas Jefferson 196 (Virginia 1994). In other words, one might understand Jefferson as placing a thumb on the scale against the constitutionality of a federal power based on a robust reading of the Tenth Amendment.

[35] Compare Jefferson, Opinion on the Constitutionality of a National Bank, in Papers of Jefferson 19: 275 (cited in note 16), with Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb 23, 1791), in Papers of Hamilton at 8: 97, 104–05 (cited in note 34) (Harold C. Syrett, ed).

[36] See note 34 and accompanying text.

[37] Jefferson to Madison Dec 24 1825, in WTJ 10: 352 (cited in note 16).

[38] Jefferson interpreted the General Welfare Clause to men "to lay taxes for the purpose of providing of providing for the general welfare" Jefferson, Opinion on the Constitutionality of a National Bank, in Papers

general phrase, the Necessary and Proper Clause, Jefferson believed should be strictly construed to mean "those means without which the grant of the power would be nugatory."[39] The heart of Jefferson's argument, in part by analogy to treaty interpretation, was that because the Constitution was a compact among the people of the several States, the powers granted by Article I of the U.S. Constitution should be strictly construed.[40]

In contrast, Hamilton justified the bank by interpreting the Article I grant of power liberally:

> [A Jeffersonian] restrictive interpretation of [Article I] is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good.[41]

Their difference lay with the presumption they brought to the interpretation of federal power. Jefferson's strict theory of interpretation stemmed from his understanding of the Constitution as a compact among the people of each State and manifested itself in a presumption against the exercise of federal power in doubtful cases.[42] Alternatively, Hamilton's belief that the Constitution was derived from the people of the United States as a whole resulted in a presumption in favor of federal power when it served the public good.[43]

Despite Jefferson's desire to construe federal power narrowly, when it came to drafting the U.S. Constitution he recognized that it needed to grant the national government more power than the Articles of Confederation had.[44] Thus, like the

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of Jefferson 19: 277 (cited in note 16). This interpretation was based on two grounds: a broad interpretation would make the specific enumerations of Article I, Section 8 redundant; and a broad interpretation would be contrary to the intent to "lace [Congress] up straitly within the enumerated powers." Id.

[39] Jefferson, Opinion on the Constitutionality of a National Bank, in Papers of Jefferson 19: 278 (cited in note 16). See Jefferson to Edward Livingston (Apr 30, 1800, reprinted in WTJ at 9: 132–33 (cited in note 16) ("Congress are authorized to defend the nation. Ships are necessary for defence; copper . . . for ships; mines . . . for copper . . . a company [for] mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'? Under such a process of filiation of necessities the sweeping clause makes clean work.").

[40] See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv L Rev 885, 931 (1985).

[41] Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb 23, 1791), in Papers of Hamilton at 8: 97, 104–05 (cited in note 34); see also Powell, 98 Harv L Rev at 913–17 (cited in note 40).

[42] See Mayer, The Constitutional Thought of Thomas Jefferson at 185–221 (cited in note 34) ("Jefferson posited a fairly strict theory which presumed against the exercise of federal powers in doubtful cases.").

[43] See id ("Hamilton posited a theory of liberal interpretation with the opposite [presumption from Jefferson]."); see also Peterson, Thomas Jefferson and the New Nation at 434–35 (cited in note 30) ("[Jefferson] sought [the central government's] strength in the trust of the states and the people, [Hamilton] in the amplitude of the general government's powers").

[44] Answers and Observations for Démeunier's Article, in TJW at 575–77 (cited in note 30) (calling the Articles of Confederation "a wonderfully perfect instrument, considering the circumstances under which it was formed" before proposing three limited changes: (1) a general rule for the admission of new States; (2) a different manner for the collection of money from the States; and (3) a congressional power for the regulation

Confederate founders, he recognized that the crucial balance lies between giving the federal government enough power for it to be effective and giving it too much power, such that it overshadows the States. So, while recognizing that the U.S. Constitution did and should have given the national government more power to raise revenues and govern commerce, Jefferson maintained a strong theory of States' rights without going so far as to believe that a simple confederation was sufficient for the well-being of all involved.[45]

Jefferson was not, however, completely consistent or explicit in his views, and it is, therefore, not easy to tag him as a States' rights advocate.[46] Despite his writings, such as the Kentucky Resolution, in some instances Jefferson's actions sometimes construed the relevant provisions broadly, particularly once elected President. His presidency famously included the Louisiana Purchase,[47] the 1806 embargo,[48] and the Cumberland Road.[49]

B. The Path to Secession

The path to secession was paved by the federalism debate that persisted throughout Jefferson's life. That debate was central to the nullification crisis in South Carolina concerning national tariffs designed to protect Northern industries.[50] The nullification

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of commerce). Jefferson even went so far as to state that "[i]ndeed, I think that all the good of this new constitution might have been couched in three or four new articles to be added to the good, old, and venerable fabrick, which should have been preserved even as a religious relique." Id at 914. See also Jefferson to Monroe, June 17, 1785, in id at 804, 806; Jefferson to Madison, Feb 8, 1786, in id at 848.

[45] Similarly, while one may find puzzling the Confederate founders' decisions (or defaults) to leave in the Confederate Constitution several seemingly anti-States' rights provisions (as interpreted by the U.S. Courts, Executive, and Congress) from the U.S. Constitution, this may have been a result of trying to find the very balance that had troubled Jefferson. The Confederate founders recognized that the U.S. Constitution had been interpreted beyond its "proper" interpretation (in a pro-federal government manner), but they were cautious not to swing too far in the other direction. Similarly, Jefferson had espoused simply amending the Articles to add several powers instead of switching to an entirely new system. It may be this desire to make modifications of existing documents that explains both Jefferson's apprehension about the new Constitution and the Confederate founders' hesitancy to make the Confederate Constitution a complete blueprint of Jeffersonian ideals.

[46] See generally R. Kent Newmyer, John Marshall and the Southern Constitutional Tradition, in Kermit L. Hall and James W. Ely, Jr., eds, An Uncertain Tradition: Constitutionalism and the History of the South 105, 121, nn 7–10 (Georgia 1989).

[47] Jefferson had concerns that the Constitution did not grant the national government the power to acquire territories but "pocketed his constitutional concern in order not to jeopardize his dream." Currie, The Jeffersonians at 97–98, nn 77–80 (cited in note 15). Compare Robert Knowles, The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase, 88 Iowa L Rev 343 (2003).

[48] See Henry Adams, History of the United States of America During the First Administration of Thomas Jefferson 1110 (Charles Scribner's Sons 1917) ("[B]etween the embargo and the old Virginia theory of the Constitution no relation could be imagined. . . . no one could doubt that under the doctrine of States-rights and the rule of strict construction the embargo was unconstitutional."). See generally Currie, The Jeffersonians at 145–155 (cited in note 15).

[49] See id at 114–122.

[50] See William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836 (Harper & Row 1966) (discussing the tariffs and the Foot Resolution, which would have limited the sale of western lands); David P. Currie, Constitution in Congress: Democrats and Whigs: 1829–1845 ch 4, § II (forthcoming Chicago 2004) (dissecting the Haynes-Webster debates). The embargo dispute in New England from 1807–15 was a precursor to the nullification crisis and was part of the reason for the Hartford

doctrine argued that States had the power to hold federal laws unconstitutional. In January of 1830, on the floor of the U.S. Senate, South Carolina Senator Robert Hayne invoked the memory and writings of Jefferson to support nullification.[51] To Hayne, Jefferson's Memoirs and draft of the Kentucky Resolutions supported opposition through nullification of the protective tariffs that burdened the South and benefited the North—the only other option was separation.[52] All this was done in the name of following Jefferson's "most fixed and settled convictions" as represented in the Kentucky Resolutions of 1798.[53] As Jefferson had argued in the Resolutions, Hayne stated that if the federal government is the judge of its own limitations, then it is "practically 'a government without limitation of powers.'"[54]

Hayne was opposed by the powerful Massachusetts Senator Daniel Webster who, in his Second Reply to Hayne, so famously stated, "Liberty and Union, now and forever, one and inseparable," perhaps drawing from Hamilton's belief that power and liberty were not always in direct opposition.[55] Webster agreed that unconstitutional laws were not binding; however, he argued that it was not the prerogative of the States to make that

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Convention. See Hartford Convention of December 1814, Resolutions, reprinted in Theodore Dwight, The History of the Hartford Convention 352–79 (White 1833) ("If the union be destined to dissolution . . . it should, if possible, be the work of peaceable times, and deliberate consent.").

[51] See 6 Register of Debates in Congress 54–55, Jan 25, 1830 (Gales & Seaton 1830). South Carolina opposed the tariffs which were thought to benefit the North's industries at the expense of Southern interests. See Calhoun, Discourse on the Constitution, in The Works of John C. Calhoun 1: 174 (Appleton 1856) (Richard K. Cralle, ed):

> If there be any point on which the (I was going to say, southern section, but to avoid as far as possible, the painful feelings such discussions are calculated to excite, I shall say) weaker of the two sections is unanimous, it is that its prosperity depends, in a great measure, on free trade, light taxes, economical, and as far as possible, equal disbursements of the public revenue, and unshackled industry, leaving them to pursue what ever may appear most advantageous to their interests. From the Potomac to the Mississippi, there are few, indeed, however divided on other points, who would not, if dependent on their volition, and if they regarded the interest of their particular section only, remove from commerce and industry every shackle, reduce the revenue to the lowest point that the wants of the government fairly required, and restrict the appropriations to the most moderate scale consistent with the peace, the security, and the engagements of the public; and who do not believe that the opposite system is calculated to throw on them an unequal burden, to repress their prosperity, and to encroach on their enjoyment.

See also Thomas P. Kettell, Southern Wealth and Northern Profits, reprinted in Stampp, Causes of the Civil War at 68–70 (cited in note 11).

[52] 6 Register of Debates in Congress at 54–58, Jan 25, 1836 (cited in note 51) ("Sir, South Carolina has not gone one step further than Mr. Jefferson himself was disposed to go").

[53] Id. One scholar has noted this connection between Jefferson's Kentucky Resolutions and Southern Nullification by stating, "If you were wondering where John C. Calhoun and Ross Barnett got their weird notions about civil disobedience of federal law, you can stop wondering." David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801 269 (Chicago 1997).

[54] 6 Register of Debates in Congress at 56–58, Jan 25 1836 (cited in note 51). Hayne, debating tariffs several years earlier, had forcefully asserted the powerful role of States in American federalism, "Gentlemen surely forget that the supreme power is not in the Government of the United States. They do not remember that the several States are free and independent sovereignties, and that all power not expressly granted to the Federal Government is reserved to the people of those sovereignties." 41 Annals of Cong 648, Apr 30, 1824 (Gales & Seaton 1856).

[55] 6 Register of Debates in Congress at 73, 80, Jan 27, 1830 (cited in note 51).

final determination.[56] Federal law, based on Article IV's Supremacy Clause, was supreme and Article III implied that the Supreme Court was to determine their fidelity to the federal Constitution.[57] To interpret the Constitution otherwise, Webster argued, would result in the States having ultimate authority that was antithetical to the Constitution's design and purpose.[58] He urged that the Constitution was no compact. The Articles of Confederation had been a compact and the Constitution rejected that form of government.[59]

Hayne and Webster's debate evoked the old struggle between Jefferson and Hamilton, the same that would eventually erupt in the Civil War.[60] A South Carolina Convention, in November of 1832, passed an Ordinance of Nullification declaring the Tariffs of 1828 and 1832 void in the State as of February 1, 1833.[61] Henry Clay's 1833 Compromise ended the nullification crisis by revising tariffs.[62] The Compromise served only to delay the debate. The tension between the North and the South over tariffs would continue until secession.[63] In fact, a leading Northern commentator during the Civil War asserted that the South's desire to secure free trade was a significant threat to the Union in 1831 and a significant factor in secession in 1860-61.[64]

Throughout these and other debates, the Southern spokesmen considered the Union itself to be a compact among the States (or people thereof) and interpreted the U.S.

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[56] Id at 77.

[57] Id at 77–79.

[58] Id at 74–79.

[59] Id at 92–93. In his proclamation condemning nullification, President Jackson similarly argued that the Articles of Confederation's chief deficiency was that while it required States to abide by Congress's determinations, it provided no means of enforcing Congressional decisions such as the tariff. Proclamation (Dec 10, 1832), in James D. Richardson, A Compilation of the Messages and Papers of the Presidents: 1789–1897 2: 640–56 (US Cong 1900). Jackson argued that the Constitution had remedied this defect by forming "a more perfect Union," thereby making it clear that "the power to annul a law of the United States, assumed by one State, [was] incompatible with the existence of the Union." Id at 642–43. President Jackson took the further step of denying that States had any right to secede (as South Carolina had also claimed), as the Constitution did not form a league and secession would destroy the unity of the nation. Id at 648. See generally Currie, Democrats and Whigs at ch 4, § IV (cited in note 50).

[60] See Peterson, The Jefferson Image at 37 (cited in note 23).

[61] 1 SC Stats 329 (Nov 24, 1832). The ordinance went beyond declaring the tariffs unconstitutional and made their enforcement in the State unlawful. The ordinance made it a crime for Federal or State officers to enforce the federal law and required citizens to disobey the federal statutes. See Currie, Democrats and Whigs at ch 4 §III (cited in note 50).

[62] 9 Register of Debates 462-74, Feb 12, 1833 (Gales & Seaton 1833); 4 Stat 629 (Mar 2, 1833). South Carolina rescinded the nullification ordinance and accepted Clay's compromise. 1 SC Stats 390 (Mar 15, 1833).

[63] See Cong Globe, 35 Cong, 2 Sess, appendix: 67, 69 (Dec 22, 1858) (Rep Reuben Davis of Mississippi) (arguing against an increase in the tariffs in 1858); see also id at appendix: 86 (Feb 7, 1859) (Rep Vance of North Carolina); id at appendix: 190 (Feb 9, 1959) (Sen Toombs of Georgia); id at appendix: 201 (Feb 21, 1859) (Rep Lamar of Mississippi).

[64] See J.T. Headley, The Great Rebellion: A History of the Civil War in the United States I: 9–14 (Hulbut, Williams 1863). Compare notes 188–215 (discussing the changes made in the Permanent Confederate Constitution to the taxing power).

Constitution to embody it.[65] The differences between the North and the South were the same as those which divided the founding generation:

> To states' rightists (the Anti-Federalists and Republicans of the early antebellum period, the Confederates of the 1860's), the People of each state were sovereign. Each People had their own unique set of government agents (state government) and a set of agents in common with the Peoples of other states (the federal government). The Constitution was a purely federal compact among thirteen sovereign principals to coordinate certain joint activities by employing a common agency. . . .
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> To nationalists (the Federalists of the early antebellum era, the Unionists of the 1860's), the People of the United States as a whole were sovereign. The People had a unique set of national agents representing the whole (the federal government) and various sets of local agents representing parts of the whole (state governments). The Constitution was not an inter-sovereign compact or treaty, but a supreme statute deriving from the supreme sovereign legislature -- the People of the nation.[66]

The rhetoric leading up to secession indicated that Southern politicians beleived that secession was necessary to reestablish a federal system based upon this compact theory of government; that is, the U.S. Constitution had been misinterpreted and misconstrued so as to result in a perversion of the original federal union. Many of the ordinances of secession stated that the States were breaking from a compact; for example, South Carolina's ordinance was entitled, "An Ordinance to Dissolve the Union between the State of South Carolina and the Other States United with Her under the Compact Entitled 'The Constitution of the United States of America.'"[67] One convention member summed up the Southern view after the War by describing the U.S. Constitution as "an agreement, a compact, a treaty, entered into by and between sovereign States, creating a common

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[65] See, for example, Calhoun, A Discourse, in Works of Calhoun 1: 276 (cited in note 36):

> Having ratified and adopted [the U.S. Constitution], by mutual agreement, they stand in relation of parties to a constitutional compact; and, of course, it is binding between them as a compact, and not on, or over them, as a constitution. . . . the people of the several States, in their sovereign capacity, agreed to unite themselves together, in the closest possible connection that could be formed, without merging their respective sovereignties into one common sovereignty.

See also David Franklin Houston, A Critical Study of Nullification in South Carolina 82 (Longmans, Green 1896) (quoting Calhoun stating that the federal union was "a union of States as communities, and not a union of individuals."). Compare text accompanying note 31 (Kentucky Resolution of 1798). See also Chisholm v Georgia, 2 US (2 Dall) 419, 471 (1793) (Jay) ("the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects"); James Madison to N.P. Trist, Feb 15, 1830, in Gaillard Hunt, ed, The Writings of James Madison 9: 355 (Putnam 1910) ("Although the old idea of a compact between the Government & the people be justly exploded, the idea of a compact among those who are parties to a Government is a fundamental principle of free Government.").

[66] Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L J 1425, 1452 (1987). See also Daniel Farber, Lincoln's Constitution ch 2 (Chicago 2003).

[67] Ordinances and Constitution of the State of South Carolina, with the Constitution of the Provisional Government and of the Confederate States of America 3 (Evans & Cogswell 1861).

agent, and delegating to that agent certain specified powers, to be exercised in common for the good of all."[68]

While the South had dominated the federal government from inception until 1860,[69] the Confederate founders maintained their belief that the federal government had violated the rights of the States.[70] Senator Calhoun declared a decade before secession, "[T]he character of the Government has been changed, in consequence, from a Federal Republic, as it originally came from the hands of the framers, and that it has been changed into a great national consolidated Democracy."[71] Similarly, on the eve of secession one soon-to-be Confederate Constitutional Convention member stated:

> If then, my friends, you have heard that I am a disunion man, and if there is an apparent foundation for it, or any truth in it, it is because my life has been devoted to opposing those who would destroy the 'more perfect Union' of the constitution, and build up an usurping union or a law higher than the constitution.[72]

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[68] William Simpson Oldham, True Causes and Issues of the Civil War, 6 DeBow's Review 735 (Sept 1869).

[69] Southern domination extended to all three branches to different degrees: (1) Legislative, see Cong Globe, 31st Cong, 1st Sess 530–31 (Mar 14, 1850) ("Though [the South has] been in a numerical minority in the Union for fifty years, yet, during the greater part of that period, [the South has] managed to control the destinies of the Union.") (Sen Lewis Cass of Michigan) (quoting Virginia Representative Meade); (2) Executive, see David M. Potter, The Impending Crisis: 1848–1861 445 (Harper & Row 1976) ("During the seventy-two years from 1789to 1861, slaveholders had held the presidency for fifty years."); see also Harold M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution 46–47 (1973); Dennis J. Mahoney, Corwin Amendment (1861), in Leonard W. Levy et al, eds, Encyclopedia of the American Constitution 2: 509 (MacMillan 1986); and (3) Judicial, see Cooley v Board of Wardens of the Port of Philadelphia, 53 US (12 How) 299 (1851) (holding that even though Congress had the power to regulate interstate commerce, the States nonetheless could also regulate interstate commerce where Congress had not exercised its authority, and the regulation by the State was sufficiently local in nature); Mayor of New York v Miln, 36 US (11 Pet) 102 (1837) (holding the State had the right of a sovereign to take all necessary steps to protect the health, safety, and welfare of its citizens); Dred Scott v Sandford, 60 US (19 How) 393 (1857) (holding Congress was unable to exclude slavery from a territory or authorize a territorial legislature to do the same, thereby recognizing a constitutional right to slavery in the territories).

[70] See Jefferson Davis, Inaugural Address, Feb 18, 1861, reprinted in James D. Richardson, ed, The Messages and Papers of Jefferson Davis and the Confederacy, Including Diplomatic Correspondence, 1861–1865 32 (Chelsea House-R. Hector 1966):

> The declared purpose of the compact of union from which we have withdrawn, was "to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare;" and when in the judgment of the sovereign States now composing this Confederacy, it had been perverted from the purposes for which it was ordained, and had ceased to answer the ends for which it was established, a peaceful appeal to the ballot-box, declared that so far as they were concerned, the government created by that compact should cease to exist.

[71] Cong Globe, 31st Cong, 1st Sess 452 (Mar 4, 1850) (Sen Calhoun).

[72] Constitutional Rights Speech of the Hon William L. Yancey of Alabama at Wieting Hall Syracuse, NY, Oct 15, 1860, 3; see Cong Globe, 36th Cong, 1st Sess, appendix: 88 (Jan 24, 1860) (Sen Toombs):

> the fundamental principles of the system or our social Union are assailed, invaded, and threatened with destruction; our ancient rights and liberties are in danger; the peace and tranquility of our homes have been invaded by lawless violence, and their further invasion is imminent; the instinct of self-preservation arouses society to their defense. These are the causes which are undermining, and which, if not so arrested will overthrow the Republic.

In particular, Jefferson and other Southern statesmen believed the Supreme Court's nationalist opinions misconstrued the U.S. Constitution. Numerous opinions read the national government's power broadly and the States' powers narrowly.[73] Some of these opinions expressly claimed the Constitution was formed by the people and not the States.[74] Whether a real or imagined threat, this helped push the South along the path to secession. Jefferson, himself recognizing the danger posed by such nationalistic decisions, stated that the nationalists "imagine they can lead us into a consolidated government, while their road leads directly to its dissolution."[75]

Secession declarations did not criticize the U.S. Constitution but, instead, criticized the North for perverting it:

> an increasing hostility on the part of the non-slaveholding States to the Institution of Slavery has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution. . . . Thus the constitutional compact has been deliberately broken and disregarded by the non-slaveholding States, and the consequence follows that South Carolina is released from her obligation.

Declaration of the Immediate Causes Which Induce and Justify Secession of South Carolina from the Federal Union 6–7 (Dec 24, 1860) (Evans & Cogswell 1860).

[73] See, for example, Fletcher v Peck, 10 US (6 Cranch) 87 (1810) (invalidating an act of the Georgia legislature that had retracted land transfers procured from an earlier state legislature through bribery); New Jersey v Wilson, 11 US (7 Cranch) 164 (1812) (holding that the State impaired the obligation of contract by revoking a tax exception); Fairfax's Devisee v Hunter's Lessee, 11 US (7 Cranch) 603 (1813) (finding that the Virginia Supreme Court had misconstrued its forfeiture laws in confiscating land of British subject); Martin v Hunter's Lessee, 14 US (1 Wheat) 304, 332 (1816) (holding that the U.S. Supreme Court has appellate jurisdiction over the decisions of state courts in certain cases arising under the Constitution, treaties, or laws of the United States); McCulloch v Maryland, 17 US (4 Wheat) 316 (1819) (interpreting the Necessary and Proper Clause broadly to hold that a national bank was necessary and proper to Congress's enumerated powers); Trustees of Dartmouth College v Woodward, 17 US (4 Wheat) 518 (1819) (holding that a college charter of incorporation was a contract protected by the Constitution against state infringement); Cohens v Virginia, 19 US (6 Wheat) 264 (1821) (holding that the U.S. Supreme Court had jurisdiction to determine the validity of a state criminal law); Gibbons v Ogden, 22 US (9 Wheat) 1 (1824) (Marshall) (giving an expansive reading to the Commerce Clause to hold that a federal shipping statute superseded a state law that granted a shipping monopoly); Prigg v Pennsylvania 41 US (16 Peters) 539 (1842) (holding Pennsylvania kidnapping statute unconstitutional because it interfered with the authority granted to Congress by the Fugitive Slave Act).

[74] See Hunter's Lessee, 14 US at 304 ("The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the Preamble of the Constitution declares, by ''the people of the United States.'"); Chisholm, 2 US at 470–71 (Jay) ("[T]he people, in their collective and national capacity, established the present Constitution …"). See also Gerald Gunther, ed, John Marshall's Defense of McCulloch v. Maryland 203, 211 (Stanford 1969) ("Our Constitution is not a compact. It is the act of a single party. It is the act of the people of the United States, assembling in their respective states, and adopting a government for the whole nation.").

[75] Jefferson to Edward Livingston, Mar 25, 1825, in WTJ 16: 113 (cited in note 16); see id (predicting that "a few such doctrinal decisions, as barefaced as that of [Cohens v Virginia, 19 US (6 Wheat) 264 (1821)] happening to bear immediately on two or three of the large States" might result in the States "arresting the march of the government" to "bring back the compact to its original principles, or to modify it legitimately by the express consent of the parties themselves, and not by the usurpation of their created agents"); Jefferson to Nicholas, Dec 11, 1821, in WTJ at 15: 350–52 (cited in note 16) (analogizing the Alien and Sedition Act crisis of 1798 to the Court's "assaults on the Constitution"); Jefferson, Autobiography, Jan 6, 1821, in id at 1: 113 (noting with condemnation and, apparently, with Marshall in mind, judges' practice "of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power").

The disregard for the true meaning of the Constitution was also perceived in the North's treatment of fugitive slaves. The Fugitive Slave Act (part of the Compromise of 1850) and the Northern States' personal liberty laws were the subject of much Southern animosity toward the North and vice-versa.[76] Even Senator Webster, Hayne's nationalist opponent, agreed Northern States were disregarding the Constitution:

> What right have [Northern abolitionists] . . . to endeavor to get round this Constitution, to embarrass the free exercise of the rights secured by the Constitution, to the persons whose slaves escape from them? None at all . . . I say that the South has been injured in this respect and has a right to complain.[77]

After all, the Constitution explicitly required the return of fugitive slaves.[78]

Slavery's expansion into the territories also served to focus the animosity between the North and the South. The Missouri Compromise in 1820 and the Compromise of 1850 both attempted to resolve the differences between the North and the South on slavery in new States and the federal territories.[79] The Kansas-Nebraska Act, passed in 1854, continued to try and reach a tenable compromise on the slavery issue but led to violence between the sectional interests in the mid-west.[80] The bloodshed was not limited to the plains of Kansas and extended to the Senate floor. In May of 1856, Representative Preston Brooks of South Carolina was so enraged by an anti-slavery speech (which also insulted his uncle, Senator Andrew Butler) that he assaulted Sumner as he sat at his desk in the Senate chamber and rendered him unconscious.[81] The bloodshed surrounding the Kansas-Nebraska Act was followed by disputes over Congressional power to ban polygamy in the Utah territory (a Congress that could ban polygamy could ban slavery) and John Brown's raid on a federal arsenal at Harper's Ferry.[82]

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[76] See Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780–1861 (Johns Hopkins 1974); William W. Freehling and Craig M. Simpson eds, Secession Debated: Georgia's Showdown in 1860 viii (Oxford 1992); id at 27 (statement of Thomas R.R. Cobb); id at 41–42 (statement of Robert Toombs); id at 70–71 (statement of Alexander H. Stephens); id at 83–84 (statement of Benjamin H. Hill).

[77] Daniel Webster, A Plea for Harmony and Peace, in Annals of America 8: 25–26 (Britannica 1976). Northern abolitionists severely criticized Webster for supporting the Fugitive Slave Act. See Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of Slavery 398–99 (1998).

[78] See US Const Art IV, § 2, cl 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[79] See generally Potter, Impending Crisis: at 199–225 (cited in note 69).

[80] The Kansas-Nebraska Act probably favored Southern interests as it served to repeal the Missouri Compromise's ban on slavery in parts of the Louisiana purchase and submit the slavery question to a popular vote. In anticipation of the vote freesoilers and slavery proponents "moved" to Kansas in order to vote. In the process, blood was spilled in a conflict that served as an antecedent to the war that was to come. See Stampp, America in 1857 at 144–81, 257–331 (cited in note 11).

[81] See David Donald, Charles Sumner and the Coming of the Civil War 278–311 (Knopf 1960).

[82] See David P. Currie, The Constitution in Congress: Descent into the Maelstrom ch 7 §§ II, III (forthcoming Chicago 2004).

Fear of the national government grew as the South became outnumbered in the Senate.[83] The South, wary of federal interference with slavery, demanded more protection for the peculiar institution. In 1860, such demands caused the Democratic Party to splinter.[84] This splintering led, in part, to Abraham Lincoln's election in 1860, which was the last straw for the deep South.[85] In the view of many Southerners, the Constitution had been perverted and the Union now presented a severe threat to Southern values and interests.[86] Then U.S. Senator Jefferson Davis captured this understanding when he rhetorically asked the Senate, "Who would keep a flower, which had lost its beauty and fragrance, and in their stead had formed a seed-vessel containing the deadliest poison?"[87] Due to slavery's importance in the South, Jefferson's and Antifederalists' hypothetical concerns of a powerful centralized government were a tangible economic and social reality for the South.[88] As a result, the ongoing debate between nationalists and States' rightists went from a simple push and pull to a nation divided.[89] At this point seven

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[83] See Currie, Descent into the Maelstrom at ch 6 §I (cited in note 82).

[84] Potter, Impending Crisis at 405–47 (cited in note 69).

[85] The feelings of much of the deep South were expressed in an editorial in the New Orleans Crescent: "There is a universal feeling that an insult has been deliberately tendered our people, which we responded to . . . [by] a settled determination that the South should never be oppressed under Lincoln's administration." Dumond, ed, Southern Editorials on Secession at xvi–xvii (cited in note 12).

[86] It seems that a fear of the new administration drove secession more than the past transgressions. A Montgomery Convention member would write after the war:

> The Southern States believed that their sovereignty was threatened with overthrow, that a complete revolution of the Government would occur, destruction of out constitutional republican system, and alike destruction of the liberties of the people, by the election of the Republican candidates in 1860, if the principles of the party electing them should be carried into execution. They believed that the agency created and clothed with power, and charged with the duty of preserving the States, and defending them in enjoyment of their sovereign powers, was about to pass into the hands of those who would use the means placed in their hands to destroy the States; they believed that the agency upon which they had conferred the administration of their external, or foreign powers of government, was about to pass into the hands of those who intended to grasp the powers of internal government also, and centralize and consolidate both in the same hands, and that these threatened acts, if carried into execution, would result in the destruction of the Constitution.

Oldham, 6 DeBow's Review at 740–41 (cited in note 68).

[87] Cong Globe, 36 Cong, 2d Sess 28 (Dec 10, 1860); see notes 70–72 and accompanying text.

[88] In 1860, the total slave population in the U.S. was almost 4 million (3,953,760), worth well over a billion dollars to their owners. Department of Commerce, Bureau of the Census, Negro Populations 1790–1915 53–57 (GPO 1968); John Hope Franklin, From Slavery to Freedom 185–86 (Knoph, 3 ed, 1967).

[89] See Donald W. Livingston, Philosophical Melancholy and Delirium: Hume's Pathology of Philosophy 363–64 (Chicago 1998):

> For seventy years American politics was a struggle between the Jeffersonian and Hamiltonian visions, until in 1861 Jefferson's beloved State of Virginia and ten other contiguous States, alarmed by the growth of power in the central government, and armed with Jefferson's constitutional arguments, recalled those powers they had delegated to the central government and seceded from the federation to form a union which could more perfectly preserve what they considered to be the original federal principles of the Constitution.

See also The Address of the People of South Carolina, Assembled in Convention, to the People of the Slaveholding States of the United States, in Journal of the Convention of the People of South Carolina, Held in 1860, 1861 and 1862, Together with the Ordinances, Reports, Resolutions, etc. 467 (R.W. Gibbes 1862) ("The one great evil, from which all other evils have flowed, is the overthrow of the Constitution of the

Southern States seceded from the Union and would later be followed by four more.[90] The young Confederacy drew heavily from the words and perceived wisdom of Jefferson. On the day Alabama ratified the Permanent Confederate Constitution, a delegate in the Alabama Convention noted, "[n]ever before have I seen the people of Jefferson so united as they are to-day."[91]

II. CONFEDERATE CONSTITUTIONS: PROVISIONAL AND PERMANENT

South Carolina was the first State to secede on December 20, 1860 and to suggest a plan for a Convention of the Southern States.[92] Five States followed: Mississippi on January 9, 1861, Florida on January 10, Alabama on January 11, Georgia on January 19, and Louisiana on January 24.[93] Mississippi included a preview of the Permanent Confederate Constitution in its ordinance of secession, providing for the founding of a new "Federal Union . . . upon the basis of the present Constitution of the said United States."[94] This Part looks at the Montgomery Constitutional Convention and provides background on the drafting of the Provisional and Permanent Constitutions.

A. Montgomery Convention

A Convention of these first six States to secede (later joined by Texas[95]) met on February 4, 1861 in Montgomery, Alabama to begin the process of forming a

United States. The Government of the United States is no longer the Government of Confederated Republics, but of a consolidated Democracy.").

[90] The constitutionality of secession is itself an interesting and, perhaps, unanswerable question. See Currie, Descent into the Maelstrom at ch 7 §VI (cited in note 82) (concluding that the best evidence supports the unconstitutionality of secession); Farber, Lincoln's Constitution at ch 4 (cited in note 66) (same).

[91] William R. Smith, The History and the Debates of the Convention of the People of Alabama, Begun and Held in the City of Montgomery, on the Seventh Day of January, 1861; In Which is Preserved the Speeches of the Secret Sessions, and Many Valuable State Papers 340 (White Pfister & Co 1861) (William S. Earnest).

[92] As early as December 19, 1860, resolutions were offered in the South Carolina Convention to hold a Southern Convention. See The Address of the People of South Carolina to the People of the Slaveholding States, in SC Journal at 34, 36 (cited in note 89). In order to examine these resolutions, a committee on "relations with the slaveholding States of North America" was formed and reported to the Convention five days after secession from the Union. See id at 35–36, 87. The Report and Resolutions provided for the appointment of commissioners to the other slave States, *inter alia*, to invite the slave States to a Convention. See id at 87, 480. The Resolutions were passed on December 31. See id at 151. This call for Convention was repeated by the States that followed South Carolina. See, for example, Smith, Alabama Debates at 77 (cited in note 91) (Report and Resolutions of the Committee of Thirteen) ("This Convention, in the resolutions accompanying the Ordinance dissolving the Union, has already responded to the invitation of the people of South Carolina, to meet them in Convention for the purposes indicated in their resolutions, and have named Montgomery, in this State, and the 4th day of February.").

[93] Virginia, Arkansas, North Carolina, and Tennessee did not secede until after the attack on Fort Sumter in April of 1861.

[94] Proceedings of the Mississippi State Convention, Held January 7th to 26th, A. D. 1861. Including the Ordinances, as Finally Adopted, Important Speeches, and a List of Members, Showing the Postoffice, Profession, Nativity, Politics, Age, Religious Preference, and Social Relations of Each 9 (Power & Cadwallader 1861); accord SC Journal at 92–93, 143 (cited in note 89); Smith, Alabama Debates 77, 139–40.

[95] The Secession Convention in Texas adopted a secession ordinance on February 1, 1861 but was late to

confederation of States based upon the U.S. Constitution.[96] All six original Confederate States authorized the holding of a Convention with the understanding that the new government would be based upon the U.S. Constitution.[97] A significant number of the delegates sent by the Southern States to Montgomery were national politicians, educated and indoctrinated in the American system of Government.[98] Their charge was to "frame a provisional government upon the principles of the Constitution of the United States, and also to prepare . . . a plan for . . . a permanent government . . . which shall be submitted to the Conventions of the seceding States for adoption or rejection."[99]

Thus, it was with the U.S. Constitution that the Convention began. The resulting variations from the U.S. Constitution made by the delegates revealed both ideas for improvement and a desire to alter the role of government in the new Confederacy from the 19th-century Northern interpretation of the U.S. Constitution. As Alexander Stephens of Georgia, Montgomery Convention delegate and later Vice-President of the Confederacy, stated in the years following the war, the Provisional and Permanent Constitutions of the Confederacy "show clearly that [the Montgomery delegates'] only leading object was to sustain, uphold, and perpetuate the fundamental principles of the Constitution of the United States."[100]

B. Provisional Constitution

In accord with the delegates' instructions from their respective state Conventions,[101] the first order of business upon arrival in Montgomery was to draft a constitution to govern the new nation until a permanent government and constitution could be adopted.

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the Convention. Governor Houston refused to convene the Texas legislature and the Convention ultimately submitted the ordinance of secession to popular vote. See E. W. Winkler, ed, Journal of the Secession Convention of Texas, 1861 (Austin 1912); Walter L. Buenger, Secession and the Union in Texas (Texas 1984). Despite Texas's absence from the early stages of the Convention, its delegates were present when the Permanent Constitution debate took place. See Journal of the Congress of the Confederate States of America, 1861–1865 I: 92, 896 (GPO 1904) ("Confed J").

[96] See, for example, SC Journal at 92–93, 143 (cited in note 89) (calling for a Convention of Slaveholding States which shall secede to draft a Constitution based on the Constitution of the United States); Smith, Alabama Debates 77, 139–40 (cited in note 91).

[97] See Smith, An Address at 1 (cited in note 10) (discussing the authority and powers granted the Convention by the State of Alabama); See Benjamin H. Hill (Georgia deputy), speaking to his constituents, quoted in William M Robinson, Jr., A New Deal in Constitutions, 4 J of Southern History 449, 450 (1938) ("We have not abandoned the provisions of the Old Constitution nor set at naught the wisdom of its framers. The framers of the New . . . have improved upon the Old—not because they are wiser—but because they had the light of seventy-three years' experience to guide them.").

[98] See Armand J. Gerson, Inception of the Montgomery Convention, in American Historical Association, Annual Report, 1910 179–87 (Washington 1912). See also Thomas B. Alexander and Richard E. Beringer, The Anatomy of the Confederate Congress: A Study of the Influences of Member Characteristics on Legislative Voting Behavior 1861–1865 (Vanderbilt 1972).

[99] Confed J at I: 17 (cited in note 95) (stating that Alabama's Secession Convention followed South Carolina's suggested plan, like other States).

[100] Stephens, A Constitutional View at II: 335–36 (cited in note 6).

[101] See, for example, Confed J at I: 17 (cited in note 95) (Alabama instructions: "frame a provisional government upon the principles of the Constitution of the United States, and also to prepare . . . a plan for . . . a permanent Government").

A committee was formed to report a plan of a provisional government.[102] The committee was chaired by Christopher Memminger[103] of South Carolina, who arrived at the Convention with a draft for the provisional Constitution.[104] Memminger's committee included Robert Barnwell Rhett[105] of South Carolina; William Barry[106] and Wiley Harris[107] of Mississippi; James Anderson[108] and James Owens[109] of Florida; Richard Walker[110] and Robert Smith[111] of Alabama; Alexander Stephens[112] and Eugenius Nisbet[113] of Georgia; and John Perkins[114] and Duncan Kenner[115] of Louisiana.[116]

Prior to the debate or adoption of the Provisional Constitution, the Convention delegates debated whether they were to act as a provisional legislature.[117] Although not

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[102] Confed J at I: 19 (cited in note 95).

[103] See Henry D. Capers, The Life and Times of C. G. Memminger (Everett Waddey 1898). Capers was Memminger's first clerk in the Confederate Treasury department. Memminger was a lawyer by trade, served in the state legislature from 1836–60, with the exception of the years 1853–54, and had served as the Secretary of the Treasury for South Carolina.

[104] Curry, Civil History at 48 (cited in note 8). No copy of this draft has been recovered; it was likely destroyed in the war. See Capers, The Life and Times of C. G. Memminger (cited in note 103) (unable to locate this draft). See generally note 151 (discussing the loss of documents from the Confederacy). Robert Barnwell Rhett of South Carolina also arrived in Montgomery with a draft for the Permanent Constitution. See William C. Davis, Rhett: The Turbulent Life and Times of a Fire-Eater 440–41, 441 n 81 (USC 2001) (describing Rhett's draft).

[105] See generally Davis, Rhett: The Turbulent Life and Times of a Fire-Eater (cited in note 104); Laura Amanda Rhett, Robert Barnwell Rhett: Father of Secession (Century 1931). Rhett was a wealthy planter and served in the state and U.S. legislatures.

[106] See generally William Taylor Sullivan Barry in Dictionary of American Biography (cited in note 105). Barry was a lawyer and served in the state and U.S. legislatures.

[107] See generally Autobiography of Wiley P. Harris, in Dunbar Rowland, Courts, Judges, and Lawyers of Mississippi, 1798–1935 270 (State Department of Archives and History 1935). Harris was a lawyer and served on the U.S. bench and in the U.S. legislature.

[108] See generally James P. Anderson, Autobiography, in James Patton Anderson Papers, Southern Historical Collection, University of North Carolina. Anderson was a lawyer and served in the state and U.S. legislatures.

[109] Owens was a planter and served in the state legislature. See generally <http://politicalgraveyard.com/bio/owenby-ozzard html> (visited Sept 10, 2002).

[110] Walker was a lawyer and planter by trade and served in the state legislature and on the Alabama Supreme Court. See Thomas McAdory Owen, History of Alabama and Dictionary of Alabama Biography IV: 1918 (S.J. Clarke 1921).

[111] See generally Robert Hardy Smith, in Dictionary of American Biography (cited in note 105). Smith was a lawyer and served in the state legislature and on the Alabama Supreme Court.

[112] See generally Alexander Hamilton Stephens, in Dictionary of American Biography (cited in note 105). Stephens was a lawyer and served in the state and U.S. legislatures.

[113] See generally Eugenius Aristides Nisbet, in Dictionary of American Biography (cited in note 105). Nisbet was a lawyer and served in the state and U.S. legislatures in addition to being among the first to sit on the Georgia Supreme Court.

[114] See generally Robert Dabney Calhoun, The John Perkins Family of Northeast Louisiana, XIX LA Historical Q 76 (Jan 1936). Perkins was a lawyer and served in the U.S. legislature and as a U.S. district court judge.

[115] See generally Duncan Farrar Kenner, in Dictionary of American Biography (cited in note 105). Kenner was a lawyer and wealthy planter in addition to serving in the state legislature and state Constitutional Conventions of 1844 and 1852.

[116] Confed J at I: 22 (cited in note 95).

[117] Id at I: 19–20.

universally, the majority supported a resolution calling for the convention to accept the legislative function as "a part of the duties incumbent upon the members of this Congress."[118] The delegates' instructions did not give the Convention the power to act as a legislative body; thus, until the Provisional Constitution granted this power, the legislative actions of the convention appear to have been an illegitimate act of expediency.[119] In any event, the Provisional Constitution provided support for the exercise of legislative power by the Convention very quickly. The Provisional Constitution was drafted by committee, debated by the Convention delegates, and adopted all within four days.[120]

The Provisional Constitution contained a sunset period of one year after which it would no longer be operative.[121] The desire for expediency prevented this sunset provision from coming into play: the Convention and respective States took only two months to have the Permanent Constitution drafted, debated, signed by the delegates, and ratified by the requisite five States.[122]

The Preamble to the Provisional Constitution made clear that the fledgling nation intended to be a union of sovereign and independent States joined by compact: "We, the Deputies of the Sovereign and Independent States of South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana . . . "[123] This change, preserved in a different manner in the Permanent Constitution,[124] makes explicit the delegates' belief that each State was sovereign and independent.[125] While still failing to use the word "compact," this change does support the claim that the South desired to adopt a Jeffersonian States' rights interpretation of the federal system.[126]

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[118] Id at I: 20.

[119] State Constitutional Conventions would exercise this dual power without explicit grants of such power. See generally Roger Sherman Hoar, Constitutional Conventions: Their Nature, Powers, and Limitations XI, §8 (Little Brown 1917) (discussing the practice from 1865–1901).

[120] See Charles Robert Lee, The Confederate Constitutions 66–67 (North Carolina 1963). The Convention formed a drafting committee on February 5th, Confed J at I: 22 (cited in note 95), and the Provisional Constitution was debated from February 7th until its adoption on February 8th. Id at I: 39.

[121] CS Provisional Const, Preamble (" . . . ordain and establish this Constitution for the Provisional Government of the same: to continue one year from inauguration of the president, or until a permanent constitution or Confederation between the said States shall be put into operation.") (emphasis added).

[122] See Confed J at I: 896 (cited in note 95). Mississippi was the fifth State to ratify the new Constitution on March 26, 1861. See Journal of the State Convention and Ordnances and Resolutions Adopted in March, 1861 35 (E Barksdale 1861) (Journal of the Mississippi Convention). For the number of States required for ratification, see CS Const, Art VII. Florida was the last of the original seven States to ratify the Constitution, and it did so on April 18. See Journal of the Proceedings of the Convention of the People of Florida 36 (Dyke & Carlisle 1861).

[123] CS Provisional Const, Preamble; see also Lee, The Confederate Constitutions at 68 (cited in note 120).

[124] See notes 155–174 and accompanying text.

[125] As one Convention delegate stated after the War: "I have defined sovereignty to be the inherent power to establish, organize, sustain, and administer government. This power always rests primarily in the State—the people constituting the political community." Oldham, 6 DeBow's Review at 738 (cited in note 68).

[126] Nothing should be made of the absence of the "people" from the Provisional Constitution. Their absence was merely a statement of fact—the Provisional Constitution was never submitted to the people.

Many of the changes in the provisional Constitution are best understood not as ideological changes but those of necessity and haste.[127] For example, the unicameral legislature was practical given that the Convention was present in Montgomery and could effectively serve the dual role of constitutional Convention and legislature on a temporary basis.[128] Additionally, the amendment procedure illustrated the transitory nature of the document in that two-thirds of the Congress could alter or amend the Provisional Constitution.[129] Stephens, in a letter to his brother concerning the Provisional Constitution, captured the general idea: "It is the constitution of the United States with such changes and modifications as are necessary to meet the exigencies of the times."[130]

C. Permanent Constitution

Following the adoption of the Provisional Constitution, the Montgomery Convention formed a drafting committee of twelve delegates on February 9, 1861 to begin work on a Permanent Constitution.[131] The committee was composed of Robert Barnwell Rhett[132] and James Chesnut[133] of South Carolina; Alexander Clayton[134] and Wiley Harris[135] of Mississippi; Jackson Morton[136] and James Owens[137] of Florida; Richard Walker[138] and Robert Smith[139] of Alabama; Robert Toombs[140] and T.R.R. Cobb[141]

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[127] There were some ideological changes; two warrant mention. First, States were made financially responsible in the case of abduction or forcible rescue of a fugitive slave. See CS Prov Const Art IV, § 2, cl 3:

> A slave in one State, escaping to another, shall be delivered up on claim of the party to whom said slave may belong by the executive authority of the State in which such slave shall be found, and in case of any abduction or forcible rescue, full compensation, including the value of the slave and all costs and expenses, shall be made to the party, by the State in which such abduction or rescue shall take place.

This change did not survive in the Permanent Constitution. See notes 297–305. Second, the line item veto for appropriations was added by Robert Smith of Alabama. See CS Prov Const Art I, §5 ("The President may veto any appropriation or appropriations and approve any other appropriation or appropriations in the same bill."). The line item veto was also included in the Permanent Constitution. See notes 255–257 and accompanying text.

[128] See Lee, The Confederate Constitutions at 68 (cited in note 120) ("The majority however finally determined that the exigency required more prompt and decisive action [in the form of a unicameral legislature].") (quoting William S. Wilson, Mississippi delegate, in a letter to a friend).

[129] Another potential example is the reengineering of the judicial system to remove circuit courts and make each State a single district. This may be explicable as logistical expediency but may also be the result of a desire to limit avenues by which individuals outside a State could sit in judgment of intrastate disputes by removing the circuit level of judges.

[130] Alexander H. Stephens to Linton Stephens, Feb 9, 1861 (UNC Southern Historical Collection).

[131] Confed J at I: 41 (cited in note 95).

[132] See note 105.

[133] See generally James Chesnut, Jr., in Dictionary of American Biography (cited in note 105). Chesnut was a lawyer and served in the state and U.S. legislatures.

[134] See generally Biographical and Historical Memoirs of Mississippi I: 556 (Goodspeed 1891). Clayton was a lawyer and served on the U.S. bench and the Mississippi Supreme Court.

[135] See note 107.

[136] See generally Biographical Directory of the American Congress 1774–1949, 724 (GPO 1950). Morton was a plantation owner and served in the state and U.S. legislatures.

[137] See note 109.

[138] Walker served as a state legislator and an associate justice of the Alabama Supreme Court. See The

of Georgia; and Alexander DeClouet[142] and Edward Sparrow[143] of Louisiana. All members of the committee had served in their respective state legislatures, five in the U.S. Congress, and four on a state or federal bench. Rhett arrived in Montgomery with a draft for the Permanent Constitution[144] and was elected chairman. One of Rhett's published letters provides some of the only first-hand, though retrospective, discussion of the Confederate Constitution.[145]

It took the committee nineteen days to present a draft of the Permanent Constitution.[146] The Convention held ten days of debate[147] before the Permanent

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Political Graveyard, available at <http://politicalgraveyard.com/bio/walker7.html> (visited on Sept 9, 2002).

[139] See note 111.

[140] See generally Ulrich Bonnell Phillips, The Life of Robert Toombs (Macmillan 1913). Toombs was a lawyer and served in the state and U.S. legislatures.

[141] See generally William B. McCash , Thomas R.R. Cobb (1823–1862): The Making of a Southern Nationalist (Mercer 1983). T.R.R. Cobb was a lawyer and author of the leading treatise on slavery. See T.R.R. Cobb, An Historical Sketch of Slavery, From the Earliest Periods (T & J W Johnson 1858).

[142] See generally Biographical and Historical Memoirs of Louisiana II: 475 (Goodspeed 1891). DeClouet was primarily a wealthy sugar planter. He practiced law for a short time and served in the state legislature.

[143] See generally Robert Dabney Calhoun, A History of Concordia Parish, XV Louisiana Historical Quarterly 447 (July 1932). Sparrow was a lawyer and served in various judicial capacities as well as in the state legislature.

[144] See Davis, Rhett: The Turbulent Life and Times of a Fire-Eater at 440–41, 441 n 81 (cited in note 104) (describing key changes from the U.S. Constitution in Rhett's draft):

> (1)making clear through the Preamble that each sovereign State retained "its sovereignty freedom and independence and every power jurisdiction and right" except those explicitly delegated in the Constitution
>
> (2) counting slaves in full for apportioning representatives
>
> (3)requiring two-thirds of the members of each house, as opposed to merely two-thirds of those present, to overturn a presidential veto
>
> (4)requiring that "no tax duty impost or excise shall be laid to foster or promote one branch of industry rather than another; nor shall any tax or duty be laid on importations from foreign nations, higher than fifteen percent on their value"
>
> (5)adding that Congress could, but need not, prohibit the slave trade
>
> (6) changing the presidential term to one six-year term
>
> (7)amending the oath of office to include an avowal to "preserve protect and defend the Sovereignty of the States"
>
> (8)eliminating recess appointments
>
> (9)strengthening the fugitive slave provision by imposing liability upon the States
>
> (10) specifying that the territories belonged to "all States and the people thereof"
>
> (11) allowing that "any State whenever it deems expedient may exercise its sovereign right of withdrawing peaceably from the Confederacy"

[145] R. Barnwell Rhett to T. M. Stuart Rhett, Apr 15, 1867, reprinted in 6 Debow's Review 929 (Nov 1869).

[146] The committee worked very hard to produce the draft within such a short time frame. The drafting of the Permanent Constitution were supplementary to their duties in the Provisional Congress. T.R.R. Cobb gives a description of his schedule during the drafting:

> I am working hard. Immediately after breakfast the Judiciary Committee meets. We work until 12 o'clock. Congress then sits until 3 or 4. From that time until night I work on my committee on Printing.

Constitution was adopted unanimously and sent to the States on March 11, 1861.[148] The short time frame for drafting and adoption is even shorter than it appears. Due to the ongoing duties of the members of the committee in the Provisional Congress, the drafting committee only met and worked on the draft for several hours in the evening during the nineteen days it took to present a draft.[149] Furthermore, the ten days of debate were actually half days, as members convened as the Provisional Congress in the morning and re-convened as a Convention in the afternoons.[150]

Like members of the Philadelphia Convention in 1787, Convention members swore to secrecy. Regrettably the Montgomery Convention lacked a "James Madison" who recorded the debate at the Constitutional Convention. Any extensive notes that may have been madewere evidently destroyed in the war or Reconstruction.[151] The Journal of the Congress of the Confederate States of America provides the committee's draft and proposals and voting but without any debate. The notes of T.R.R. Cobb on the drafting of the Constitution are preserved, but provide less detail than the Journal of the Convention.[152] As a result, analysis of the Confederate Constitutional Convention is largely left to supposition and extrapolation. However, this does not leave us empty-handed, as the constitution's text and other sources do shed light on the Convention and the ideas emanating from it.

The final version of the Permanent Constitution was ratified by the requisite five States by March 26, 1861.[153] It roughly approximated the U.S. Constitution with several

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> At 7: 30 o'clock P.M. the Committee on the Constitution meets and works until 10. Then I have my correspondence to bring up.

T.R.R. Cobb to his wife, Feb 13, 1861 (T.R.R. Cobb Papers, Special Collections Division, University of Georgia (UGA)). The next day, Cobb wrote: "The Committee [drafting the Permanent Constitution] work on it every night. . . .We have agreed to go over it by paragraphs for revisal and then we shall report it. I am sure it will be adopted by the last of next week and then I am of love and home." T.R.R. Cobb to his wife, Feb 14, 1861 (UGA).

[147] See Confed J at I: 851–896 (cited in note 95).

[148] Id at I: 896.

[149] See note 146 (describing the daily routine of drafting committee member T.R.R. Cobb).

[150] Confed J at I: 94 (cited in note 95) (resolving on a motion by Jackson Morton of Florida to meet as the Provisional Congress in the mornings and resolve back into Convention to consider the draft of the Permanent Constitution after noon each day "until the same shall be disposed of").

[151] See generally George Wymberley Jones DeRenne, A Short History of the Confederate Constitutions of the Confederate States of America 1861–1899 *2–4 (Morning News Press 1909). DeRenne tells the tale of how a Confederate newspaper correspondent, who had found refuge in a store attic in Chester, SC, was told of a shipment of Confederate documents that had arrived on train just before the Federal troops. He loaded a wagon full of the Confederate records from Richmond. The correspondent stated, "Much had to be left behind, but I have thought many more times that a little more opportunity and a few more wagons would have enabled me to save some of the most valuable records of the Confederate Government." Id. In the wagonload of records he saved from the federal troops, the correspondent found manuscript copies of the Provisional and Permanent Constitution. One can easily imagine this scene taking place all over the South, resulting in the tragic loss of the records and documents that would help historians and constitutional scholars fill in the gaps.

[152] See A.L. Hull, The Making of the Confederate Constitution, in Publications of the Southern Historical Association IX: 286 (Sept 1905).

[153] See note 122.

significant (and insignificant) changes. Among the significant changes were a revised Preamble, a more limited taxation power, a denial of authority to Congress to appropriate money for internal improvements to aid in commerce, a means for state impeachment of federal officers, several increased institutional obstacles to legislating, the elimination of diversity jurisdiction, a more flexible amendment procedure, and stronger protections for slavery.

III. STATES' RIGHTS ALTERATIONS IN THE PERMANENT CONFEDERATE CONSTITUTION

A. Preamble

> We, the People of the [United States][154] *Confederate States, each State acting in its sovereign and independent character,* in order to form a [more perfect Union] *permanent Federal government,* establish Justice, insure domestic Tranquility [provide for the common defense, promote the general Welfare], and secure the Blessings of Liberty to ourselves and our Posterity, *invoking the favor and guidance of Almighty God,* do ordain and establish this Constitution for the [United] *Confederate* States of America.

The Confederate founders believed that interpretation of the U.S. Constitution's Preamble was at the core of the Union's perversion of the U.S. Constitution: "The whole Constitution [of 1787], by the construction of the Northern people, has been absorbed by its Preamble."[155] Following the Provisional Constitution, the changes made by the Confederate Constitution seem to be an attempt to resolve the debate over the proper interpretation of the Preamble and, collaterally, whether the U.S. Constitution created a mere compact between the States.[156] The Preamble of the Permanent Constitution followed the Provisional Constitution's pattern of expressing the independent, sovereign nature of the States,[157] joining together via compact to create the Confederate States of America.[158] This change embodied the Southern view that the U.S. Constitution properly should have been understood as a compact between the States (and/or the People thereof).[159] Alexander Stephens described the Confederate Preamble as clearly establishing a union of States and not of the combined people: "the words 'each State acting in its Sovereign and Independent Character' were introduced to put at rest forever

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[154] The bracketed text is that of the U.S. Constitution which was deleted, and the italicized text is that added by the Confederate Constitution. See Appendix A (reprinting the U.S. and C.S.A. Constitutions in parallel columns).

[155] Address of South Carolina to the Slaveholding States at 471 (cited in note 89). See Newmyer, John Marshall and the Southern Constitutional Tradition at 105 (cited in note 46).

[156] See notes 50–67 and accompanying text.

[157] See notes 123–124 and accompanying text.

[158] See Lee, The Confederate Constitutions at 145 (cited in note 120) ("The Preambles of the Confederate Constitutions describe a confederation of sovereign States and not a sovereign confederation of people.").

[159] See Alexander H. Stephens, A Comprehensive and Popular History of the United States 559 (UNC 1884) (stating that the Confederate Preamble stressed that the Constitution was the action of individual States and not of a collective people).

the argument . . . that it had been made by the people of all the States collectively, or in mass, and not by the States in their several Sovereign character."[160] Joseph Story's Commentaries, after the Civil War, explained the importance of the interpretive change established by the Confederate Constitution's Preamble:

> When, in 1861, the people of that section of the country in which the doctrines of Mr. Tucker [see St. George Tucker, Blackstone's Commentaries 170 note D (Birch & Small 1803)] had taken most root, attempted to withdraw from the Union and establish a government of Confederate States, they endeavored by their constitution to preclude forever such a construction of the instrument as had prevailed regarding the Constitution of the United States. The Preambles of the two instruments placed side by side will show very distinctly the difference in the ends sought. [161]

There were two other relevant changes in the committee draft of the preamble that would become part of the Permanent Constitution. First, there was a wording change from the U.S. Constitution's "to form a more perfect Union" to "to form a permanent Federal Government." While not a significant change, the formation of a permanent[162] federal government does not carry the same implication of consolidation as "Union" and reinforces the compact theory of government. More importantly, the changed language directly rebuked Lincoln's rhetorical claims of the importance of the "Union."[163] Second, the committee limited the scope of the Preamble by removing the phrasing "provide for the common defense, promote the general Welfare." As we will see in regard to Article I, Section 8, Clause 1, the meaning of the General Welfare Clause was an issue that would be resolved by removing the language from that clause as well. This seemingly indicates that the scope of the Confederate federal government was less than that which could have been exercised by the U.S. federal government—a minor, yet revealing change.

While the language of the Preamble ultimately adopted was not exactly the same as that initially proposed by the committee, it was substantially similar.[164] The two changes

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[160] Stephens, A Constitutional View at II: 335 (cited in note 6).

[161] See Joseph Story, Commentaries on the Constitution of the United States I: §220 n2 (Little, Brown, 4th ed, 1873) (notes and additions by Thomas M. Cooley).

[162] Given the understanding of the constitution as forming a compact and the recent secession from the United States, the inclusion of "permanent" must be in contrast to the earlier Provisional Constitution and not a statement about the ability of the confederation to dissolve or the right to secede. See William R. Leslie, The Confederate Constitution, 2 Mich Q Rev 153, 156 (1963) ("[W]hile it was being framed, it was referred to as the 'permanent constitution' to distinguish it from the provisional constitution under which the government was actually operating at the time.").

[163] Compare, for example, Abraham Lincoln, First Inaugural Address, Feb 4, 1861, in Richardson, Messages and Papers at 6: 10 (cited in note 59) ("the Union will endure forever").

[164] See Committee on Permanent Constitution, Draft of Permanent Constitution, in Confed J I: 851 (cited in note 95):

> We, the people of the Confederate States, each State acting for itself, and in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—to which ends we invoke the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America.

were the phrasing of the "invoking Almighty God" clause,[165] and the removal of "for itself" phrasing when referring to the actions of each State.[166] However, some of the proposed amendments to the committee draft themselves shed a little light on the founders' ideas.

To begin the debates, Harris introduced the first amendment to the committee's proposal, which would have removed mention of "each State acting" and referred solely to the people acting.[167] This amendment ultimately lost after numerous attempted amendments to revert, at least in part, to a version which indicated the action of the people of each Confederate State and not the people as a whole. Withers lost a proposed amendment to Harris's amendment to strike the "We the people of."[168] This would have removed the people from the Preamble altogether, presumably to indicate that the compact was formed by the States and not the people. Hill moved, and lost, to change the Preamble to explicitly indicate that the States and not the people were acting to form the government.[169] Smith prevailed in changing the introductory clause to read, "We, the people of *each of* the Confederate States."[170] This amendment was clearly intended to unambiguously establish the Preamble's resolution of the debate over the nature of the Constitution. Chilton moved to amend the Preamble to read "each state acting for itself and in its sovereign and independent character."[171] Hill then prevailed in striking "for itself, and" from Chilton's amendment before the motion was defeated.[172] Finally, Harris amended the "Almighty God" clause to read "invoking the favor and Guidance of Almighty God."[173] So amended, the Preamble was adopted.[174]

The Preamble is a critical portion of the Constitution and sets out the basic tenets of the federal relationship. While retaining the "We the people," the Confederate founders made clear that the Constitution was a product of the people of each state and not of the people of the Confederate States as a whole. The Confederate founders made that relationship clear, at the start of the Convention and the beginning of the Constitution.

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[165] The committee version read "to which ends we invoke the favor and guidance of Almighty God;" the permanent version, "invoking the favor and guidance of Almighty God." Confed J at I: 851, 859 (cited in note 95).

[166] The committee version read "We, the people of the Confederate States, each State acting for itself, and in its sovereign and independent character;" the permanent version "We, the People of the Confederated States, each State acting in its sovereign and independent character." Id.

[167] Id ("We, the people of the Confederate States of America . . .").

[168] Id.

[169] Id ("The States of Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas, in order to form a permanent federal government . . . .").

[170] Id.

[171] Id.

[172] Id.

[173] Id. The invocation of the Deity was not present in the U.S. Constitution. See US Const, Preamble. However, twenty-eight of the thirty state constitutions in 1850 did recognize God. See Franklin Benjamin Hough, American Constitutions: Comprising the Constitutions of Each State in the Union and of the United States I: 439, 668 (Weed Parsons 1872) (Michigan and Kentucky's constitutions in 1860 did not mention God).

[174] Confed J at I: 859 (cited in note 95).

B. Article I: Legislative Branch

Article I of the Confederate Constitution, like that of the U.S. Constitution delineates the legislative power of the Confederate States. Six of the ten days spent debating the Permanent Constitution were spent on Article I.[175] This attention illustrates the importance placed on legislative powers: It was through the legislative actions of establishing a national bank, instituting protective tariffs, distributing public lands or their proceeds, and aiding internal improvements that the South saw undue power being concentrated in the central government.[176] Furthermore, and perhaps most critically, it was legislative power that posed the greatest threat to slavery; thus, the Convention was careful to create a legislative branch that would not be capable of accumulating the power to threaten the institution most important to the Southern States and their people.

One Convention member later stated: "The permanent Constitution was framed on the States' rights theory to take from a majority in Congress unlimited control."[177] Yet the changes did not go so far as to effect a return to the Articles of Confederation. Indeed, the Confederate Constitution left intact the most expansive grant of legislative power, the Necessary and Proper Clause.[178] However, the general shift was apparently toward limiting central legislative powers. The most significant changes to Article I are discussed below.[179]

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[175] See Confed J at I: 851–96 (cited in note 95).

[176] See notes 34, 73–75, 193–201, 216–228 and accompanying text.

[177] Curry, Civil History at 69 (cited in note 8).

[178] Why the Confederate Constitution did not choose to reverse prior U.S. interpretation of this clause is puzzling. Compare McCulloch v Maryland, 17 US (4 Wheat) 316 (1819). One may think that to the Confederate founders the Bank was inconsequential, beneficial, or, perhaps, that the test established by Marshall in McCulloch was acceptable even if the result was not. Cf David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888 (Chicago 1985) (praising Marshall's expression of the general principle while questioning Marshall's application of that principle to the Bank). Regardless, the apparently prevalent Southern distaste for the precedent established by McCulloch for interpreting the Necessary and Proper Clause (which, remaining unchanged in the C.S.A. Constitution, would likely be interpreted in the same manner as before unless a court found that the Preamble or other changes were sufficient to require a changed interpretation) suggests that the phrasing should have been changed in the C.S.A. Constitution so as to make reinterpretation more likely by the Confederate Courts. Perhaps the South, despite its grumblings, recognized the need for a broad Necessary and Proper Clause. C.S.A. President Davis stated, in response to a claim that the Confederate conscription laws were unconstitutional,

> I hold, that when a specific power is granted by the Constitution . . . 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 true and only test is to enquire 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.

Davis to Joseph E. Brown (May 29, 1862), in Dunbar Rowland, ed, Jefferson Davis: Constitutionalist: His Letters, Papers, and Speeches 5: 254, 256–57 (Mississippi Archive 1923). This language could easily have been written by Chief Justice Marshall in McCulloch as by the Confederate President. See McCulloch, 17 US (4 Wheat) at 316.

[179] Several less important, yet interesting, aspects of Article I do not warrant a full discussion: (1) Article I retained the three-fifths compromise by which representation and taxes were allocated by including three-fifths of all slaves. The Convention rejected a South Carolina representative's proposed an amendment to

1. Article I, Section 1: "Delegated" not "Granted"

> All legislative Powers herein [granted] *delegated,* shall be vested in a Congress of the [United] *Confederate* States.

The change from the U.S. Constitution's Article I Vesting Clause, like that of the Preamble, seems intended to make patently clear the relationship between the national government (here, the legislative body) and the state governments. "Delegated" instead of "granted" makes clearer that the Confederate legislative power comes from the sovereign powers of each State. For "delegate" indicates a grant from a superior (principle) to an inferior (agent),[180] while a "grant" need not have such a hierarchal connotation.[181] This further demonstrates the drafters' belief that the federal government was an agent of the States.

While this wording change seems insignificant, it, along with the re-worded Preamble, conveys a clearer sense of the States' role vis-à-vis the federal government and, therefore, might justify different interpretations of other, unaltered language in the Confederate Constitution, even though that language mirrors the U.S. Constitution.[182] Past interpretations relating to federalism would be distinguishable on the grounds that the Confederate Constitution clearly established a confederacy of sovereign States and not the consolidated nation to which, in the Southern view, the Northern perversions of

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allocate taxes and representation according to the States' respective populations excluding Indians but including slaves, see Confed J at 891 (cited in note 95). Perhaps, States such as South Carolina with a large slave population did want to count slaves in full (that is, they were willing to pay greater direct taxes in exchange for greater representation). The majority, however, desired the three-fifths compromise to remain in effect. A potential explanation might be that States felt that the compromise would balance out because all States were slave States. Another explanation might be that counting slaves in full might disrupt a State's balance of federal representatives between the large plantation areas and other areas. Alternatively, such a compromise was intended to attract the Border States by making clear that the heavily slave cotton States would not dominate the new government. (2) Article I provided a means for Congress to grant executive cabinet members a seat "upon either floor of either House, with the privilege of discussing any measures appertaining to his department." Robert Toombs had made such a suggestion in the U.S. Senate in 1859, Cong Globe, 35 Cong, 2 Sess at 286 (Jan 10, 1859), and Smith explained in his address to the people of Alabama: "The want of facility of communication between the Executive and Legislative, has, it is believed, been a serious impediment to the easy and harmonious working of the Government." Smith, An Address at 9 (cited in note 10); see also Davis, Rise and Fall at I: 224 (cited in note 6) ("This wise and judicious provision, which would have tended to obviate much delay and misunderstanding, was, however, never put into execution by the necessary legislation.").

[180] Calhoun, Discourse on the Constitution and Government of the United States, in Ross M. Lence, ed, Union and Liberty: The Political Philosophy of John C. Calhoun 194–196 (Liberty 1992); Calhoun, Letter to General Hamilton on the Subject of State Interposition, in Works of John C. Calhoun 6: 144, 151 (cited in note 51); Gunther, ed, John Marshall's Defense of McCulloch v. Maryland at 52, 56 (cited in note 74).

[181] Compare Joseph E. Worcester, A Dictionary of the English Language 377 (Hickling, Swan & Brewer 1860) (defining delegate, *inter alia*, "To intrust; to commit to another's power"), with id at 635 (defining grant, *inter alia*, "[T]o confer or bestow upon: to give").

[182] See Opinion of the Confederate Attorney General (To President Jefferson Davis, Mar 4, 1863), in The Opinions of the Confederate Attorneys General, 1861–1865 231, 238–41 (Dennis 1950) (Rembert W. Patrick, ed) (laying out a strongly States' rights perspective of the Confederate States); but see note 349 (citing Confederate Attorney General Opinions that used U.S. Supreme Court and U.S. Attorney General opinions as aids in interpreting the Confederate Constitution).

the U.S. Constitution were based. The reinterpretation that might be justified based upon this change may, however, be slight in theory and considerable in impact. For example, if the government is a compact of States, then an interpreter may begin reading the Constitution with a presumption that the government lacks the power, while an interpreter of a consolidated nation's constitution taking a less robust view of the States' reservation of powers, might feel no need for such a presumption (or apply an opposite presumption).[183]

2. Article I, Section 2: State Impeachment of Federal Officers

> The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment; *except that any judicial or other federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the Legislature thereof.*

The power retained by the States to impeach certain federal officers provided a means to check the power of the federal government.[184] A federal official serving in a State would be accountable to the State (through the State's impeachment power) and, thus, might think twice before acting against the States.[185] However, the States retained only the power to impeach, while the power to try all impeachments remained with the Senate.[186] Given the stringent criteria for conviction in the Senate,[187] this change likely would have had little effect on the workings of the government. Indeed, this provision was never utilized during the brief life of the Confederacy.

3. Article I, Section 8, Clause 1: Taxes and Tariffs

> To lay and collect Taxes, Duties, Imposts and *Excises, for revenue necessary* to pay the Debts [and], provide for the common Defense [and general Welfare of the

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[183] Compare notes 42–43 and accompanying text (discussing Jefferson's interpretive presumption that the national government lacked the power in question and Hamilton's presumption that the federal government had the power). See also Amar, Of Sovereignty and Federalism, 96 Yale LJ at 1452 (cited in note 66):

> Of course, as a logical matter, the question whether the People of the state or of the Union were sovereign did not necessarily dictate the allocation of power between state and federal government. . . . Nevertheless, the states' rights vision did at least support a rebuttable interpretive presumption favoring state legislatures over Congress, and state courts over the federal judiciary.

[184] Lee, The Confederate Constitutions at 145 (cited in note 120) ("The power of the States was also expanded in the judiciary provision allowing the impeachment of Confederate officials acting solely within the limits of a state by the legislature."). This provision was not part of the committee draft but was added during debate. See Confed J at I: 910 (cited in note 95) (approving T.R.R. Cobb's resolution).

[185] While the impeachment power is rarely used, the possibility of such severe punishment may still have an effect on the actions of officials.

[186] "It is but the inquest of the grand jury which is given the State." Smith, An Address at 21 (cited in note 10).

[187] See, for example, CS Const, Art I, §3, cl 6 ("no person shall be convicted without the concurrence of two thirds of the members present"); id, Art II, §4 ("The President, Vice President and all civil Officers fo the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

> United States]; *and carry on the government of the Confederate States; but no bounties shall be granted from the treasury, nor shall any duties, or taxes, on importation from foreign nations be laid to promote or foster any branch of industry*, and all Duties, Imposts, and Excises shall be uniform throughout the *Confederate States* [United States].

Drafting committee chairman Rhett stated: "The two great vital powers in all governments are the laying of taxes and the expenditure of taxes. These powers decide the character of every government, whether it is limited or unlimited, federal or consolidated; hence from the commencement of the Government of the United States, strife arose as to the extent of these powers."[188] Given this sentiment, it is not surprising that significant time was spent debating taxes and tariffs.

The Confederate Constitution eliminated the general welfare language, thereby limiting the scope of the Confederate national government. The U.S. Constitution provided Congress with the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the Common Defense and general Welfare of the United States." There were three possible interpretations of the Taxing Clause: (1) the view that the Clause granted Congress the power to enact all laws that it deemed for the general welfare;[189] (2) Hamilton's view that the Clause granted Congress the power to tax or spend for any purpose it deemed for the general welfare;[190] and (3) Madison's view that the Clause granted a power to tax and spend only for purposes elsewhere enumerated.[191] The first view was not widely held, but it had not been definitively rejected in 1861.[192] This very broad reading would have certainly offended Southern notions of federalism, and may have motivated removal of the Clause just to be safe.

Early U.S. Congressional interpretation seemingly indicated that Hamilton's interpretation as an independent grant of tax-and-spend power was not correct.[193]

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[188] Rhett to T. M. Stuart Rhett, Apr 15, 1867 (cited in note 79).

[189] See Brutus VI, Dec 27, 1787, reprinted in The Founders' Constitution 2: Art 1, §8, cl 1, doc 8 (Chicago 1987) (Phillip B. Kurland and Ralph Lerner, eds); see also Joseph Story, Commentaries on the Constitution of the United States ch XIV (Little, Brown, 2d ed, 1851) (attacking this view).

[190] See Alexander Hamilton, Report on Manufacturing, in Papers of Hamilton at 10: 303 (cited in note 34); see also Brutus I, NY J, Oct 18, 1787, reprinted in The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, Letters During the Struggle Over Ratification (Library of America 1993).

[191] See James Madison to Andrew Stevenson, Nov 27, 1830 (Supplement), in Writings of James Madison 9: 424 n 1, 428–29 (cited in note 65); see also Oliver Ellsworth, On the Power of Congress to Lay Taxes, Jan 7, 1788, reprinted in Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 190–97 (JB Lippincott, 2d ed, 1881).

[192] This view was raised in Congressional debates as late as 1935. See 79 Cong Rec 5688 (April 15, 1935) (Rep Lewis of Maryland) (arguing that Article 1, Section 1, Clause 1 granted Congress a plenary power to legislate for the general welfare).

[193] Compare Currie, The Federalist Period at 71–72 (cited in note 53) (discussing early suggestions that broad spending powers were afforded by the General Welfare Clause); id at 222–25 (concluding that early Congressional leaders viewed the spending power as limited). Hamilton's Report on Manufacturing was not adopted because the narrow view of the tax-and-spend power prevailed in Congress. See id at 169 n 283 ("the codfish controversy [in which Congress failed to adopt Hamilton's interpretation of general welfare] was a proxy for the federal subsidies proposed in Hamilton's famous Report on Manufacturers . . . which after

However, the Hamiltonian view was more than merely viable; it was espoused by the leading constitutional commentator of the day[194] and ultimately would be adopted by the U.S. Supreme Court.[195] For some Southerners, either of these interpretations appeared effectively to provide an "open door for any type of government intervention."[196] While Hamilton himself said the power was only to tax and spend (not to intervene in *any* manner), a broad power to tax and spend could drastically expand the federal government's scope.[197] Nonetheless, there were historical examples of attempted reliance on the power to spend for the general welfare; and these interpretations indicated a possibility that the General Welfare Clause would be interpreted to confer expansive federal power.[198] In 1817, then Representative John C. Calhoun found authority to spend funds for internal improvements in the "grant of power" to lay taxes to promote the general welfare.[199] It is almost unnecessary to point out the irony that the father of the Southern movement, a Jeffersonian from South Carolina, found the General Welfare Clause to grant power beyond those elsewhere enumerated in the Constitution.[200]

Calhoun did reverse course, and he spoke for most Southerners when he later said:

> It is a bold and unauthorized assumption, that Congress has the power to pronounce what objects belong, and what do not belong to the general welfare; and to

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resolution of the codfish dispute was never brought to a vote").

[194] See Story, Commentaries on the Constitution of the United States at ch XIV (cited in note 189).

[195] See United States v Butler, 297 US 1 (1936). In Butler, the Court rejected Madison's interpretation as a "mere tautology." Id at 65. Justice Roberts continued, "Hamilton . . . maintained the [general welfare] clause confers a power separate and distinct from those enumerated . . . [We] conclude the reading advocated by [Hamilton and endorsed by Story] is the correct one." The Court went on to say that the "power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Id at 66. However, after establishing that the power was not limited by the enumeration, the Court held the act unconstitutional because it violated the Tenth Amendment. Id at 67–72. As one commentator has pointed out, "The rule of decision in Butler . . . is precisely Madison's view, applied notwithstanding the Court's simultaneous nominal endorsement of Hamilton's view. The majority's seeming obliviousness to this flagrant self-contradiction makes its opinion in Butler one of the few truly ridiculous opinions delivered in two centuries of Supreme Court jurisprudence." David E. Engdahl, The Spending Power, 44 Duke L J 1, 36 (1994) (footnote omitted). Not only was Butler's application contradictory, but Hamilton's position was wrong. See David P. Currie, The Constitution in the Supreme Court: The Second Century 227–31 (Chicago 1990).

[196] Address of South Carolina to the Slaveholding States, in SC Journal at 469 (cited in note 89); id ("'The General Welfare' is the only limit to the legislation . . . and the majority of Congress, as in the British Parliament, are the sole judges of the expediency of the legislation this 'General Welfare' requires. Thus, the Government of the United States has become a consolidated Government.").

[197] Compare South Dakota v Dole, 483 US 203 (1987) (upholding a federal statute conditioning States' receipt of portion of federal highway funds on adoption of minimum drinking age of 21), and McCray v United States, 195 US 27 (1904) (sustaining a tax imposed on colored margarine and none on butter), with The Child Labor Tax Case, 259 US 20 (1922) (invalidating a ten percent excise tax on employers of child labor because the subject matter was otherwise beyond Congress's power).

[198] See Edward S. Corwin, The Spending Power of Congress apropos the Maternity Act, 36 Harv L Rev 548 (1923), reprinted in Corwin on the Constitution 246, 253–69 (Cornell 1981) (Richard Loss, ed) (collecting instances of a broad interpretation of the General Welfare Clause and federal statutes potentially based thereon). Compare Currie, The Jeffersonians at 278–81 (cited in note 15).

[199] 30 Annals of Cong 855–57, Feb 4, 1817 (Gales & Seaton 1854).

[200] See Currie, The Jeffersonians at 262 (cited in note 15).

> appropriate money, at its discretion, to such as it may deem to belong to it. No such power is delegated to it; nor is any such power necessary and proper to carry into execution those which are delegated. On the contrary, to pronounce on the general welfare of the States is a high constitutional power, appertaining not to Congress, but to the people of the several States, acting in their sovereign capacity . . . To prove, then, that any particular object belongs to the general welfare of the States of the Union, it is necessary to show that it is included in some one of the delegated powers, or is necessary and proper to carry some of them into effect, before a tax can be laid or money appropriated to effect it. For Congress, then, to undertake to pronounce what does, or what does not belong to the general welfare, without regard to the extent of the delegated powers, is to usurp the highest authority; one that belongs exclusively to the people of the several States in their sovereign capacity. And yet, on this assumption, thus boldly put forth, in defiance of a fundamental principle of the federal system of government, most onerous duties have been laid on imports, and vast amounts of money appropriated, to objects not named among the delegated powers, and not necessary and proper to carry any one of them into execution; to the great impoverishment of one portion of the country, and the corresponding aggrandizement of the other.[201]

The Confederate delegates resolved this ongoing debate in favor of narrower federal power by eliminating the General Welfare Clause. This resolution is reinforced by two textual additions. First, the Convention added a requirement that taxes be laid and collected "*for revenue necessary* to . . . ."[202] Adding "for revenue necessary" makes clearer that the debt, defense, and governmental action clauses are limitations on the power to tax and not independent grants of authority. Second, adding "carry on the government of the Confederate States" in place of the General Welfare Clause reinforces that spending is only incidental to governmental powers granted elsewhere.

Article I, Section 8, Clause 1 of the Confederate Constitution further limited the power of the federal government:

> *no bounties shall be granted from the treasury, nor shall any duties, or taxes, on importation from foreign nations be laid to promote or foster any branch of industry.*

This limitation has no parallel in the U.S. Constitution and provides strong support for free trade. Tariffs had been a divisive issue between the North and South leading up to the South's secession, and the Confederate founders sought to resolve the dispute over federal power in this area.[203] Southern spokesmen had argued that as the producer of

[201] Calhoun, A Discourse, in Works of Calhoun 1: 350–51 (cited in note 36).

[202] CS Const, Art I, § 8, cl 1 (emphasis added). Interestingly, the most prominent online display of the Confederate Constitution has misplaced the comma in this provision in a way that would inhibit the clarity added by "for revenue necessary." Compare Constitution of the Confederate States of America, as reproduced online at <www.yale.edu/lawweb/avalon/csa/csa htm> (visited on June 18, 2018) ("To lay and collect taxes, duties, imposts, and excises *for revenue, necessary* to pay . . . ") (emphasis added).

[203] See notes 50–64 and accompanying text.

staple goods that were often exchanged for manufactured goods from abroad, the South accounted for a majority of the tariff revenue while the benefit accrued to the North in the form of increased prices for the Northern manufactured goods.[204] The ban on all tariffs in the Confederate Constitution ensured that industries or sections could not be favored at the expense of others.[205]

The payment of bounties (for example, payments to owners of fishing vessels to counter duties imposed by other countries[206]) was an alternative means of supporting Northern industries.[207] The U.S. had not explicitly used bounties, and Jefferson, among others, had disputed Congressional power to impose bounties.[208] On the other hand, Hamilton, in his Report on the Subject of Manufactures, argued in favor of "pecuniary bounties" as an encouragement to the development of manufacturing.[209] The Confederate founders likely barred bounties because they have the goals and harms of tariffs, and work in a similar manner. A ban solely on tariffs, for example, could have been rendered ineffective through the use of bounties to achieve the same purpose.

While reducing the national government's power to tax in the ways just discussed, the Confederate founders increased national taxing power by allowing a super-majority to tax exports in Article I, Section 9, Clause 7:

> No tax or duty shall be laid on articles exported from any State, *except by a vote of two-thirds of both Houses*.

Such an expansion of national power is puzzling in light of the strong Southern support for free trade.[210] In fact, the U.S. Constitution's ban on export duties was an apparent

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[204] See Kettell, Southern Wealth and Northern Profits at 69–70 (cited in note 52).

[205] The U.S. Constitution did require uniformity of duties, imposts and excises. See US Const, Art I, § 8, cl 1 ("but all Duties, Imposts and Excises shall be uniform throughout the United States"). However, the Constitution allowed those that were nominally uniform but taxed goods found only in one area. See Hylton v United States, 3 US 171 174 (1796). The Confederate Constitution did not change this provision.

[206] See Currie, The Federalist Period at 168–69 (cited in note 53). The New England codfish industry garnered support for relief from foreign duties placed on their fish exports, bounties to their foreign competitors, and U.S. duties placed on items used in the industry. An attempt to grant relief in the form of a "bounty," while supported as constitutional by some members of the Senate, ultimately was rejected in favor of an "allowance" as a "reimbursement of the sum advanced" in the form of tariff payments on salt. Id, quoting 3 Annals 386, Feb 6, 1792 (Gales & Seaton 1849).

[207] See generally S. Elkins and E. McKitrick, The Age of Federalism 258– 64 (Oxford 1993).

[208] Madison and Jefferson had argued that bounties were unconstitutional. See Currie, The Federalist Period at 169 (cited in note 53) (discussing the Congressional debate surrounding the New England codfishers in which Madison argued that bounties were not constitutional); Jefferson, Notes on the Constitutionality of Bounties to Encourage Manufacturing, in Papers of Jefferson at 23: 172–173 (cited in note 16) ("the general govmt. has no powers but what are given by the Constn. [and] that of Levying money on the people to give out premiums is not among the powers in that instrument, nor necessary to carry any of the enumerated powers into [existence].").

[209] See Report on the Subject of Manufactures, Dec 5, 1791, in Papers of Hamilton at 10: 302–304 (cited in note 34).

[210] Davis, Inaugural Address, Feb 18, 1861 (cited in note 70) ("our true policy . . . [is] the freest trade which our necessities will permit"). See also Herbert Wender, Southern Commercial Convictions, 1837–1859, 48 John Hopkins Studies in Historical & Pol Sci 1 (1930) ("Free trade with all the world, untrammeled by legislative restrictions was their [that is, Southerners'] motto; and they opposed an absorbing centralism in

compromise to appease the South at the Philadelphia Convention.[211] An amendment offered by James Madison of Virginia and James Wilson of Pennsylvania to allow taxation of exports under the U.S. Constitution was narrowly defeated when Connecticut joined with the five States stretching from Maryland to Georgia.[212] Perhaps, however, the Confederate founders did not perceive the need for an absolute ban because the Confederate States were a more homogeneous group with respect to industry and likely to share the same interests in this regard.[213] A motion in the Montgomery Convention on March 5, 1861 to remove "except by a vote of two-thirds of both Houses" from the committee's draft constitution lost.[214] One commentator claims this provision can be justified in light of the need to raise funds.[215] However, the rationale for this justification is unclear and, thus, the reason for distinguishing exports from imports remains unclear.

4. Article I, Section 8, Clause 3: Internal Improvements Reserved to the States

> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; *but neither this, nor any other clause contained in the Constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation, in all which cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof.*

The U.S. Congress, to varying degrees, had found authority in the U.S. Constitution to appropriate money for internal improvements.[216] The Confederate founders generally

commerce, just as they fought centralization in government.").

[211] Rakove, Original Meanings at 84–89 (cited in note 18). The ban on export taxes was likely inserted by John Rutledge of South Carolina as part of the committee of detail. Id at 85. Indeed, one Convention member "reminded the Convention that if the Committee [of detail] should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd be bound by his State to vote against [the Committee's] Report." Max Farrand, ed, Records of the Federal Convention of 1787 II: 95 (Yale, rev ed, 1937) (Gen Charles Pinckney of South Carolina).

[212] Farrand, ed, Records of the Federal Convention at II: 359–64 (cited in note 211).

[213] However, this justification could be used for many other provisions (including tariffs) and, thus, seems incomplete at best. Furthermore, many believed that the Confederacy might not always be homogeneous. See, for example, notes 291–292 and accompanying text (suggesting the Confederate founders envisioned the admission of free States).

[214] Confed J at I: 870 (cited in note 95). The motion lost five to two with Alabama, Georgia, Mississippi, South Carolina, and Texas voting to defeat the amendment. Id.

[215] See Lee, Confederate Constitutions at 94 (cited in note 120) ("The reason for such a modification [that is, to allow taxation of exports] was the need for revenue by the federal government, especially in view of the acceptance of the principle of low import duties.").

[216] See Currie, The Jeffersonians at 258–282 (cited in note 15); Currie, Democrats and Whigs at ch 1 (cited in note 50). However, several presidents used the Presidential veto to limit the use of appropriations for internal improvements. See, for example, James Madison Veto Message, Mar 3, 1817, in Richardson, ed, Messages and Papers at 1: 584 (cited in note 59); Monroe Veto Message, Dec 2, 1817, in id at 2: 18; Andrew Jackson Veto Message, May 27, 1830, in id at 2: 483–93.

opposed such appropriations as they granted the federal government more power and threatened state sovereignty.[217] The question of internal improvements highlights the means-ends debate as to whether States' rights were merely a means of protecting slavery. For example, John Randolph illuminated at least part of the motivation for opposing internal improvements: A Congress that can build roads and canals can also emancipate slaves.[218] Again, Confederate founders resolved an ongoing debate over the scope of power granted the national legislature under the U.S. Constitution in favor of a narrow construction of that power. The committee draft did not limit internal improvements. Toombs proposed the language that was adopted on the last day of debate.[219] Thereby, internal improvements to facilitate commerce by the federal government were limited to furnishing navigational aids.

The Confederate Constitution's limitation on internal improvements is consistent with the view of a limited national government with the power only to perform national functions and not to support one section at the expense of others.[220] Robert Smith of Alabama, in his Address to the Citizens of Alabama after returning from the Montgomery Convention, explained:

> the great object of the Federal Government is to perform national functions and not to aggrandize . . . sectional . . . interests . . . and that internal improvements are best judged of, and more wisely and economically directed by the localities desiring them, even when they legitimately come within the scope of Federal action . . . and that under [the commerce] power lurked danger of sectional legislation and lavish

[217] The propriety from a policy perspective of eliminating the national government's ability to provide for internal improvements can be questioned. There would be instances where the federal government would be able to overcome the free-rider and transaction cost problems that would have resulted in States failing to provide for mutually beneficial improvements. Compare Albert Gallatin, Report on Internal Improvements, Apr 4, 1808, in American Papers: Documents, Legislative and Executive of the Congress of the United States I: 725 (Gales & Seaton 1832) ("The General government can alone remove these obstacles."). However, this federal power could also readily be abused by paying for internal improvements that benefit solely, or significantly, a single State or region. See, for example, Thomas Hart Benton, Thirty Years View; or, A History of the Working of the American Government for Thirty Years, From 1820 to 1850 I: 26 (Appleton 1854) (stating that one internal improvement act (Survey Act) degenerated "from national to sectional, from sectional to local, and from local to mere neighborhood improvements").

[218] 41 Annals of Cong at 1308, Jan 30, 1824 (cited in note 54). See Calhoun, to Virgil Maxcy, Sep 11, 1830, in The Papers of John C. Calhoun XI: 226, 229 (South Carolina 1978) (Robert L. Meriwether, ed) (stating that nullification was really about slavery); id at 269-70; see also Nathaniel Macon to Bartlett Yancey, Apr 15, 1818, in Edwin Wilson, The Congressional Career of Nathaniel Macon 46–47 (UNC 1900); Macon to Yancey, Dec 26, 1824, in id at 71–72; Macon to Yancey, Dec 8, 1825, in id at 76; Jefferson to Richard Rush, Oct 13, 1824, in WTJ at 12: 380–81 (cited in note 16).

[219] Confed J at I: 865, 891 (cited in note 95). Toombs' original amendment would have forbade all appropriations for internal improvements to promote commerce, but his amendment was amended to allow improvements to aid in navigation and to harbors so long as the duties were imposed on those using the improvements. Id at I: 891.

[220] See Curry, Civil History at 84 (cited in note 8) (advocating taxation only to pay debts and carry out government).

> expenditure, the [Confederate] Constitution denies to Congress the right to make appropriations for any internal improvements . . . .[221]

Federalism was not the only driving force behind the amendment. The limited scope of internal improvements granted to the federal government required that users pay for the improvement. As Stephens expressed, "The true principle is to subject the commerce of every locality to whatever burdens may be necessary to facilitate it. If Charleston harbor needs improvement, let the commerce of Charleston bear the burden."[222] This Southern idea, that the user should pay, can also be seen in two other changes made in the Confederate Constitution: Article I, Section 10 allowed States, without the consent of Congress as in the U.S., to impose tonnage taxes on sea-going vessels for the improvement of rivers and harbors used by said vessels;[223] and Article I, Section 8 required that the post office be financially self-sustaining after an initial grace period.[224]

Although it is unclear why navigational aids were allowed while other improvements were not,[225] this distinction was the same one proposed by President Andrew Jackson, who opposed non-navigational internal improvement bills on Constitutional grounds.[226] Others, including drafting committee chairman Rhett (while

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[221] Smith, An Address at 4 (cited in note 10):

> We may congratulate ourselves that henceforth the Federal Government will know no favorite State or section; that prosperity however widely, profusely or partially scattered, is to be the legitimate result of legitimate causes, and that agriculture, commerce and manufactures will no longer breed jealousy and discontent, but will, hand in hand, each advance the prosperity and harmony of the whole.

See also Address of South Carolina to the Slaveholding States at 470 (cited in note 89):

> The great object of the Constitution of the United States . . . was, doubtless, to secure . . . a Government limited to those matters only, which were general and common to all portions of the United States. All sectional or local interests were to be left to the States . . . . Yet, by gradual and steady encroachments . . . the limitations in the Constitution have been swept away; and the Government of the United States has become consolidated, with a claim of limitless powers in its operation."

[222] Stephens, Cornerstone Address at 45 (cited in note 10).

[223] CS Art I, §10, cl 3 ('No State shall, without the consent of Congress, lay any duty on tonnage, except on sea-going vessels, for the improvement of its rivers and harbors navigated by the said vessels").

[224] See text accompanying notes 237–238.

[225] See Currie, Democrats and Whigs at ch 1 §I (cited in note 50); see also Jefferson to Secretary of Treasury (Albert Gallatin), Oct 13, 1802, WTJ at 9: 398–99 (cited in note 16).

[226] On the distinction, see Jackson, Second Annual Message, in Richardson, ed, Messages and Papers at 2: 508–09 (cited in note 59):

> The practice of defraying out of the Treasury of the United States the expenses incurred by the establishment and support of light houses, beacons, buoys, and public piers within the bays, inlets, harbors, and ports of the United States, to render the navigation thereof safe and easy, is coeval with the adoption of the Constitution, and has been continued without interruption or dispute. . . .
>
> It is indisputable that whatever gives facility and security to navigation cheapens imports and all who consume them are alike interested in whatever produces this effect. If they consume, they ought, as they now do, to pay; otherwise they do not pay. The consumer in the most inland State derives the same advantage from every necessary and prudent expenditure for the facility and security of our foreign commerce and navigation that he does who resides in a maritime State. Local expenditures have not of themselves a corresponding operation.

For an example of President Jackson's distinction, see Jackson, Veto Message, May 27, 1830, in Richardson,

serving in the U.S. Congress), did not accept this distinction and had opposed harbor and river improvements on Constitutional grounds.[227] This was not the majority view: The U.S. Congress did, on occasion, draw the distinction; for despite vigorous debate over the federal power to perform internal improvements, Congress often financed navigational aids with little debate.[228]

The text of the Permanent Constitution forbids only internal improvements that "facilitate commerce." Presumably, then, the Confederate Congress could have constitutionally appropriate money for internal improvements intended for some purpose other than commerce so long as the Constitution granted power to regulate that purpose.[229] The rationale for this difference is not clear, and it raises the question of whether an incidental effect on commerce would trigger the clause?[230]

5. Article I, Section 8, Clause 7: Post Routes and a Self-Sustaining Post Office

> To establish post Offices and post *routes* [roads]; *but the expenses of the Post Office Department, after the first day of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenue.*

The Confederate founders' substitution of "route" for the U.S. Constitution's use of "road" does not have a clear purpose. Two options exist, although only one makes sense in light of other changes made. First, the change could be an attempt to resolve the prior debate about whether this clause allowed for the construction of canals, although such a construction is unlikely.[231] By using the more general "routes" as opposed to the specific "roads," the change might imply that canals are permissible.[232] Alternatively, the change may have resolved a different debate over the power to designate versus the power to build post roads.[233] Changing from "roads" to "routes" narrowed the power to

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ed, Messages and Papers at 2: 483–93 (cited in note 59). But see Polk, Veto Message, Dec 15, 1847, in id at 4: 610, 614 (rejecting Jackson's distinction).

[227] See, for example, Cong Globe 29th Cong, 1st Sess appendix: 447–449 (Feb 27, 1846) (Rep Rhett) (arguing rovers and harbors were unconstitutional objects of appropriation by the General Government); Cong Globe, 30th Cong, 1st Sess 27–28 (Dec 15, 1847) (same).

[228] See, for example, 2 Stat 150 (Apr 6, 1802); 2 Stat 270 (Mar 16, 1804); 2 Stat 294 (Mar 26, 1804).

[229] Perhaps, if the power to create postal "routes" was interpreted to mean funding road construction, then such funding would be permissible notwithstanding the denial of Congressional power to fund internal improvements. See notes 232–235 and accompanying text.

[230] For example, if the Confederate Congress built a bridge near Charleston for the supposed purpose of aiding in the national defense (for example, aiding the supply of forts which guard a key port), then would the incidental benefit to commerce preclude this exercise of enumerated power? This question appears to be unanswered by the text or by contemporaneous discussion.

[231] See William Rawle, A View of the Constitution of the United States of America (Niklin 1829) ("doubt has been extended to the right of appropriating money in aid of canals through states"); William J. Hull and Robert W. Hull, The Origin and Development of the Waterways Policy of the United States 12 (National Waterways Conference 1967).

[232] See Currie, The Jeffersonians at 122 n 255 (cited in note 15) ("Employment of the term "post routes" rather than "post roads" would have made it easier to read this clause to apply to canals, to which its purpose obviously extended.").

[233] See Joseph Story, Commentaries on the Constitution of the United States 3: §1123 (Hillard, Gray 1833):

designation. Establishing post roads under the U.S. Constitution had been interpreted, by some, to include the power to build those roads.[234] However, many had argued that Congress lacked the power to construct roads with federal funds, implying that the clause was limited to designating the route the post was to take.[235] Read in light of the explicit limitation on internal improvements in Article I, Section 8, Clause 3, the change to "routes" was most likely intended to allow only designation, not improvement through road or canal building.

The Convention required that, following a start-up grace period, the post office pay for itself.[236] Consistent with the user-pay viewpoint expressed in limiting the ability of the federal government to pay for internal improvements,[237] the Convention wanted a small federal government that did not subsidize activities that should be supported by those market participants who benefited from the activity. As then U.S. Representative W.W. Boyce of South Carolina stated in 1859:

> That the [U.S. Post Office] should be self-sustaining, I assume as an axiom; for, why should one man be taxed to carry the letters of another? There is no justice in it. Let those who send letters pay for them. . . . Indeed, when I consider the immense patronage of this Department, as a State-rights man, opposed to too strong a Federal Government, I see great advantage in getting rid of this patronage, and thus simplifying the Government.[238]

6. Article I, Section 9, Clause 4: No Law Impairing Slavery

> No bill of attainder, ex post facto law, *or law denying or impairing the right of property in negro slaves, shall be passed.*

Given the importance of slavery to the South, it is not surprising that the Confederate Constitution provided explicitly that the Confederate government could not pass laws impairing slavery. This merely confirmed that which almost everyone (John Quincy Adams notwithstanding) agreed: The U.S. Constitution did not permit the national government to outlaw slavery.[239] This explicit protection was all that was

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> Upon the construction of this clause of the constitution, two opposite opinions have been expressed. One maintains, that the power to establish post-offices and post-roads can intend no more, than the power to direct, where post-offices shall be kept, and on what roads the mails shall be carried. Or, as it has been on other occasions expressed, the power to establish post-roads is a power to designate, or point out, what roads shall be mail-roads, and the right of passage or way along them, when so designated.

[234] See Currie, The Federalist Period at 225 n 149 (cited in note 53).

[235] See 12 Annals 311, Jan 4, 1803 (Gales & Seaton 1851); 13 Annals 554, Nov 1, 1803 (Gales & Seaton 1852); 2 Stat 275, 277 § 4 (Mar 26, 1804).

[236] Impressively, the Confederate Post Office became and remained self-sustaining during the costly and debilitating war. See Stein, 21 Pace L Rev at 404 n 39 (cited in note 18).

[237] See notes 222–221 and accompanying text.

[238] Cong Globe, 35 Cong, 2 Sess appendix 244 (Feb 24, 1859). See Cong Globe, 35 Cong, 2 Sess, appendix: 184, 188 (Feb 9, 1859) (Sen Toombs).

[239] See, for example, Potter, Impending Crisis at 423 (cited in note 69) (noting that the Republican Party platform in 1860 promised the "maintenance inviolate of . . . the right of each state to order and control its

required to protect slavery in the Confederacy; although, as we will see, the Confederate Constitution's Article IV also included three specific provisions to protect slavery.[240] That the Permanent Constitution adopted many pro-States' rights provisions,[241] even though Article I, Section 9, Clause 4 explicitly protected slavery (and Article IV added other protections), suggests that States' rights was not merely a means of protecting slavery but an end in itself.

The Confederate founders' failure to render this provision not subject to amendment[242] is surprising given the proposed Corwin Amendment (not ratified) to the U.S. Constitution to that effect. U.S. Representative Thomas Corwin of Ohio's amendment was presented to the States by the Thirty-sixth Congress in 1860.[243] That amendment would have forbidden amending the U.S. Constitution to give Congress the power to interfere with slavery within a State. There is no definitive evidence as to why the Permanent Constitution did not follow Corwin's example. It may have been a result of the desire to ensure a flexible amendment process or an attempt to show moderation to recruit the Border States and gain support from foreign nations.[244]

7. Increased Institutional Costs of Federal Action

In the tug of war between the States and central government, a number of measures in Article I served to hamstring the federal government and thereby to decrease its ability to pull against the States. Most of these limitations were focused on resolving separation of powers issues and governmental abuses that were perceived to have arisen under the U.S. Constitution,[245] but they also affected the federalism balance. Because of these additions, the States would have greater power de facto: Increased costs of federal legislation would reduce the federal government's power by reducing its ability, at the margin, to pass federal statutes and appropriations; reducing the ability to pass statutes

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own domestic institutions") (quoting the Republican Party Platform).

[240] See notes 300–318 and accompanying text.

[241] See generally Part III.

[242] For examples of unamendable constitutional provisions, see US Const, Art V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."); CS Const, Art V ("But no State shall, without its consent, be deprived of its equal representation in the Senate").

[243] See Harold M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction of the Constitution 46–47 (Knoph 1973); Dennis J. Mahoney, Corwin Amendment (1861), in Encyclopedia of the American Constitution 2: 509 (MacMillan 1986) (Leonard W. Levy et al, eds).

[244] See notes 273–277 and accompanying text (discussing the changes to the Article IV amendment process); notes 333–336 and accompanying text (discussing the Convention's desire to appeal to Border States and foreign governments).

[245] See Smith, An Address at 7–8 (cited in note 10) (asserting that the U.S. Constitution failed to curb the "reprehensible, not to say venal, dispositions of the public money"); Alexander Stephens, as quoted in Milledgeville Southern Federal Union (Apr 2, 1861) (stating that he and other delegates were appalled by "the extravagance and profligacy of appropriations by the [U.S.] Congress for the several years past").

and appropriations would limit the federal government's ability to grow and control society.[246]

First, the Convention required all legislation to "relate to but one subject," which had to be "expressed in the title."[247] This anti-omnibus provision was meant to increase accountability and make logrolling more difficult.[248] It also had the separation of powers effect of protecting the executive's veto power.[249] Such a limitation on legislative action was not new; twelve state constitutions included such a provision prior to the South's secession.[250] Second, the framers added a requirement that "[a]ll bills appropriating money shall specify . . . the exact amount of each appropriation, and the purposes for which it is made."[251] This provision also served to increase accountability and reduce logrolling.[252] The idea of specific appropriations was also not new; it had been advised by Jefferson, among others, and practiced by Congress periodically.[253]

A third addition required Confederate appropriations to be approved by a two-thirds majority unless the appropriation was requested by the executive.[254] This addition may be explained by a desire to address separation of powers concerns (strengthening the executive and weakening the legislature) but may have been intended to create, or at least, resulted in, a procedural cost (limitation) on the federal government. As discussed above, such an obstacle to federal action would likely result in a slight shift in the

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[246] Cf Stephens, quoted in Milledgeville Southern Federal Union (cited in note 245) ("Our fathers had guarded the assessment of taxes by insisting that representation and taxes should go together . . . but our new constitution [that is, the C.S.A. Constitution] went a step further, and guarded not only the pockets of the people, but also the public money, after it was taken from their pockets."); Smith, An Address at 10–11 (cited in note 10) ("By refusing to give a mere majority of the Congress unlimited control over the treasury . . . and by giving the President the power to veto very objectionable items in appropriations bills, we have . . . greatly purified our government.").

[247] CS Const, Art I, § 9, cl 20.

[248] See Thomas M. Cooley, A Treatise on the Constitutional Limitations, 142–44 (Little, Brown 1st ed 1868). But see Daniel H. Lowenstein, California Initiatives and the Single-Subject Rule, 30 UCLA L Rev 936, 954 (1983) (recognizing logrolling as a potential rationale for the single-subject rule but ultimately rejecting it).

[249] See Robert F. Williams, State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement, 48 Pitt L Rev 797, 809 (1987).

[250] See Millard H. Rudd, No Law Shall Embrace More Than One Subject, 42 Minn L Rev 389, table 1 (1958) (California, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, New Jersey, New York, Oregon, Texas, and Wisconsin). Such provisions were adopted by a majority of the States after the Civil War. See id.

[251] CS Const, Art I, § 9, cl 10.

[252] See Lee, The Confederate Constitutions at 99 (cited in note 120); Confed J at I: 872 (cited in note 95).

[253] See, for example, Jefferson, First Annual Message, in Richardson, ed, Messages and Papers at 326, 329 (cited in note 59). For congressional enactment of specific appropriations, see, for example, 2 Stat 178, 183, 184. See generally Currie, The Federalist Period at 68, 165 (cited in note 53); Currie, The Jeffersonians at 4, 215 (cited in note 15).

[254] CS Const, Art I, § 9, cl 9:

> Congress shall appropriate no money from the Treasury except by a vote of two thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments, and submitted to Congress by the President; or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the Government, which it is hereby made the duty of Congress to establish.

federalism balance toward the States[255]—the less power of the federal government, the greater the power of the States in comparison. Finally, the Confederate Constitution (like the Provisional Constitution[256]) provided for a line item veto of appropriations, which may also be explained as a shift toward the executive.[257] But, like the other provisions, the line item veto may create an obstacle to federal action (by vesting a negative power in the executive), thus weakening the power of the federal government as a whole.[258]

C. Article II, Section 1, Clause 1: Presidential Term Limits

> The executive power shall be vested in a President of the *Confederate* [United] States of America. *He and the Vice-President shall hold their offices for the term of six years; but the President shall not be re-eligible.*

The Convention allowed a President only one term of six years.[259] At the time the Confederate Constitution was drafted, the U.S. Constitution did not limit re-eligibility, although the example set by George Washington of only serving two terms was followed until Franklin D. Roosevelt's election to a third term in 1940.[260] The idea of a limiting the executive to one term was not new; for example, President Jackson advocated limiting the President to a single term in his Second Annual Message.[261] The Confederate founders considered making re-eligibility conditional (in that a Past president could run again after the passage of time) but ultimately limited the President unconditionally.[262]

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[255] Compare Stephens, A Constitutional View at II: 336 (cited in note 6) ("The object of this was to make, as far as possible, each administration responsible for the public expenditures.").

[256] See note 127.

[257] See CS Const, Art I, § 7:

> The President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.

See Curry, Civil History at 74–76 (cited in note 8); Smith, An Address at 8 (cited in note 10) ("Bills necessary for the support of the Government are loaded with items of the most exceptional character, and are thrown upon the President at the close of the session, for his sanction, as the only alternative for keeping the Government in motion.").

[258] The line item veto might have just the opposite effect. It might facilitate legislation by allowing the executive to accept what he likes and discard only what he does not.

[259] Interestingly, other provisions of the Confederate Constitution expanded the power of the executive while he was in office. See notes 245–258 and accompanying text.

[260] The U.S. Constitution was amended in 1951 to limit Presidential terms. See US Const, Amend 22 ("No person shall be elected to the office of the President more than twice . . . ").

[261] President Jackson stated: "In order . . . that he may approach the solemn responsibilities of the [office] . . . uncommitted to any other course than the strict line of constitutional duty . . . , [I] invite your attention to the propriety of . . . such an amendment . . . as will render him ineligible after one term." Richardson, ed, Messages and Papers at 2: 519 (cited in note 59). See generally, Lawrence L. Schack, Note, A Reconsideration of the Single, Six-Year Presidential Term In Light of Contemporary Electoral Trends, 12 J L & Pol 749, 754–67 (1996).

[262] Rhett first offered an amendment to his committee draft providing "[t]he President shall not be eligible again to the Presidency until six years after the expiration of his term of service." Confed J at I: 875 (cited in note 95). Rhett later explained: "By this policy, the President would have no motive to use his patronage in

Eliminating reelection served primarily a separation of powers concern: A perpetually re-eligible President could have shifted the balance of power to the President.[263] However, the limitation might have had the secondary effect of assuring that the national government did not accumulate too much power. As Rhett wrote after the war, "The re-eligibility of the President was not without danger, as the re-eligibility of the Consuls of Rome opened the way to the Roman Empire."[264] While capping the acquisition of power by any one executive, the single six-year term probably increased the power of each President. Without the demands of campaigning, he would presumably have more time and energy to achieve his policies.[265] Hamilton, the supporter of a strong national government, believed that an energetic President would result in an energetic national government:

> Energy in the executive is the leading character in the definition of good government . . . . A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.[266]

A longer term without campaign distractions increased the power attained through a single election, but the restriction to a single term eliminated the concern that one man would acquire too much power through reelection.

D. Article III: No Diversity Jurisdiction

> The judicial power shall extend to all cases . . . [between Citizens of different States] . . .

The Confederate Constitution did not extend diversity jurisdiction to Confederate federal courts. At the suggestion of Stephens, the Convention struck the phrase "between citizens of different States" from the draft.[267] This limitation of federal jurisdiction accordingly expanded the caseload and importance of state courts.[268] As Professor

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the election, and the services of a very able man might be obtained for a second term." Rhett to T. M. Stuart Rhett, Apr 15, 1867 (cited in note 79). Boyce of South Carolina succeeded in removing the conditional re-eligibility provision from the adopted amendment. Confed J at I: 875 (cited in note 95).

[263] While preventing re-eligibility removes the concern of the perpetual executive, lengthening the term to six-years means that each executive will have more time in office to acquire power and energy. Cf Story, Commentaries on the Constitution of the United States at 3: §1429 (cited in note 233) ("a very short [Presidential term] is, practically speaking, equivalent to a surrender of the executive power, as a check in government").

[264] Rhett to T.M. Stuart Rhett, Apr 15, 1867 (cited in note 79).

[265] See Lyndon B. Johnson, The Vantage Point 344 (Rinehart & Winston 1971); see also Bruce Buchanan, The Six-Year One Term Presidency: A New Look at an Old Proposal, 18 Presidential Stud Q 129, 132 (1988); Henry W. Chappel, Jr. and William R. Keech, Welfare Consequences of the Six-Year Presidential Term Evaluated in the Context of a Model of the U.S. Economy, 77 Am Pol Sci Rev 75, 75 (1983).

[266] The Federalist No 70 (Hamilton) (cited in note 18). Hamilton argued that duration (along with unity, adequate material support, and competent powers) encouraged an energetic President. See id.

[267] Confed J at I: 878 (cited in note 95).

[268] Although not adopted in the Permanent Constitution, the Provisional Constitution had changed the system so that there were no circuit courts and only one district per State. See Confed J at 906 (cited in note

Frankfurter would later argue, "The happy relation of states to nation—our abiding political problem—is in no small measure dependent on the wisdom with which the scope and limits of the federal courts are determined."[269] Diversity jurisdiction served a nationalizing function at its origin, and resulted in States loosing total control of the interpretation of their own law.[270] While States' rights might justify a reduction in federal jurisdiction, there is little evidence explaining why diversity jurisdiction was singled out and excluded from the Confederate Constitution. Diversity jurisdiction, it appears, was established to protect the outsider from (real or imagined) local bias.[271] Given this justification for its existence under the U.S. Constitution, one possible reason for the change in the Confederate Constitution was that the founders did not think the state courts of the Confederacy were susceptible to such bias. States' rights advocates would presumably have more faith in the state courts and believe that they would be as fair as federal courts. Furthermore, because of the homogeneity of the Southern States, the risk of bias, if, in fact, there was any such risk, was eliminated or greatly reduced.

E. Article V: The Amendment Process

> *Upon the demand of any three States, legally assembled in their several Conventions, the Congress shall summon a Convention of all the States, to take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time when the said demand is made and should any of the proposed amendments to the Constitution be agreed on by the said convention--voting by States--and the same be ratified by the Legislatures of two-thirds of the several States, or by conventions in two-thirds thereof*—as the one or the other mode of ratification may be proposed by the general convention—*they shall*

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95). The Provisional Constitution's judicial structure may have been expedient to simplify the system for the short period of time that the Provisional Constitution was going to be in effect. However, eliminating circuit courts reduced oversight by the federal court system by assuring that even when federal judges were reviewing State actions, the reviewing judges would be from the State; only an appeal to the Supreme Court (which was never established in practice, in part because the Confederate Congress could not agree on the jurisdiction of the Supreme Court over State courts) could result in reversal by non-State judges. See William M. Robinson, Jr., Justice in Grey: A History of the Judicial System of the Confederate States of America (Harvard 1941).

[269] Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L Q 499, 500 (1928).

[270] See id; William L. Marbury, Why Should We Limit Federal Diversity Jurisdiction?, 46 ABA J 379, 380 (1960); James W. Moore and Donald T. Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Tex L Rev 1 (1964).

[271] See Henry Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv L Rev 483, 510 (1928) ("[Diversity jurisdiction] had its origins in fears of local hostilities, which had only a speculative existence in 1789 . . . ."); Bank of the United States v Deveaux, 9 US (5 Cranch) 61, 87 (1809) (Marshall):

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

> *thenceforward form a part of this Constitution.* [The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof] *But no State shall, without its consent, be deprived of its equal representation in the Senate* [Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate]

The U.S. Constitution's amendment procedure, according to some, was unfit for a Constitution that was to last for many generations.[272] As former President John Tyler had remarked, "[The United States founders] made the difficulties [in amending the Constitution] next to unsurmountable to accomplish amendments to an instrument which was perfect for five millions of people, but not wholly so as to thirty millions."[273] The Confederate Constitution contains several changes from the U.S. Constitution in this respect. First, Congress is excluded from the amendment process, and the power to propose amendments is granted to any group of three States. This removes the ability of the entity created by the Confederate Constitution (that is, the federal government) to institute changes to itself. Reserving the ability to amend to the States (principals) exclusive of the federal government (agent) reinforces the compact theory of government. The super-majority of States required to ratify any amendment (two-thirds in the Confederate Constitution) checks the power of any three States. However, the power of any three States was not inconsequential. Simple inertia is often a strong protector of the status quo; the ability to begin the amendment process is a critical power.

Second, the Confederate Constitution limited a convention, once called by the States, to consideration of only those amendments suggested by the States making the demand. This constraint would reduce the ability of a convention to make drastic changes without the direction of several States. It is possible to interpret the U.S. Constitution to allow a convention to rewrite the entire Constitution, because the convention is not expressly limited to the suggestions of the demanding States. Under the Confederate Constitution, only amendments that originated with the demanding States themselves and not the convention could even be submitted to a vote. It might appear that this concern is addressed by requiring a super-majority of the States to ratify any amendments made by

[272] See Smith, An Address at 14 (cited in note 10) ("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"). In fact, in the seventy years between the Bill of Rights and secession, only two amendments to the Constitution had been ratified. See US Const Amends 11, 12.

[273] The American Annual Cyclopedia and Register of Important Events I: 564 (Appleton 1869) (ex-President John Tyler).

the Convention; however, this limitation has the additional benefit of reducing the potential risks to the States in demanding a convention.[274]

Third, the Confederate Constitution required only two-thirds of the States to ratify an amendment instead of the U.S. Constitution's three-fourths. This increased flexibility was considered important in terms of the Constitution's adaptability. Committee chairman Rhett stated: "If [the Confederate Constitution's Article V] had been part of the Constitution of the United States the vast discontent which preceded the war, and made it inevitable, would have been easily arrested and allayed; and the States in Convention would have settled amicably their differences."[275] While perhaps an overstatement, Rhett's statement does signify the importance placed on Article V by the Confederate Convention's members. This change recognized that any constitution could be either unduly restricting or overly expansive of powers and, therefore, allowed for easier amendment of the Permanent Constitution. In this way, it provided a means by which fewer States could limit any centralization of power, further increasing the powers the States had over the national government.[276]

Fourth, the Confederate Convention made a subtle word change to represent the paramount importance of the States: The Confederate Constitution substitutes "representation" for "suffrage" in the final phrase regarding the unamendable nature of the Senate's make-up. This word change indicates that the critical aspect of the Senate that could not be changed was not the equal suffrage of the people but the equal representation of each State.[277] Furthermore, the word change suggests that senators should consider themselves to represent their States. While this change, like several others, would not affect the application of Article V, it does provide further textual support for the importance of each State in the compact.

F. Article VI: Retention and Reservation of Powers to the States

> The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people *of the several States*. The powers not delegated to the [United] *Confederate* States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or the people *thereof*.

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[274] That is, the Convention could only reject the demanding States' amendment(s) and could not, *sua sponte*, introduce or adopt other amendments that could be harmful to any of the three States calling the Convention.

[275] Rhett to T. M. Stuart Rhett, Apr 15, 1867 (cited in note 79). See also Smith, An Address at 4 (cited in note 10) ("the substituted provision imparts a wholesome flexibility to our Constitution and, at the same time, assures us against an assembling of the States for light or transient causes, or hopeless purposes, and the consultive body when convened, will be confined to action on the propositions put forth by three States.").

[276] Note, however, that reducing the size of the supermajority required to ratify an amendment also made it possible for fewer States to increase the power of the national government.

[277] Cf Rakove, Original Meanings at 170–71 (cited in note 18) (discussing the U.S. founding debates about the character of the U.S. Senate).

Article VI's last two clauses correspond to the Ninth and Tenth Amendments of the U.S. Constitution.[278] The Tenth Amendment, in particular, was crucial to any understanding of States' rights within the Union.[279] While the Confederate Convention roughly adopted the language of the amendments themselves, two changes were made to clarify the role of the States by indicating that the people referred to were the people of the distinct States and not the people as a national body.[280] First, the Convention added "of the several States" as a modifier of the people who retained the rights.[281] This alteration was proposed by an ardent States' rights advocate, Porcher Miles of South Carolina, who earlier had declared on the floor of the U.S. Congress:

> I am a States-rights man. I do not lay the same stress upon party organization that most politicians in this country do. We assemble here as the representatives of the people of the various sovereign States which compose this Confederacy and it is our first duty to labor for the best interests of our immediate people, without doing injustice to the people of any section of the Country.[282]

Second, the addition of "thereof" to the end of the reservation of power clause made clear that the rights were reserved not to the people in general but to the particular people of each State. The Convention did not revert to the Articles of Confederation language, which would have reserved to the States power "not *expressly* delegated" to the central government.[283] There is no way to know whether this was because they saw dangers in such a limitation on federal powers (that is, they saw the need for implicit powers) or because they simply missed the opportunity to demonstrate their commitment to Jeffersonian principles.

IV. EXPANSIONS OF FEDERAL POWER IN THE PERMANENT CONFEDERATE CONSTITUTION

The changes made in the Confederate Constitution were not simply Jeffersonian limitations on the federal government's power. In fact, at least with regard to slavery, the new Constitution also expanded national powers. The antebellum South had exhibited a similar nationalist tendency when the protection of slavery was at issue.[284] The Convention's addition of federal power primarily to protect the institution of slavery

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[278] See US Const, Amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); US Const, Amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

[279] See note 34 and accompanying text (discussing Jefferson's belief of the centrality of the Tenth Amendment).

[280] See note 155–161 and accompanying text (discussing the similar reasons for the Confederate Constitution's Preamble).

[281] CS Const, Art VI ("retained by the people of the several States").

[282] Cong Globe, 36th Cong, 1st Sess, appendix: 67 (Jan 6, 1860).

[283] See Articles of Confederation, Art II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation *expressly delegated* to the United States, in Congress assembled.").

[284] See, for example, Paul Finkelman, States' Rights North and South, in Ely, Uncertain Tradition at 134–144 (cited in note 46).

supports the claim that the South seceded not on the general principle of States' rights but in order to maintain its "peculiar institution." Regardless, this expansion of federal power indicates that Confederate founders were willing to sacrifice a strict States' rights approach in order to ensure the continued existence of slavery.[285]

A. Article I, Section 8, Clause 4: Naturalization

To establish [an] uniform *laws* [Rule] of naturalization

The ability to determine citizenship is a central right of sovereignty. Agreeing with Chief Justice Taney's opinion in *Dred Scott*, the Convention made the Confederate Constitution explicit in stating that it was the national government that granted citizenship.[286] As Convention member Smith later stated,

> It may be worthy of remark in this connection that the Constitution of the United States confers on Congress the power "to establish an uniform *rule* of naturalization" and "uniform *laws* on the subject of bankruptcies" and, it has been insisted with much plausibility, derived from history and from the language used, that the naturalization clause was designed only to give the Congress of the United States power to prescribe an uniform *rule*, to be observed by *each State* in making citizens, and not power to make citizens of the Federal Government. From this proposition has been drawn the deduction that there are no citizens of the United States, but that the people are citizens of the several States owing allegiance to the United States only through the several States. The convention of the Confederate States, after mature deliberation, adopted the judicial decisions and the practice of Congress on the question, and hence changed the expression—"rule" to "laws of naturalization."[287]

Smith makes clear that this change settled yet another ongoing debate over the meaning of the U.S. Constitution. However, unlike those discussed above, this clause resolved the debate in favor of a broader federal power.[288]

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[285] The Confederate Constitution, unlike the U.S. Constitution, explicitly called the peculiar institution by its name. See Smith, An Address at 9 (cited in note 10) ("We have now placed our domestic institution, and secured its rights unmistakably, in the Constitution; we have sought by no euphony [see US Const, Art IV, § 2] to hide its name—we have called our negroes 'slaves,' and recognized and protected them as persons and our rights to them as property.").

[286] See Dred Scott v Sanford, 60 US (19 How) 393, 417 (1857):

> For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government.

[287] Smith, An Address (cited in note 10).

[288] It is not clear why the Confederate Constitution did not explicitly make the power exclusive.

At least in part, this nationalistic change was designed to protect the institution of slavery. The Privileges and Immunities Clause of the Confederate Constitution made it important that the power of naturalization be centralized.[289] If a State had this power to determine citizenship, then because of the Privileges and Immunities Clause, a single State could give an individual full rights and protections in every State. Such a result was unacceptable because it would allow a free State to naturalize immigrants and freed slaves, giving them the rights of citizens in all States. Once given these rights, the concern was that the immigrants and blacks would incite the slaves.[290]

Thus, giving the power to the national government to make the laws of naturalization limited the power of any outlier States that might become a part of the Confederacy. The Convention recognized that the Confederacy might one day include anti-slavery States,[291] either through the addition of a free State or through abolition.[292] The role of this provision is clear when one realizes that even those who supported the addition of free States did not imagine that free States would outnumber slave States. Therefore, while the Confederacy may have one State that might provide for liberal citizenship of "undesirables," it would be highly unlikely to have enough of those States such that the Congress (particularly the Senate) would have enough votes to implement a progressive system.[293]

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[289] See CS Const, Art IV, § 2 ("The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several States."). This clause was copied from the U.S. Constitution. See US Const, Art IV, § 2.

[290] See Freehling, Prelude to the Civil War at 113–15 (cited in note 50); see also Dred Scott, 60 US (19 How) at 405–06, 416–18, 422–23; The Federalist 42 (Hamilton) (cited in note 18).

[291] Proposals to ban the admission of free States failed, see Confed J at I: 885 (cited in note 95), and a compromise was reached by which "other States may be admitted into this Confederacy by a vote of two-thirds of the whole house of Representatives and two-thirds of the Senate, the Senate voting by States." Id; CS Const Art IV, § 3, cl 1. Thus, the compromise left some hopeful that free States could join and others confident that the extra-majority vote required would allow those opposed to block their admission. Cf Smith, An Address at 20 (cited in note 12).

[292] Rumors circulated that New York and Pennsylvania might apply for admission to the Confederacy. See New Orleans Daily Delta, Mar 8, 1861. During the Convention's debates, T.R.R. Cobb wrote to his wife:

> I found out yesterday why George Sanders was here. He is an agent from Douglass [sic] and is working to keep out of the Constitution any clause which will exclude 'Free States.' The game now is to reconstruct [the Union] under our constitution . . . Stephens and Toombs are both leaving the door open . . . Confidentially and to be kept secret from the public, Mr. Davis is opposed to us on this point also and wants to keep the door open. . . . I am very much afraid of the result.

Cobb to his wife, Mar 6, 1861, in UGA Collection (cited in note 146). While Sanders's role is unclear, history suggests that Sanders was, in fact, dispatched by Stephen A. Douglas to advocate a potential re-construction of the Union, at least in the form of a commercial union. See Gerald Mortimer Capers, Stephen A. Douglas: Defender of the Union 217 (Little, Brown 1959); see also Charleston Mercury, Apr 1, 1861 ("Friends of Mr. Douglas, including the near and dear George N. Sanders, are already declaring that the Northwestern States should apply for admission into the Confederate States."); Howell Cobb to his wife (Feb 6, 1861), reprinted in Ulrich B. Phillips, ed, The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb, in Annual Report of the American Historical Association, 1911 537 (GPO 1913) (stating that even those delegates who had opposed secession initially now opposed re-construction of the Union).

[293] This belief that free States would not outnumber slave States is strengthened by the supermajority required to admit any state. See note 291.

Another example of a reduction in States' rights in regard to citizenship was the citizenship requirement

B. Article IV, Section 2, Clause 1: Right to Travel with Slaves

> *And shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.*

Stephen Hale of Alabama, on the seventh day of debates, made the first of several amendments to explicitly protect the South's "peculiar institution."[294] Again, the Convention was resolving an old debate over the protections that a visiting or traveling slave owner should have in other States.[295] The founders' addition of this clause ensured that slave owners would be allowed to travel to other States with their slaves without worrying about their property interest. This provision (like the pre-existing Fugitive Salve Clause) thereby limited the power of any single State to free slaves within their own borders. Like other pro-slavery provisions, this limitation on a State's power presumably would be necessary only when and if the Confederacy included free States.[296]

C. Article IV, Section 2, Clause 3: Fugitive Slaves

> No *slave or* Person held to Service or Labour in [one State] *any State or Territory of the Confederate States* under the Laws thereof, escaping *or unlawfully carried* into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such *slave belongs, or to whom such* Service or Labour may be due.

The fugitive slave provision of the U.S. Constitution had been a primary source of the sectional tension before secession.[297] On March 7, Rhett proposed to amend the committee version (taken from the U.S. Constitution[298]) so that "in the case of the failure of the executive [of a State] to deliver up a slave, or of any abduction or forcible rescue, full compensation . . . shall be made to the party by the State to which said slave may have fled."[299] This amendment and a similar amendment by Hill that would have made the federal government responsible for compensation were not adopted by the Convention.[300] Instead, the Convention accepted an amendment by Hale, with phrase

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for voting for any office—state or federal. See Confed J at I: 859 (cited in note 95); CS Const, Art I, § 2 ("no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal"). See Smith, An Address at 15 (cited in note 10).

[294] Confed J at I: 882 (cited in note 95).

[295] See Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 285–338 (UNC 1981) (contrasting Northern and Southern treatment of traveling slave owners).

[296] See notes 291–292 and accompanying text.

[297] See note 76–78 and accompanying text.

[298] US Const Art IV, § 2, cl 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[299] Confed J at I: 882 (cited in note 95).

[300] The Provisional Constitution did make the State financially responsible in the case of abduction or forcible rescue. See CS Prov Const Art IV, § 2, cl 3 ("A slave in one State, escaping to another, shall be

changes by Stephens and Keitt, to make the provision more specific and, in resolution of an old debate, [301] extended the Clause to territories.[302] By including the territories in the Constitutional mandate, the Convention again accepted the broader interpretation of the power granted by the U.S. Constitution to the federal government for the sake of protecting slavery. However, in light of the extensive conflict arising from this clause before secession, these changes are slight and do not vastly expand federal power.

The convention did not resolve the debate over who was required to "deliver" the fugitive slave.[303] The Provisional Constitution had resolved this debate by making state executives responsible for the return.[304] It is not clear why this clarification was not retained in the Permanent Constitution. Such a change would have also made clear that state officers could be required to enforce the provision. Prior to secession, Northerners had argued that the federal government could not conscript state officers to enforce the federal fugitive slave law.[305] This interpretation remained plausible under the Confederate Constitution and would have been consistent with the general States' rights perspective but counter to the pro-Slavery views of the Confederacy.

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delivered up on claim of the party to whom said slave may belong by the executive authority of the State in which such slave shall be found, and in case of any abduction or forcible rescue, full compensation, including the value of the slave and all costs and expenses, shall be made to the party, by the State in which such abduction or rescue shall take place.").

[301] The U.S. Congress had applied the fugitive slave provisions to the territories under the Territories Clause. See US Const, Art IV, § 3, cl 2. See Cong Globe, 31st Cong, 1st Sess appendix: 1622–24 (August 23, 1850) (Sens Underwood of Kentucky, Baldwin of Connecticut, and Dayton of New Jersey); but see id at appendix: 1619 (Aug 23, 1850) (Sen Chase of Ohio) (denying Congress's power to extend the act to territories). Interestingly, this provision supported the proposition that Congress could regulate slavery in the territories. See Currie, Descent into the Maelstrom at ch 5 (cited in note 82) (discussing the Wilmont Proviso which, if passed, would have banned slavery from any territory won in the Mexican War); Cong Globe App, 30th Cong, 1st Sess appendix: 833 (June 30, 1849) (Rep Mann of Massachusetts) (pointing out the inconsistency between the extension of the fugitive slave laws to territories and the stance that Congress could not legislate with regard to slavery in the territories).

[302] See id. The Confederate Constitution also extended the right to recover the slave to the owner of the slave instead of limiting it to the person to whom labor was due.

[303] The debate was whether the State had to deliver the slave or whether the U.S. government or private citizens were responsible. See Currie, Descent into the Maelstrom at ch 6 §IV (cited in note 82); Morris, Free Men All at 28–29, 42–58, 107–29 (cited in note 76).

[304] See note 127.

[305] See 31 Annals 245, 246–48, Mar 9, 1818 (Gales & Seaton 1854) (Sen Morril of New Hampshire) (arguing that Congress had no power to conscript state officers to enforce a fugitive slave law); id at 839, Jan 30, 1818 (Rep Whitman of Massachusetts) (Congress could only authorize state officials to act, not require them to do so); Cong Globe, 31st Cong, 1st Sess appendix: 476 (Mar 27, 1850) (Sen Chase) (arguing that there was no express authority to implement a fugitive slave law and that implementation was not necessary and proper to any enumerated power); Kentucky v Dennison, 65 US (24 How) 66, 107-08 (1860) (holding that Congress could not impose a duty on state officers); see also Printz v United States, 521 US 898 (1997) (adopting the view that Congress could not impose duties on state officials to enforce federal laws); but see Cong Globe, 31st Cong, 1st Sess 235 (Jan 28, 1850) (Sen Mason of Virginia) (suggesting that while the federal government could not impose general affirmative duties on state officials, it could enforce the two extradition clauses' affirmative duties); Puerto Rico v Branstad, 483 US 219, 228, 230 (1987) (overruling Dennison).

D. Article IV, Section 3, Clause 3: Territories: Slavery Recognized and Protected

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

First, the Convention resolved the old debate over whether the federal government had the power to acquire territories in favor of granting this power to the national government.[306] Second, and more important, the Confederate Constitution required that the Confederate government protect the institution of slavery in the territories. This went one step beyond *Dred Scott*'s holding that the federal government lacked the power to exclude slavery from the territories by adding the affirmative duty to protect the institution.[307] The issue of Congress' power to regulate slavery in the territories (as well as the District of Columbia[308]) permeated Constitutional debates in the years leading up to secession.[309] As one prominent commentator puts it, "Through all the interminable debates over the Wilmont Proviso, the Compromise of 1850, [and] the Kansas-Nebraska Act, had run the question of whether Congress possessed power (and could delegate it to a territorial legislature) to regulate slavery in the territories."[310] Southerners tended to take the view that Congress had no power to proscribe slavery anywhere, while Northerners tended to argue that it did.[311] The U.S. Supreme Court, through Chief Justice

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[306] This debate was raised most prominently by President Jefferson regarding the Louisiana Purchase. See note 47.

[307] The protection of slavery in the territories was one issue that broke-up the Democratic Party in 1860. See Potter, Impending Crisis at 405–47 (cited in note 69) (discussing Southern Democrats' demands for territorial slave codes).

[308] Compare, for example, 12 Register of Debates in Congress 97, Jan 7, 1836 (Gales & Seaton 1836) (Sen Calhoun) (arguing that abolishing slavery in the District of Columbia would violate the due process clause), and id at 648, Feb 29, 1836 (Sen Black of Mississippi) (arguing that the abolition of slaves was a taking that was not for the public use and, thus, not allowed), with id at 2054, Dec 23, 1835 (Rep Slade of Vermont) (arguing that Art I, §8 gave Congress the right of exclusive legislation in the District), and id at 670, Mar 1, 1836 (Sen Prentiss of Vermont) (arguing that the federal government was not limited to taking property strictly for public use). See Currie, Descent into the Maelstrom at Prologue §III (cited in note 82). Note that this question is a different one from that regarding the territories as Congress is given different powers over the District of Columbia than it is over territories. Compare US Const, Art I, § 8, with US Const, Art IV.

[309] See generally Michael A. Morrison, Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War (UNC 1997).

[310] Potter, Impending Crisis at 270 (cited in note 69).

[311] Andrew C. McLaughlin, A Constitutional History of the United States 512–15 (Appleton 1936). Furthermore, the many Southern spokesmen, among others, believed that because Congress was given power

Taney in *Dred Scott*, adopted the Southern view that Congress lacked the power to exclude slavery from the territories (at least without compensation) based, in part, on the Fifth Amendment's Due Process Clause.[312] Ultimately, it was this division over the federal government's territorial power that broke-up the Democratic Party in 1860.[313]

V. WHY THE FRAMERS DID NOT GO FURTHER TO BOLSTER STATES RIGHTS

The Confederate Constitution does reveal changes made in an apparent attempt to shift the balance of power toward the States. However, why did the Confederate founders not make a more drastic shift away from the centralized government of the Union? The Confederate Constitution could have incorporated more fully the Articles of Confederation. However, the members of the Montgomery Convention were well aware of the problems that resulted from the Articles of Confederation's weak national government.[314] The question, in part, is the same one that faced the Philadelphia Convention: Where is the happy medium between a strong nationalist government and a weak confederation?[315] The rhetoric surrounding secession and formation of the Confederacy supported finding a balance that closely resembled the U.S. Constitution (as read by Confederate founders). There are several reasons why the goal was to create a modified U.S. Constitution with limited changes: commitment to the principles of the U.S. Constitution, feasibility, transaction and information costs, uncommitted Border States, need for quick ratification, and haste.

In the minds of Secessionists, the "unperverted" U.S. Constitution was an ideal model for the Confederate Constitution.[316] The founders of the Confederacy had among them men who had sworn to protect the U.S. Constitution while serving in the U.S. government,[317] and there was a general feeling of approval of the U.S. Constitution.[318] Senator Hammond of South Carolina, before secession, believed in the U.S. Constitution

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over territories under Article IV, they lacked sovereignty and, therefore, lacked the ability possessed by States to prohibit slavery. See Cong Globe, 36th Cong, 1st Sess 2148–49 (May 17, 1860) (Sen Davis). Southerners had not always expressed the narrow view of Congress' power over the territories. See Currie, The Jeffersonians at 110 (cited in note 15) ("These assertions [in 1803] of plenary congressional power over the territories contrasted sharply with the narrow conceptions later embraced by the Supreme Court in the Dred Scott case. Not one Southerner in Congress protested [a broad power in 1803]."); see also note 301 (discussing the extension of the fugitive slave act into the territories).

[312] Dred Scott, 60 US (19 How) at 450–51.

[312] Id at 450–51; see Potter, Impending Crisis at 276 (cited in note 69).

[313] See note 84 and accompanying text.

[314] See notes 19, 44 and accompanying text.

[315] The balance is precarious. Too many States' rights might have been thought to hamper the Confederacy's War efforts, as an effective war campaign required strong national powers. See Frank Lawrence Owsley, State Rights in the Confederacy (Chicago 1925) (stating that the Confederacy "died of state rights").

[316] Compare McPherson, What they Fought For at 30 (cited in note 12) ("Confederates regarded themselves as the true heirs of American nationalism, custodians of the ideals for which their forefathers of 1776 had fought.").

[317] See, for example, notes 105–115, 133–143. See generally Alexander and Beringer, Anatomy of the Confederate Congress (cited in note 98).

[318] See notes 316, 319–330 and accompanying text.

so strongly that he suggested the seceding States "should at once adopt the present Federal Constitution without any modification;" he anticipated "the most terrible results" from attempts to improve it.[319]

South Carolina's secession convention made the first, of many, official Southern statements that the U.S. Constitution would serve as the ideal model for the yet-to-be-formed Southern government.[320] The consensus appeared to be that the Southern States were not leaving the U.S. Constitution but, rather, were leaving the Northern perversion of that instrument.[321] As Lewis Stone stated in the Alabama ratifying convention, "Rather than give up the principles of the Constitution, the Southern States have given up the Union."[322] The belief in and support for the principles of the U.S. Constitution were not espoused only by the politicians but extended even the front lines of the then-forming Confederate Army.[323] Members of the Montgomery Convention would state after the Civil War, "the States withdrew not from the Constitution, but from the wicked perversion of the Compact;"[324] that the "leading object [of the Convention] was to

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[319] See James H. Hammond to R.F. Simpson, Nov 22, 1860, in Carol Bleser, ed, The Hammonds of Redcliffe 90 (Oxford 1981).

[320] See Report and Resolutions From the Committee on Relations with the Slaveholding States, Providing for Commissioners to such States, in SC Journal at 481–82 (cited in note 89):

> That the [U.S. Constitution] was the work of minds of the first order in strength and accomplishment. That it was most carefully constructed by comprehensive views and careful examination of details. That experience has proved it to be a good form of government for those sufficiently virtuous, intelligent and patriotic to cause it to be fairly and honestly construed and impartially administered. That the settled opinion of this State has never been adverse to that plan of Government [in the U.S. Constitution] on account of anything in its structure; but the dissatisfaction is attributable to the false glosses, and dangerous misinterpretation, and perversion of sundry of its provisions.

See also Ordinances and Constitution of the State of Alabama with the Constitution of the Provisional Government and the Confederate States of America 32–33 (Barrett, Wimbish 1861) ("[Alabama] Convention cordially approves the suggestions of the Convention of the people of South Carolina . . . to frame a Provisional Government, upon the principles of the Constitution of the United States, and also to prepare and consider upon a plan for the creation and establishment of a Permanent Government for the seceding States, upon the same principles.") (adopted Jan 17, 1861).

[321] Alabama Convention of the People, Report and Resolution From the Committee of Thirteen, upon the formation of a Provisional and Permanent Government between the Seceding States (Jan 16, 1861), reprinted in Smith, Alabama Debates at 131 (cited in note 91):

> In the opinion of the Committee, there has never been any hostility felt by any portion of the people of Alabama against the Constitution of the United States of America. The wide-spread dissatisfaction of the people of this State, which has finally induced them to dissolve the Union styled the United States of America, has been with the conduct of the people and Legislatures of the Northern States, setting at naught one of the plainest provisions of the Federal Compact, and with other dangerous misinterpretations of that instrument, leading them to believe that the Northern people design, by their numerical majority, acting through the forms of government, ultimately to destroy many of our most valuable rights. [Report and Resolutions of the Committee of Thirteen]

[322] Id at 333.

[323] See note 12 and accompanying text.

[324] Curry, Civil History at 50 (cited in note 8). See Smith, Alabama Debates at 141–42 (cited in note 91) (William L. Yancey) ("it must be a government as nearly similar as possible to the Federal Constitution . . . . that the disease, which preys on the vitals of the Federal Union, does not emanate from any defect in the Federal Constitution—but from a deeper source—the hearts, heads and consciences of the Northern people. .

sustain, uphold, and perpetuate the fundamental principles of the Constitution of the United States."[325] Rhett referred to the drafting of the Confederate Constitution as more "a matter of restoration, than innovation."[326] Jefferson Davis remarked, "the Confederacy was the true embodiment of American principles of government. Rather than destroying the American system, the formation of the Confederacy preserved and vindicated it. The Confederacy had become the guardian of the [U.S.] founders' legacy."[327] Even the Seal of the Confederate States shows an equestrian image of George Washington,[328] and Confederate stamps bore the images of Washington and Jefferson, in addition to Davis and Calhoun.[329]

The perception was that unanimity in the Convention was important,[330] and unanimity would be easier with a document similar to the U.S. Constitution. In forming a new nation, it was far easier to have a starting point from which the debate could begin, and at the Montgomery Convention, the default position for contentious issues was to maintain the status quo of the U.S. Constitution.[331] This default position was beneficial only because the Confederate founders and citizens believed the old (that is, U.S.) Constitution was a good model.[332]

. . the elements of that conflict are not to be found in the Constitution, but between the Northern and Southern people.").

[325] Stephens, A Constitutional View at II: 339 (cited in note 6).

[326] William C. Davis, A Government of their Own 226 (Free Press 1994) (quoting from Rhett's personal papers).

[327] Paul D. Escott, After Secession: Jefferson Davis and the Failure of Confederate Nationalism 40 (Harper & Row 1978) (quoting a speech given by Davis in 1861).

[328] See William E. Earle to Quitman Marshall, Secretary of State, South Carolina, Dec 22, 1888 (UNC Southern Historical Collection); see also Lee, The Confederate Constitutions at 127–28 (cited in note 120) (stating that Alabama suggested the grant of an area of land near Montgomery to be called the "District of Davis" for new capital).

[329] Emory M. Thomas, The Confederate Nation 222 (Harper & Row 1979).

[330] Compare Robert Toombs to E.B. Pullin and Others, Dec 13, 1860, in Phillips, ed, Correspondence of Toombs, Stephens, and Cobb at 520 (cited in note 301) (advising that there be no division among those with different opinions as to when to secede); see Howell Cobb to his wife, Feb 6, 1861, in id at 537 (discussing the Georgia delegation's perfect unanimity); see also Smith, Alabama Debates at 360 (cited in note 91) ("[L]et us not be divided. Divisions are dangerous and often ruinous. Unity of sentiment and unity of action inspires confidence, and vastly adds force and effect to a cause in which any people are engaged.") (Baker); William Trescott to Porcher Miles, Feb 6, 1861 (UNC Southern Historical Collection) (expressing concern based upon the publication of several articles and letters in the Charleston Mercury):

> The impression they make is that there are grave and unfortunate differences of opinion among you [Montgomery Convention]—that you have not clear views of your won powers and purposes . . . . they do harm to us and must prejudice us out of the state if Davis goes for re-construction—he must have been . . . re-constructed (and very badly at that) since I saw him. . . . The great desire is that you should speedily as possible organize a Government—Between us, it is a matter of great moment to our State.

[331] Cf Confed J at I: 875 (cited in note 95) (adopting the U.S. Constitution's electoral college system because of the inability to agree on a better alternative); Smith, An Address at 14 (cited in note 10) (stating that the chief defect in the Confederate Constitution was the failure to alter the presidential election system).

[332] See notes 316–329 and accompanying text.

The Convention consisted of only six States, and there appears to have been a great incentive to hew closely to the U.S. Constitution in order to encourage the uncommitted (and generally more moderate) slave States to join.[333] William Yancey stated:

> [a] great and prime obstacle to the earlier movements of the border States in favor of secession has been a wide spread belief that the Gulf States designed in seceding, to establish a Government, differing essentially from the Federal Constitution. . . . A Southern Confederacy, with the Federal Constitution slightly altered to suit an entire slaveholding community, will be an invitation to Southern States, yet in the Union, to leave it and seek for peace and security and liberty within a Union, having no enemies--no irrepressible conflicts--and being a confederacy of slaveholding States, under the Constitution of our slaveholding sires.[334]

The Border States were not the only entities the Confederate founders were courting—foreign nations were also important.[335] A report given to the South Carolina secession convention stated

> [t]hat [a government based on the U.S. Constitution] is more or less known to Europe, and, if adopted, would indicate abroad that the seceding Southern States had the foresight and energy to put in to operation forthwith a scheme of government and administration competent to produce a prompt organization for internal necessities, and a sufficient protection for foreign commerce directed hither as well as to guarantee foreign powers in confidence that a new Confederacy has immediately arisen, quite adequate to supersede all the evils, internal and external, of a partial or total interregnum.[336]

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[333] Report and Resolutions From the Committee on Relations (cited in note 320) ("That the opinions of those to whom it is designed to offer it, would be conciliated by the testimony the very act itself would carry, that South Carolina meant to seek no selfish advantage, nor to indulge the least spirit of dictation."); see Letter of Cobb to the Confederate States accompanying the Permanent Constitution, in Journal of the Mississippi Convention at 4 (cited in note 122) (stating, in effort to gain its acceptance, that the new Constitution was patterned after the U.S. Constitution and that changes were made from experience to guard against the dangers that led to the disruption of the Union); Junius Hillyer to Howell Cobb, Jan 30, 1861, in Phillips, ed, Correspondence of Toombs, Stephens, and Cobb at 535 (cited in note 301) ("I warn our friends at Montgomery that unless you proceed with the greatest caution you will have the border slave States strongly bound with our foes against us.").

[334] Constitutional Rights Speech of Yancey at 144 (cited in note 91).

[335] See Smith, Alabama Debates at 137–38 (cited in note 91) (James Williamson):

> During the war of '76 [Revolutionary War], if the colonists had united and presented an unbroken front, the British Lion would have been much sooner expelled—millions saved to the Treasury, and our fathers spared the shedding of much blood . . . . Yet millions have already been and will continue to be lost to the South by its depreciation, if we do not demonstrate to the World that we are in earnest, and intend, regardless of cost, at every hazard, and to the last extremity, to present an unbroken front in defence of our nationality and rights. This can only be done by establishing a Permanent Government. To-day the people are with us, and expect us to act. If disappointed and left for an indefinite time, surrounded by difficulties more intolerable to an intelligent and brave people than war itself, no one can predict the consequences.

[336] Report and Resolutions From the Committee on Relations (cited in note 320).

There was also a need for quick passage as the political climate was uncertain; a new constitution would provide stability and improve the chance for success of the new Confederacy.[337] There were significant benefits to a quick passage:[338] unity in times of uncertainty;[339] marketability of bonds and availability of loans to raise money in the capital markets;[340] strength of the new nation that would stem from foreign and domestic recognition of a legitimate government;[341] and attraction of the Border States.[342] This need and desire for expedition in drafting and adopting the Constitution led to adoption of many second-best provisions with the hope for amendment once the government was established and peaceful. For example, the South Carolina Convention adopted the Permanent Constitution but called for amendments via national Convention as soon as the government was fully and peacefully operational.[343] Convention member Curry wrote, with regard to the Electoral College, "that the reluctant acquiescence in the retention of what none favored was in the strong hope that what was temporary might be adjusted

[337] See Smith Alabama Debates at 334 (cited in note 91) (Lewis Stone) ("[T]he necessities of the times require that the Confederate States should adopt, without delay, a real, substantial Government."). Report and Resolutions From the Committee on Relations (cited in note 320):

> That speedy adoption [of a Confederate government based on that of the U.S. Constitution] would work happily as reviving agency in matters financial and commercial, between States adopting it, and between them as a united power and foreign commercial nations, and at the same time would combine without delay a power touching purse and sword, that might bring to a prudent issue the reflections of those who may perchance be contemplating an invasion, or to an issue disastrous to them, the attempted execution of such unholy design.

Report and Resolutions From the Committee on Relations (cited in note 320) ("That a speedy confederation by the South is desirable in the highest degree"); Smith, Alabama Debates at 137 (cited in note 91) (G.C. Whatley):

> I am for establishing speedily another Government upon the basis of the old Federal Constitution, and to avoid, if possible, the abuse of it by a fanatical majority. Our people love their Government—they are a loyal and patriotic people—I am ready to give my energies, and my feeble ability, to lay the foundations of a more permanent Government, and that at no distant day.

[338] Telegram from S.C. Gov Pickins to Porcher Miles, Feb 7th 1861 (UNC Southern Historical Collection) ("There is danger ahead unless you give us immediately a strong organized government and take jurisdiction of the military defense. We will be soon forced into a war of sections[;] unless you act quickly it will be too late and reaction will commence which will inaugurate confusion and with it the most fatal consequences."); Smith, Alabama Debates at 140 (cited in note 91) (Yancey) (expressing the need for "a common Government in order to meet a common enemy, as soon as one can be organized—It is plain that, with divided councils, and divided resources, and divided action, these States cannot contend against the united power of the Northern States, as well as if they met their enemy with the strength and wisdom of union, in council and action.").

[339] See Smith, Alabama Debates at 332 (cited in note 91) (Lewis Stone).

[340] See id at 335 (Lewis Stone); but see id at 349 (doubting the need for haste to help gain loans) (William R. Smith).

[341] See id at 334–36 (Lewis Stone); but see id at 350–51 (expressing concern over attempts to curry favor with foreign nations) (William R. Smith).

[342] See id at 137 (G.C. Whatley) ("[O]ur speedy action will be an invitation to them to join us in this great movement. By the formation of a new Government, we offer to the Border States, who join us, a guaranty of protection against Northern coercion and Northern tyranny.").

[343] SC Journal at 249, 256, 274 (cited in note 89).

under more favorable circumstances."[344] Some argued that that a quick adoption was unwise,[345] partly because it would exclude those States that had not yet seceded and, thus, were unrepresented in the Montgomery Convention,[346] though the overwhelming view was to the contrary.

Finally, if the changes that were made succeeded in changing the presumptions and interpretations in favor of a States' rights approach, then more significant textual changes were not necessary. Many Southerners believed that the Union was misinterpreting the U.S. Constitution; under this view, one may think that the Confederate Constitution was an attempt to revive the United States' founders' views of government, not to create a new form of government.[347] The Confederacy was both concerned with the past perversion of the Constitution by the North and motivated by a fear of future distortion by the Republican Party.[348] Regardless, the founders' decision to leave much of the

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[344] Curry, Civil History at 73 (cited in note 8); see note 331.

[345] See Smith, Alabama Debates at 345 (cited in note 91) (William R. Smith), for a comparison of the deliberation over the U.S. Constitution in 1787 to deliberation over the Confederate Constitution:

> Rhode Island deliberated nearly three years; North Carolina deliberated more than two years; Virginia deliberated nine months; South Carolina deliberated eight months; and Georgia deliberated four months! Who were the men that thus deliberated? We boast of the wisdom of our Fathers. Those were the days of Washington, Jefferson, Madison, Hamilton—men, God-like in attitude and thought, still standing out like colossal statues, illuminating the niches in the shadowy walls of the American Pantheon. They paused over these momentous questions! Are they to become dwarfs in our estimation? Verily it would so seem—for we, the intellectual giants of this day representing the sovereign State of Alabama—are not willing to deliberate a single day over the instrument that makes a radical change in the Government of the country, involving the destiny of the people, the happiness, the honor, the fortunes, and the lives of millions!

See also id at 330 (James S. Clark) ("There is no necessity for the immediate ratification of the Constitution; and moreover, such telegraphic celerity and indecent haste are wholly inconsistent with the solemn importance of the subject and the grave consequences which are to follow the act. When delegates deliberated calmly, States were slow to ratify permanent Constitutions.").

[346] See Smith, Alabama Debates at 137 (cited in note 91) (O.S. Jewett):

> when we consider that, at this time, there are only four States in a position to enter this proposed Convention, I think a proper respect to the other slave States demands of us the postponement of our action in the formation of a Permanent Government. I do not wish to defer action to a remote day—but to a day sufficiently far off to enable [other slave States] . . . to come into our Convention, and take part in the discussions of those questions which must arise in the formation of any system of Government.

[347] See notes 316–329; see also Opinion of the Confederate Attorney General (To President Jefferson Davis, Mar 4, 1863), in Confederate AG Opinions at 231, 238–41 (cited in note 182) (laying out a strongly States' rights perspective of the Confederate States); Smith, Alabama Debates at 361 (cited in note 91) (R. Jemison):

> So far as I am concerned, I entertain no opposition to this Constitution. In all its features, as well as I am enabled to judge, upon a careful examination, it seems to be all that we could desire. Considering its every feature, with some amendments and evident improvements, it is fashioned after the Old Constitution, the one under which we have so long lived, and with the spirit and meaning of which our people have become so well acquainted; with such a Constitution, sir, so framed, retaining all the old guarantees of liberty, and others in addition, which adapts it better to our institutions, preserving and securing a pure Republican Government. With such a Constitution as this, presented to me for my sanction, I can find no reason to oppose it, but every reason to support it.

[348] See note 86.

language of the U.S. Constitution unchanged raised the possibility that the Confederate Constitution would be "mis"interpreted in the same manner based, in part, on U.S. precedents.[349]

The danger is illustrated by the practice of state constitutional conventions. State conventions often borrowed heavily from the U.S. Constitution and other state Constitutions. Many felt that in doing so, they adopted the gloss placed on that provision by the state or U.S. government from which it was borrowed. A delegate to the 1868 California constitutional convention stated that "a cardinal canon of interpretation of constitutions" was that "where a constitutional provision has been incorporated from the constitution of one state into the constitution of another state . . . that the courts invariably turn to the decisions in that (first) state to guide them in their interpretation of the provision."[350] Despite this general principle, which indicated that language copied from the U.S. Constitution should be interpreted the same way, the changes that were made[351] provided grounds for re-interpreting even those phrases that remained unchanged.[352] If the changes in the Confederate Constitution effected a global change in purpose and design, then language similar to that in the U.S. Constitution could be interpreted differently in light of the new purpose.[353] Notwithstanding this possibility of re-interpretation, however, President Jefferson Davis, and several Confederate Attorney Generals, indicated that the Confederate Constitution should be interpreted based on the precedents and understanding of the U.S. Constitution: "The Constitution formed by our fathers is that of these Confederate States, in their exposition of it, and in the judicial construction it has received, we have a light which reveals its true meaning."[354]

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[349] In fact, a brief look to the courts of the Confederacy illustrates the danger of leaving so much of the Constitution unchanged. See Burroughs v Peyton, 57 Va (16 Grat) 470, 474 (1864):

> The clauses of the Confederate constitution relating to the military power and its exercise . . . have been adopted without change from the constitution of the United States. . . . Whatever therefore throws light upon the meaning of the constitution of the United States, on this point, throws equal light upon the meaning of ours.

See also id at 482–92 (examining U.S. Supreme Court opinions as aids in interpreting the Confederate Constitution).

[350] Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878 1: 185 (State Office 1880–81). See Andrew J. Marsh, Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada, Assembled at Carson City, July 4, 1864, To Form a Constitution and State Government 15–16 (Eastman 1864) (wanting to incorporate California's interpretation of its constitutional provisions by adopting California's language verbatim).

[351] Of particular importance in this regard are the Preamble, see notes 155–162 and accompanying text; Article I, § 1, cl 1, see notes 180–183 and accompanying text; Article V, see note 277 and accompanying text; and Art VI, see notes 279–282 and accompanying text.

[352] See notes 182–183 and accompanying text.

[353] See Prigg v Pennsylvania, 41 US (16 Pet) 539, 610–11 (1842) (Story) ("the safest rule of interpretation after all will be found to look at the nature and objects of the particular powers, duties and rights"); Bank of the United States v Deveaux, 9 US (5 Cranch) 61, 89 (1809) (Marshall) (reasoning from the purpose of the Diversity clause of Article III); Martin v Hunter's Lessee, 14 US (1 Wheat) 304, 348 (1813) (Story) (reasoning from the purpose of the arising under clause of Article III). See also Story, Commentaries on the Constitution 2: §459–60 (cited in note 233).

[354] Davis, Inaugural Address, Feb 18, 1861 (cited in note 70). See Op Confederate Attorney General (To

CONCLUSION

The Confederate Constitution contains changes that indicate a desire on behalf of the Confederate founders to adopt a Jeffersonian federal compact theory of government and narrow the conception of federal authority. However, to fully appreciate the significance of the Confederate founders' preference, one must understand the impetus behind such a change. The Southern States did not secede solely because the nation was moving toward a centralized democracy; they seceded because this movement infringed on the Southern economic system of slavery. The U.S. Constitution, cast in a Hamiltonian light, would allow the elimination or reduction of slavery. Because of this threat to slavery, the South was compelled to urge acceptance of Jeffersonian ideals. The Southern States wanted a union based on the language of the U.S. Constitution but interpreted with Jeffersonian presumptions.[355] The Jeffersonian interpretation of the constitutional relationship between the federal government and the States served as a means and principled reason for creating a more homogeneous union in order to protect slavery.[356] This use of ideals to effectuate or retain a concrete end is not unique. For example, Jefferson viewed States' rights as an abstract ideal to protect real personal liberties, and American revolutionaries fought under the banner of freedom to remedy perceived injustices such as taxation.[357] But as the preceding discussion has shown, the Confederate founders treated States' rights as more than a mere means of protecting slavery. They were willing to protect slavery by expanding the federal government's power and, consequently, limiting the power of the State governments. Conversely, they expanded the rights of the States relative to the national government even though slavery was explicitly protected by the Permanent Constitution.[358]

Hon S.R. Mallory, May 6, 1862), in Confederate AG Opinions at 85, 85–86 (cited in note 182) (using opinions of U.S. Attorney Generals as precedent); Op Confederate Attorney General (To Hon Reagan, May 8, 1863), in Confederate AG Opinions at 261, 262–63 (cited in note 182) (same); Op Confederate Attorney General (To President Jefferson Davis, Aug 8, 1863), in Confederate AG Opinions at 311, 311–13 (cited in note 182) (using U.S. Supreme Court opinions as precedent). Note however, that President Davis did not follow his own advice and vetoed federal action that had been accepted under the U.S. Constitution. Cf Davis, Veto Message, Feb 11, 1864, in Richardson, ed, Messages and Papers of Jefferson Davis and the Confederacy at 409, 411 (cited in note 70) (vetoing a bill which would have given "corporate powers" to a federal institution).

[355] See Smith, An Address at 1 (cited in note 10) ("The Constitution of our Fathers had been long and persistently abused"); id at 5 (stating that in the Confederate Constitution "grave errors have been corrected and additional hopes given for the preservation of American liberty.").

[356] Compare Smith, An Address at 1 (cited in note 10) (noting the homogeneous nature of the people of the six States present at the Montgomery Convention). See Robinson, 4 J of Southern History at 450 (cited in note 97) ("They [cotton States in 1861] were thinking of a more homogeneous union under the same old constitutional provisions."). The Address of the People of South Carolina to the People of the Slaveholding States, in SC Journal at 472–73 (cited in note 89) (pointing out the differences that have developed between the North and the South, and stating that "We but imitate our [revolutionary founding] fathers in dissolving a union with non-slaveholding confederates and seeking a confederation with slave-holding States."); id at 475 ("Providence has cast our lot together, by extending over us an identity of pursuits, interests and institutions.").

[357] See notes 12, 16–17, 32 and accompanying text.

[358] See text accompanying notes 240–244.

In the modern era, some have begun to question the hundred and fifty year trend to nationalism. As these sparks of Jeffersonian States' rights re-appear,[359] the debates and ideas of the Confederate founders should be a part of the background against which we decide tough Constitutional questions. I can only hope that through this Paper the reader will be better equipped to find answers to Constitutional questions. I can think of no better way to close than with the wisdom of the man who is responsible for this effort:

> Constitutional questions that are worth disputing have no answers. Look rather for insights, for wisdom, for guidance, for the raw materials that inform judgment, and you will not be disappointed. For constitutional interpretation is a matter of informed judgment, and there is nothing like the extrajudicial debates of the early years to inform our judgment as to what the Constitution means.[360]

[359] See, for example, US Term Limits, Inc v Thornton, 514 US 779, 846–47 (1995) (Thomas dissenting); note 18 (quoting US Term Limits).

[360] Currie, The Jeffersonians at 345 (cited in note 15).

Nomination of Julius Ness Richardson
United States Circuit Court for the Fourth Circuit
Questions for the Record
Submitted June 27, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

    a. Do you believe there is implicit racial bias in our criminal justice system?

    Racism still exists in our nation. That racism takes a variety of forms, from the evil acts of hatred of those like Dylann Roof to softer bigotry and bias (explicit and implicit) that affects too many people in their daily lives. The criminal justice system, like other institutions and areas of our lives, is susceptible to that racism. While I have seen the very best and most honorable people working in the criminal justice system, I also recognize that not everyone lives up to our ideals. Indeed, I manage the U.S. Attorney's civil rights practice, which focuses on prosecuting law enforcement officers who violate their duty and tarnish the badge they wear.

    b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

    Yes.

    c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

    While I am generally familiar with the topic, I have not studied the issue.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

    a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

    I have not studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

    b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

    I have not studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

    Yes.

4. Since Shelby County, Alabama v. Holder, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.[7] One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.[8] Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

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[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*

[7] JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), *available at* http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf.

[8] Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

As I understand it, questions concerning voter fraud are pending and impending in courts across the country, *cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008); accordingly, Canon 3(A)(6) of the Code of Conduct for United States Judges prevents me from commenting on the issue.

b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see my response to Question 4(a) above.

c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to Question 4(a) above.

5. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.[9]

a. Do those statistics alarm you?

I am alarmed by any statistics suggesting racial prejudice plays a role in the administration of justice. In affirming the grant of habeas relief for a state-court capital defendant based on the prosecutor's appeals to racial prejudice in a capital sentencing proceeding, the Fourth Circuit Court of Appeals recently explained:

> It is beyond dispute that "[t]he Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987). Racial prejudice, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). For this reason, the Supreme Court has "engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey*, 481 U.S. at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). Finally, we remain sensitive to the Court's judgment that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998–99 (1983). Courts cannot avert their eyes from the risk that "racial prejudice infect[ed] a capital sentencing proceeding ... in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

[9] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited June 13, 2018).

Bennett v. Stirling, 842 F.3d 319, 323 (4th Cir. 2016).

b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

If called upon to address a claim as a lower court judge, I would apply the pertinent Supreme Court and Fourth Circuit precedents in light of the facts presented in a particular case. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Bell v. Ozmint*, 332 F.3d 229, 237 (4th Cir. 2003).

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

Please see my response to Question 5(b) above.

6. The judiciary is in danger of becoming an exceedingly white, male institution. You yourself advocated for diversity and inclusion in at a country club that discriminated against people of color and women in your own home state, saying "the best way to ensure that the Club sought and admitted a diverse membership was by becoming a member and advocating for diversity."

a. If you become a member of the judiciary, do you believe that it is important to have a judiciary that more accurately reflects the rich racial and gender diversity of our great country?

Diversity is important in the judiciary.

b. What will you do to advocate for and ensure a more diverse judiciary?

Should I be so fortunate to be confirmed, I will continue to work on encouraging and providing opportunities and access to all students and young lawyers. I am limited, and will remain limited, in my ability to be involved directly in political issues and advocacy.

7. In *United States v. Dylan Storm Roof* – you had a front row seat to the violent, pernicious effects racism and racial animus have in American society. On June 19, 2018, President Trump referred to immigrants "infest[ing]" our country, as if people who come to this country seeking asylum and a better life for their families are less than human.

a. Do you believe it is important to call out the use of racially inflammatory and dehumanizing language by our political leaders?

I believe this is a political issue on which I am prohibited from commenting. *See* Canon 5, Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").