DID CONSTITUTIONS MATTER DURING THE AMERICAN CIVIL WAR?

SUKRIT SABHLOK
Bachelor of Arts (First Class Honours)
Bachelor of Laws, Graduate Diploma Legal Practice

A thesis submitted for the degree of Master of Arts at the Faculty of Arts, School of Social Sciences, Monash University.
Date of Submission: March 2017

COPYRIGHT NOTICE

ABSTRACT

The question of why the Confederate States of America (CSA) lost the American Civil War has been extensively discussed, with scholars such as Frank Owsley and David Donald arguing that constitutional philosophy – in particular, a preference for local over central government action – constrained the CSA's options and therefore prospects for victory. While Owsley and Donald's portrayal of a government hindered by constitutional fidelity has been countered by Richard Beringer, Herman Hattaway and William Still, who have pointed out that the Confederate government grew in scope during the war in spite of apparent legal restrictions, there has been limited examination of the factual basis underlying the notion that constitutions were highly influential.

This thesis examines the US Constitution and the Confederate Constitutions (provisional and final) with attention to how provisions and interpretive actions may have constrained each respective central government in the realm of economic and military policy. I find that the Confederate States disregarded several provisions, even though in some cases this led to loss of revenue that could have strengthened its position and allowed for more adequate supply of its armies. While non-constitutional discretionary factors primarily account for the Confederacy's defeat, constitutional institutions did constrain the CSA to unfavourable outcomes in raising revenue from taxation and use of African-Americans as soldiers.

DECLARATION

This thesis, except with the Graduate Research Committee's approval, contains no material which has been accepted for the award of any other degree or diploma in any university or other institution. I affirm to the best of my knowledge that the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed: 

Print Name: Sukrit Sabhlok

Date: 25 March 2017

ACKNOWLEDGEMENTS

First and foremost, thanks to all Australian taxpayers for paying my tuition fees as part of the Research Training Scheme, without whom my enrolment would not have been possible.

I thank my supervisors Paul Strangio and Matthew Laing for their constructive feedback on draft chapters. In addition, my confirmation of candidature panel which included James Walter and Narelle Miragliotta made me realise the value of narrowing the scope of my topic.

I would like to thank Sue Stevenson of the Graduate School for answering my administrative questions as I completed the program.

Finally, the Monash Institute of Graduate Research and the Arts Faculty were kind enough to provide travel grants to visit the United States for research at the Ludwig von Mises Institute library, Auburn University library and to present my work at the Austrian Student Scholars Conference in Pennsylvania. These grants permitted me to visit America in July 2015 and February 2017 to discuss my ideas with others knowledgeable about US history.

TABLE OF CONTENTS

INTRODUCTION

We are under a Constitution, but the Constitution is what the judges say it is.

Charles Hughes[1]

On November 6, 1860 Abraham Lincoln was elected President of the United States. Lincoln won without a majority of the popular vote and without carrying a single southern slaveholding state. The northern and western states had propelled Lincoln to victory. In response to his ascension to the presidency, on February 4, 1861 delegates from the southern states of South Carolina, Florida, Alabama, Mississippi, Georgia and Louisiana met in Montgomery, Alabama to affirm their secession from the United States and create an alternative entity they named the Confederate States of America (CSA). A Provisional Constitution for the new nation was adopted on February 8. On March 11, the final Confederate Constitution was completed, although it awaited ratification by the states and the provisional government continued to operate in the meantime. Texas joined the Confederacy in March 1861, and later so did Virginia, Arkansas, Tennessee and North Carolina. These 11 states that made up the CSA withdrew their loyalty by citing disagreements over slavery, tariffs, monetary policy (especially the establishment of a national bank) and internal subsidies to foster northern industrialisation that was felt to be of little benefit to the South's agrarian economy and came at the expense of southern taxpayers.

Lincoln was inaugurated as president on March 4, 1861. Just over a month later, he called for volunteers to militarily subdue the southern states and force them back into the United States. Thus arose the most destructive conflict in US history – the American Civil War, in which some 700,000 persons died. The war was a struggle for dominance over the interpretation of the US Constitution, with the major area of disagreement pertaining to the locus of sovereignty within a federal system. Which level of government is superior? The leaders of the Confederacy believed that the US Constitution reserves sovereignty in the states, while Lincoln thought it allows for central government dominance through its preamble and supremacy clause.

[1] Charles Hughes, *Addresses of Charles Evans Hughes: 1906-1916* (GP Putnam's Sons, 1916) 179.

The lineage of American constitutionalism includes the Magna Carta (1215), the English Bill of Rights (1689), The Declaration of Independence (1776), the Articles of Confederation and Perpetual Union (ratified 1781), the Philadelphia Constitutional Convention (1787) and the US Constitution (ratified 1788).[2] The seceding southerners cited the Declaration of Independence as evidence that the founders would have approved their confederal interpretation and supported the idea of secession.

Ultimately, the CSA failed in its bid for independence, losing a war that killed just over 25 percent of its military age free men. Frank Owsley's *State Rights in the Confederacy* suggests that 'state rights' – obstruction by states relying on a philosophy of constitutional interpretation that emphasises decentralisation – was responsible for defeat.[3] Owsley alleges that the free rider problem hindered the Confederacy. This refers to the tendency of individuals in groups to abstain from contributing to achieve a common goal whether through a monetary contribution or labour contribution.[4] In turn, there is an argument that this leads to difficulties in supplying public goods. When applied to nation-states, the free rider problem has been said to undermine sustained coordinated military action. But defenders of the 'Lost Cause' contend – like the Antifederalists during the ratification debates of the 1780s – that decentralisation and military defence are not contradictory (the 'Lost Cause' refers to ideas that portray the South in an honourable light because of defence of home against Northern barbarians). For them it is possible to delegate to the general government the minimum authority it needs to mount an effective defence without compromising state sovereignty.

It would be ironic indeed if the reason southerners lost is because they clung too dearly to the constitutional fidelity that was cited as justification for their secession. In this thesis, the Confederate Constitutions (provisional and final) are compared to the US Constitution between 1861 and 1865. Specifically, I consider the degree of constitutional constraint from the perspective of the central government. Did the US Constitution better

---

[2] Paul Ferrino, *The Idea of union: From the revolutionary covenants of the 1776 Pennsylvania constitution and the 1781 articles of confederation and perpetual union to the Nationalist Compacts of the 1780 Massachusetts constitution and the 1787 constitution of the United States*' (Masters thesis, Southern Connecticut State University, 2011) 88-89.

[3] Frank Owsley, *State Rights in the Confederacy* (University of Chicago Press, 1925) 1.

[4] Dennis Chong, 'Collective action' in William Darity (ed), *International Encyclopedia of the Social Sciences* (MacMillan Reference USA, 2008) 5.

accommodate the goal of victory than its Confederate counterpart? How much of the outcome of the war can be attributed to constitutional design and the resulting institutions?

The Provisional Constitution lasted for one year, from February 1861 to February 1862. It was more flexible than the final constitution, due to features such as a unicameral legislature that made passing legislation easier and the ability of the Provisional Congress to amend the Constitution with a two-thirds majority. The final Confederate Constitution was in effect from February 1862 till April 1865 when the government was evacuated. Under it, the state governments had three remedies to keep the federal government in check: a state could impeach a federal official operating solely within its limits, three states could call a convention to amend the constitution or states could secede from the Confederacy.[5]

The main constraint which operated on the CSA government (one which many say had a lesser influence on the US government) is that flowing from the Bill of Rights, and in particular Article I of the Provisional Constitution, Article VI of the CSA Constitution or its equivalent the Tenth amendment of the Bill of Rights in the Union. When one speaks of state rights constraining the federal government, one is speaking of the provisions in Table 1.

US Constitution (1788)	**Confederate Constitution (1862)**
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. 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.	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 Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.

Table 1: Text supporting state rights philosophy

[5] Coulter points out that President Jefferson Davis of the Confederacy, "declared that [the Confederate Constitution] 'admits of no coerced association' and that this rule of voluntary union had great merit by making the central government doubly regardful of the rights of the states". E. Merton Coulter, *The Confederate States of America 1861-1865* (Louisiana State University Press, first published 1950; 1994 ed) 29.

In addition, there are other provisions that could potentially operate as constraints on the federal government. The Confederate Constitution restricted the powers of Congress as compared to its US counterpart. It eliminated legislative riders, eliminated the 'general welfare' clause that had left open a backdoor to expansion of federal power in the US, encouraged free trade by confining tariffs to revenue rather than protectionism, incorporated restrictions on spending for internal improvements, required a two-thirds vote to lay a tax or duty on any Confederate state and limited Congress' ability to undermine property in slaves. These provisions can be categorized as civil liberties, including economic liberties, rather than state rights. They form a major part of the analysis in this thesis.

A CSA president was granted slightly more influence in budgetary affairs as compared to a Union president. Only when the CSA president initiated an appropriation bill could the Congress pass it with a majority vote, but when Congress on its own initiative wished to pass a fiscal measure it was required to garner a two-thirds majority. By contrast, the US Congress enjoyed equal initiative with its president because it could pass budgetary measures with a simple majority in all circumstances. In addition, a Confederate president possessed a line-item veto power whereas the US president had to veto entire bills.

The CSA president was more constrained however, in that while he had authority to remove from office department heads and members of the diplomatic service, he could only remove other civil officers when their services were unnecessary, for dishonesty, incapacity, misconduct or neglect of duty and had to table reasons with the Senate. This can be contrasted with the ability of a US president to remove any official in executive departments at will, subject only to ordinary legislation. And while a US president at the time could be re-elected indefinitely, a Confederate president was limited to a single six-year term. The British notion of making cabinet responsible to parliament was partially implemented in article I, section 6, clause 2 of the CSA Constitution which provides that 'Congress may, by law, grant to the principal officer in each of the executive departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department'. These administrative constraints on the CSA government were rarely obviously influential.

This study considers significant constitutional provisions, whether these pertain to state rights, civil liberties (political and economic) or are just administrative in nature.

Chapter 1 begins with some remarks on relevant literature. Chapter 2 moves on to the economics domain, where I analyse constitutional influences that could have impacted revenue available to the respective governments, and therefore financial capacity to win the war. Chapter 3 investigates the legal framework that potentially constrained logistical choices open to military policymakers. Finally, Chapter 4 deals with civil liberties from the perspective of whether individual freedoms prevented the warring parties from suppressing dissent and whether this had a negative impact upon military success.

As the quote beginning this Introduction suggests, legal provisions are given meaning by human beings; clauses cannot be viewed in isolation of the people who interpret them. Therefore, for the remainder of this thesis I consider actual interpretative opinion in the US and the Confederacy and not just constitutional text. My approach distinguishes between constitutions narrowly defined and 'constitutional institutions' (which encompass interpretative opinion). A limitation of such an inquiry lies in the fact that since war is a state of panic when nationalistic fervor tends to trump legal formalities, the likely conclusion of any study such as the present is that constitutions do not restrain government. Moreover, there is necessarily a degree of subjectivity when assessing the relative weight of constitutional constraints and their impact on revenue raised, logistical strength and fostering of unity. Nonetheless, despite the complexities of a wartime 'emergency constitution', there is value in understanding when constitutions were followed and when they were not.

1 CONSTITUTIONAL POLITICS AND THE CIVIL WAR

In July 1861, Vice-President of the Confederacy Alexander Stephens justified the South's secession as follows:

> [W]e simply wish to govern ourselves as we please. We simply stand where our revolutionary fathers stood in '76. We stand upon the great fundamental principle announced on the 4th of July, 1776, and incorporated in the Declaration of Independence – that great principle announced that governments derive their just power from the consent of the governed.[6]

By withdrawing from the United States, the Confederate States of America reignited a dispute over constitutional design that dated back to the 1780s. A major question was how far a constitution should centralise power for the sake of promoting safety, in light of a counter-argument that too much centralisation would pave the road to an authoritarian state and ultimately be ineffective in enhancing security.

The Civil War literature is far too vast for one thesis, let alone a chapter, to adequately summarise. The purpose of this chapter is to selectively explain what has been written so far about the reasons for the CSA's loss, and in particular to examine the strand of the literature that mentions constitutional influences. Thus, this chapter aims to contextualise the thesis' inquiry into whether constitutions matter when it comes to military performance.

Two writers exemplify discussion of constitutional factors and form this chapter's core. First, there is Frank Owsley who focuses on the state rights component of constitutions – based on provisions that safeguard power in the people of the states – in *States Rights in the Confederacy* (published 1925). And second, there is David Donald who narrows matters down to the issue of civil liberties found in the Bill of Rights in both constitutions.[7] 'Though engaged in deadly war', laments Donald, '[President Jefferson] Davis [of the Confederate

[6] Quoted in Marshall DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* (University of Missouri, 1991) 1.

[7] David Donald, 'Died of Democracy' in David Donald (ed), *Why the North Won the Civil War* (Louisiana State University Press, 1960) 82.

States]' government preserved the traditional civil rights of freedom of speech, freedom of the press, and freedom from arbitrary arrest, even when the government itself was debilitated by these rights'.[8]

This chapter begins by acknowledging the centrality of non-constitutional explanations for defeat within the literature. Next, the authoritativeness of Donald and Owsley's work within Civil War scholarship that comments on constitutional design issues is evaluated. Finally, the academic background to the specific policy areas to be assessed for constitutional influence in later chapters – namely, economics and finance, military policy and civil liberties – is mentioned and an evaluation of the contribution this thesis will make to the field is explicated.

I COMMONLY STUDIED FACTORS

To set the scene, it is worth noting that interpretations of the war's outcome are of two types: internal and external.[9] Internal interpretations focus on the Confederacy's self-inflicted failures while external interpretations look at both the Union and the Confederacy. There are three substantive variables commonly considered: overwhelming Union resources (external), incompetence in planning and implementation of military strategy (internal) and lack of political will (internal). Within these we can further subdivide into constitutional and non-constitutional influences. Often the same subject matter contains both constitutional and non-constitutional components. The difference between the constitutional and non-constitutional lies in the level of discretion that can be exercised without regard to law; matters that are not constitutional are those where practically everyone at the time acknowledged that the outcome in that area was primarily influenced by factors other than the Constitution.

Many agree with General Robert E. Lee, who offered the theory that '[a]fter four years of arduous service marked by unsurpassed courage and fortitude, the Army of Northern Virginia has been compelled to yield to overwhelming numbers and resources'.[10] As Mark

[8] Ibid 83.

[9] James McPherson, 'American Victory, American Defeat' in *Why the Confederacy Lost* (Oxford University Press, 1992) 18.

[10] Robert Lee, General Order No. 9, 10 April 1865.

Thornton and Robert Ekelund write, Lee's explanation that the CSA was quantitatively outnumbered is the popular explanation for its defeat.[11] One way a resources shortage has been accounted for is to suggest an externally determined inevitability about the outcome, which suggests that the South was foolish to ever think they could win. This is what historian Richard Current maintains, basing his opinion on the fact that the CSA was the economically weaker party throughout the war.[12]

A resources shortage has also been blamed on poor leadership by Confederate officials. The idea that poor internal leadership should be blamed is presented in Douglas Ball's *Financial Failure and Confederate Defeat,* which takes the approach that the Confederacy had every right to expect success but for fiscal mismanagement by its president and treasury. In Ball's book we find allegations concerning personality-driven discretionary decisions being raised to prominence, with relatively less emphasis on underlying constitutional explanation.[13] Ball criticises Davis for not adequately supervising Treasury secretary Christopher Memminger and ensuring he paid the army on time. This represents discretionary action in that there was no constitutional provision committing Davis to any style of management when it came to controlling cabinet officers. Hence Ball elevates the behind-the-scenes human influences: matters of personality, psychology and convenience rather than issues surrounding law and its interpretation.

Another popular explanation for the defeat of the CSA was its failure to adopt guerrilla warfare tactics. Jeffrey Hummel in 1994 downplays the overwhelming resources thesis and suggests that failure to adopt guerrilla warfare snatched away Confederate victory.

---

[11] Mark Thornton and Robert Ekelund, "The 'Confederate' Blockade of the South" (2001) 4 *Quarterly Journal of Austrian Economics* 23.

[12] Richard Current, 'God and the Strongest Battalions' in David Donald (ed), *Why the North Won the Civil War* (Louisiana State University Press, 1960) 15.

[13] Douglas Ball, *Financial Failure and Confederate Defeat* (1991) 1. Ramsdell, Eaton and Pollard say the same. Ramsdell believes that the greatest weakness of the Confederacy lay in its handling of finances. Eaton argues 'the inability of the Government to mobilize its resources went far to explain the economic deterioration of the Confederacy' and criticises the Confederacy's currency and taxation programs. Pollard finds that defeat was due to 'the absence of any intelligent and steady system in the conduct of public affairs'. These assessments can be contrasted with Beringer et al who assert that 'economic shortcomings did not play a major role in the Confederate defeat'. Charles Ramsdel, *Behind the Lines in the Southern Confederacy* (1997) viii; Clemont Eaton, *A History of the Southern Confederacy* (1954) 235; E.A. Pollard, *The Lost Cause* (1867) 489; Richard Beringer, Herman Hattaway, Archer Jones and William Still, *Why the South Lost the Civil War* (1986) 13.

Despite the North having a higher per capita income, owning three-quarters of American material wealth and its industrial output being ten times that of the South, he notes that natural advantages like rugged terrain made fighting a defensive war a realistic prospect because '[m]ilitary theorists generally agree that an attacking force needs a three-to-one numerical superiority to ensure victory on the battlefield, and a still greater superiority to pacify unfriendly territory'.[14] The key problem according to Hummel was that Confederate high command refused to adopt guerrilla warfare. 'Whatever the reason,' he writes, 'the Confederacy condemned itself to waging a war on the Union's terms, in the realm where the Union had overwhelming predominance'.[15] Yet his argument, which has been repeated many times by others, is not predominantly a constitutional one.[16]

In fact, little attention has been paid to the constitutional influences upon the quantity of resources available to the South or its military policies. Admittedly, because there is no mention of guerrilla tactics in either constitution it cannot be said the issue was constitutional in nature. The war power granted to both sides allowed military commanders discretion whether to adopt or reject guerrilla tactics so long as appropriation of funds for their decision was made via Congress. However, there are other aspects of military planning that are constitutional in nature and had the potential to affect logistics, as I discuss in Chapter 3.

Some authors actively discount constitutional influences and instead stress extra-legal constraints such as political will. In 1986, *Why the South Lost the Civil War* pinpointed declining morale as the culprit, finding that 'the agrarian South did exploit and create an industrial base that proved adequate, with the aid of imports, to maintain suitably equipped forces in the field' but that leaders' depredations led to lack of motivation and brought about the South's downfall.[17] The authors Richard Beringer, Herman Hattaway, Archer Jones and William Still argue '[n]o Confederate army lost a crucial battle or campaign because of a lack

---

[14] Jeffrey Rogers Hummel, *Emancipating Slaves, Enslaving Free Men* (Open Court, 2014) 178.

[15] Ibid 180.

[16] Bevin Alexander, *How the South Could Have Won the Civil War: The Fatal Errors that Led to Confederate Defeat* (Crown, 2007) 5; Robert Kerby, 'Why the Confederacy Lost' (1973) 35 *Review of Politics* 326-45.

[17] Richard Berginer, Herman Hattaway, Archer Jones and William Still, *Why the South Lost the Civil War* (1986) 16 (incidentally, Union General Ulysses S. Grant also argued in his memoir that advantages of manpower and material alone do not account for Northern victory).

of ammunition, guns, or even shoes and food, scarce though these latter items became' and propose the Confederate Constitutions allowed for garnering sufficient resources despite the philosophy of state rights.[18] They acquit an inflexible legal framework from being a primary causal factor and suggest that constitutional design per se did not make much difference.

The work of Current, Ball, Hummel and Beringer et al illustrate some of the non-constitutional constraints that need to be factored into one's analytical calculus when evaluating the relative influence of constitutions. Poor discretionary leadership is a non-constitutional factor unrelated either to state rights or civil liberties, since CSA leaders could not reasonably blame either constitutional text or ideology for certain decisions - such as the probable mistake to not adopt guerrilla warfare on a large scale. The degree of political will among the public can also be heavily accounted for by non-constitutional influences, since the CSA certainly had ample constitutional power to engage in a propaganda effort to raise morale without being hindered by legal constraints. Even in the economic realm, there were many aspects of revenue-raising that were influenced largely by non-constitutional factors, as Chapter 3 finds.

II DIED OF DEMOCRACY, DIED OF STATE RIGHTS?

Although Civil War historians offer mostly non-constitutional explanations for the South's defeat, since 1925 a minority of scholars have investigated the hypothesis that institutional constraints exerted a negative effect. Donald in 1960 identified constitutional philosophy as an internal influence on military performance, in that it imposed constraints on the legislative, executive and judicial branches.[19] Although rarely explicitly citing provisions of the Confederate Constitutions, Donald and Owsley independently from each other construct a theory that relies on the idea that the constitutional philosophy animating the Confederates was that of decentralisation and individual liberty. In a sense, they take constitutions to be more than just their text and consider interpretation by individuals in positions of power, thereby adopting a broader vision that includes unwritten conventions – such as in the British constitution which has no written text but nevertheless is a constitution.

[18] Ibid 13.

[19] David Donald, 'Died of Democracy' in David Donald (ed), *Why the North Won the Civil War* (1960) 82.

In the Donald-Owsley analysis, important aspects of the war were dictated by popular interpretation of the constitutional powers of the central government. They hint that all customary explanations for Confederate defeat – that they were overwhelmed by superior material and manpower, that they used faulty military strategy or that they lacked will – were influenced by the Constitution. For example, they suggest that unwritten constitutional philosophy determined the allocation of economic resources (that is land, labour and capital) in aid of the war effort. Owsley writes that it was a necessary and sufficient condition:

> We are in the habit of ascribing as the causes of the failure of the Confederacy the blockade, lack of industrial development and resources, breakdown of transportation, inadequate financial system, and so on, all of which are fundamental; yet, in spite of all of these, if the political system of the South had not broken down under the weight of an impracticable [state rights] doctrine put into practice in the midst of a revolution, the South might have established its independence.[20]

Owsley cites four categories of evidence to suggest Southerners placed constitutional ideology above winning. First, he says that Confederate states despite building up small armies of their own withheld at times 'a hundred thousand or more men, together with arms and equipment to fit them out, all of which were sorely needed on the battle front'.[21] According to Owsley, exemptions granted to individuals subject to conscription was one means through which some states undermined a coordinated defence. Second, each state tried to control the troops they did tender by insisting on appointing officers over their forces in Confederate service and many of the states instead of pooling their resources decided to supply their own troops, thereby taking the matter out of the hands of the CSA. Third, he argues resistance to suspension of the writ of habeas corpus and to implementation of marital law by Davis caused the defence of the CSA to become ineffective due to trade with the enemy undermining loyalty, spies operating within the Confederacy, newspaper editors publishing compromising information and so on. Fourth, Owsley holds that interposition by the likes of Governor Joseph Brown of Georgia against Confederate officials seeking to impress property (including negroes) from civilians and railroads from states ultimately created shortfalls in army supplies.

---

[20] Frank Owsley, *State Rights in the Confederacy* (1925) 1.

[21] Ibid 6.

Donald likewise insists that southerners lost because they demanded constitutional fidelity during wartime.[22] First, he finds that in the army 'the Southerners never took kindly to regimented life' and, due to their individualist impulses, lacked military discipline which was manifested in soldiers reserving the right to interpret orders broadly, to disobey orders which they deemed unreasonable and to decide on their own the length of their service.[23] Furthermore, politicians sensitive to the democratic aspirations of Confederate soldiers reserved to them the right to elect their superior officers; even President Davis supported this elective system. However, the method of electing officers undermined discipline even further, as 'men spent much of their time in quasi-political campaigning'.[24] Second, the tolerance of liberal democratic impulses extended to the central government respecting the Bill of Rights. Like Owsley, Donald believes that too much respect for freedom of speech by Davis meant disloyal newspapers were allowed to operate regardless of their corrosive effect on southern morale. Moreover, Davis only hesitatingly suspended the writ of habeas corpus. Third, Davis did not endorse congressional candidates or intervene in other ways in the electoral process and thereby allowed his enemies to be influential. This can be contrasted to Lincoln who shut down newspapers, suspended the writ without consulting Congress and supported loyalists in elections.

The Donald-Owsley hypothesis carried significant clout until the 1950s, as reflected in E. Merton Coulter's *The Confederate States of America 1861-1865*, first published exactly twenty-five years after Owsley. Coulter reports on state rights and internal dissension:

> [CSA governors] looked with varying reactions on [the] building up of a great Confederate Provisional Army. It smacked of a concentration of power which might erect a tyranny as great as secession had sought to avert in the old government…In fact, they were looking on the war in terms of each state rather than of the whole Confederacy, and were, therefore, working against a unified national strategy. This was one of the logical results of the state-rights dogma on which the South had been fed for a generation and which had produced

[22] David Donald, 'An Excess of Democracy: The American Civil War and Social Process' in David Donald (ed), *Lincoln Reconsidered: Essays on the Civil War Era* (1956).

[23] David Donald, 'Died of Democracy', above n 14, 78.

[24] Ibid 81.

> secession and the Confederacy. The states of the North, where state rights had not thrived, played a much more effective part than the Southern states in concentrating the national effort, and their governors never gave Lincoln the trouble which the Southern governors gave Davis.[25]

Thus, for Coulter, the Union benefited militarily because its states did not insist on self-governance over military affairs and resisted Abraham Lincoln less.

Beginning with the publication of Curtis Amlund's *Federalism in the Southern Confederacy* in 1966 however, the Donald-Owsley school of thought came under serious attack. Amlund argued that even if the states had not withheld nearly 30,000 troops from Confederate service, the outcome of the conflict would have been the same and so it is not accurate to blame constitutional factors.[26] In 1986 Beringer et al followed up by noting that the notion the CSA was undermined by its constitution fails on two levels. First, as a historical reality they contend favourable interpretations by Confederate judiciaries achieved a level of national coordination by way of policies like conscription that was comparable to the North's approach, so it is misleading to suggest that individuals or states had significant autonomy. Indeed, despite successful implementation of similar policies, the CSA still lost. And second, the states actually were beneficial because their social welfare programs improved quality of life and allowed the CSA to survive longer than otherwise possible. Without state rights, Beringer et al suggest Southern morale would have collapsed sooner.

Richard Bensel's 1987 study confirms Congress and Confederate President Jefferson Davis succeeded in establishing a formidable apparatus dedicated to war: '[t[he Union state apparatus appears relatively anemic when compared to the Confederacy. Northern experiments with conscription and internal economic controls never approached the all-encompassing Confederate operation in the South'.[27] Strong southern nationalism aided the centralisation process; Davis was supported by public sentiment which was in favour of expanding federal power if it could provide financial assistance to alleviate the hardships of

---

[25] E. Coulter, *The Confederate State of America, 1861-1865* (first published 1950; 1994 ed) 311.

[26] Curtis Amlund, *Federalism in the Southern Confederacy* (Public Affairs Press, 1966).

[27] Richard Bensel, 'Southern Leviathan: The Development of Central State Authority in the Confederate States of America' (1987) 2 *Studies in American Political Development* 135.

the war economy. So if the South was such a highly centralised state as Bensel says, it hardly seems fair to blame constitutional constraints for its poor end result in the war.

Thus, in the modern era, most have been sceptical of the Donald-Owsley belief that individual and state rights undermined the CSA.[28] While some work after Amlund's 1966 study stand as exceptions to the general scepticism of Donald and Owsley (such as Richard Goff's 1969 *Confederate Supply*[29]), most do not see constitutional constraints as a primary cause of defeat. Some even observe that the Constitution was a positive influence, because through citing their legal powers state governors held at bay dissidents within the Confederacy, alleviated economic hardships and contributed favourably to national objectives by creating the conditions for the CSA to carry on fighting. Another problem with Donald-Owsley's analysis, as James McPherson wrote in 1992, is that their arguments are equally applicable to Americans under Lincoln's tenure and so they commit the fallacy of reversibility. In the North too, '[b]itter division and dissent existed…over conscription, taxes, suspension of *habeas corpus*, martial law [and] over emancipation of the slaves as a war aim' – and yet they won.[30]

III AREAS OF CONSTITUTIONAL INFLUENCE

The centrality of Donald and Owsley in the discussion so far should not be taken to mean others have not examined legislation, bureaucracies or court cases to determine constitutional influence. In what follows, I canvass other studies across the economic, military and civil liberties dimensions to provide background for analysis in Chapters 2, 3 and 4.

A *Economics and finance*

[28] As noted by Mark Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (University of North Carolina Press, 2011) modern historians have tended to discount the Owsley argument. For a book review that indicates the substantive response of the establishment see Charles Ramsdell, 'Book Review – *State Rights in the Confederacy*' (1927) 14 *The Mississippi Valley Historical Review* 107-110.

[29] Richard Goff, *Confederate Supply* (Duke University Press, 1969).

[30] McPherson, 'American Victory, American Defeat' in *Why the Confederacy Lost* (1992) 28.

The components of Union and Confederate finance were taxes, debt (bonds), unbacked paper money and outright seizure of property, however the relative reliance on each differed between the two nations. Direct taxes – that is, taxes on land or slaves – contributed 20 percent of revenue to the Union but only eight percent to CSA coffers. When it came to indirect taxes, the Union enjoyed greater success there too. Edward Seligman finds that income tax – an indirect tax – yielded about one-quarter of the internal revenue of the US, and therefore '[a]s a fiscal engine, the income tax must be pronounced a comparative success'.[31] Although there was some evasion and residents of different states contributed varying amounts, most historians believe the income tax was lucrative and allowed the North to avoid the harmful effects of relying on printing currency. In contrast, the money supply rose by over a thousand percent in the South, causing serious distortions.[32] Overall, most award higher marks to the Union's tax policies.

According to Jeff Hummel, one reason for this divergence is that the US Constitution was not a restraint on taxation because of the mercantilist attitudes of the Abraham Lincoln administration which overcame any limiting constitutional provisions. Hummel cites the example of Secretary of Treasury Salmon Chase, who had misgivings about the constitutionality of the means he advocated, yet given wartime conditions 'was desperate' and went ahead despite doubts.[33] Thomas DiLorenzo likewise argues that administration officials were nationalists and did not let constitutional niceties get in the way of what they regarded as practical necessities.[34]

The standard view of the CSA on the other hand, is that its top officials initially hesitated to implement taxes because of constitutional restraints. Although both the US and Confederate Constitution required the taking of a census before levying direct taxes plus apportionment of direct taxes by population, Paul Escott believes that the provision was taken

---

[31] Edwin Seligman, *The Income Tax: History, Theory and Practice of Income Taxation* (1970) 479.

[32] Mark Thornton and Robert Ekelund, *Tariffs, Blockades and Inflation: The Economics of the Civil War* (2004).

[33] Hummel, *Emancipating Slaves, Enslaving Free Men* (Open Court) 225. Treasury Secretary Chase when appointed Chief Justice of the Supreme Court from 1864, ruled that the *Legal Tender Act of 1862* was unconstitutional, thus revealing his true views on the legality of the actions he promoted as Treasury Secretary.

[34] Thomas DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda and an Unnecessary War* (Crown Forum, 2003).

so seriously in the South – where wartime conditions prevented enumeration of a census – that it slowed down significant imposition of taxes on property until late in the war.[35] In this vein, Douglas Ball opines that Treasury Secretary Memminger was hindered by a 'narrow concept of government responsibility' that detracted from pursuing a vigorous platform of internal taxation.[36] As an illustration, Ball observes that Memminger had successfully proposed a limiting proviso in article I, section 8 at the initial convention establishing the CSA Constitution. Ball also claims that Memminger did not pursue tariff revenue, noting that 'the Confederate tariff appears more as an exercise in abstract philosophy than a serious effort to raise revenue under war conditions'.[37] Similarly, Richard Burdekin and Farrokh Langdana exemplify a common theme in the literature with their view that tax revenue did not play a large role for the Confederacy because state opposition precluded giving broad power to the capitol.[38]

When it comes to the CSA's monetary inflation however, not much blame has been placed upon constitutional constraints. Here, the main complaint is that discretion (a non-constitutional influence) was not exercised properly. It is the failure by the federal government to utilise its powers that has been criticised by the likes of Ball, who asserts that Davis and Memminger should have mobilised all the specie in the country by requiring banks to suspend payments and lend their coin and foreign exchange holdings to the government in exchange for interest bearing bonds. He estimates that by simply putting in place a plan within its legal authority, the CSA could have raised $40 million of coin and $15 million of foreign exchange.[39]

Seizure of property has also attracted attention, with many suggesting that the Union had less success in this area due to a belief that southerners were entitled to the protection of the provision in the Bill of Rights that required fairness through 'just compensation'. The higher

---

[35] Paul Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (1978) 68.

[36] Douglas Ball, *Financial Failure and Confederate Defeat* (University of Illinois Press, 1991) 202.

[37] Ibid 206.

[38] As Burdekin and Langdana note, '[t]he Confederacy was slow to provide for direct taxes that could support the woefully insufficient revenues from import and export duties'. Richard Burdekin and Farrokh Langdana, 'War Finance in the Southern Confederacy, 1861-1865' (1993) 30 *Explorations in Economic History* 352-76.

[39] Ball, *Financial Failure and Confederate Defeat*, above n 31, 17.

monetary value of gains achieved through impressment and sequestration of property in the South as compared to the North is generally attributed to lax constitutional constraints since numerous studies confirm that southern courts deferred to congressional and presidential acts on the subject, and in so doing allowing CSA leaders free reign.[40] When applied to enemy aliens, most see sequestration of property to have been a useful tool to raise revenue. William Robinson's 1941 survey of the judicial system of the CSA remains at the forefront in this regard, although it has lately been supplanted by Daniel Hamilton's *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War*. According to Robinson, '[t]he number of sequestration cases in most of the district courts ran well into the thousands and the proceeds into the millions of dollars'.[41] However where impressment was applied to loyal citizens, its impact has been viewed negatively by a majority of scholars, who cite its corrosive effect on morale. In other words, some have suggested that in the long-term its success had perverse consequences. For example, Escott argues that public discontent in the South due to impressment legislation far outweighed the military benefits.[42]

B *Military strategy*

The construction of railroads, the naval blockade, the ability to recruit negro soldiers and the capacity for states to influence federal army appointments– these have been the main subjects of discussion when it comes to military policy because of their logistical effects on fighting capacity. The tendency has been to suggest that the Union performed better across all these areas, partly through presidential decrees that suppressed the initiative of the state governments or of the Congress. James Randall's *Constitutional Problems under Lincoln* suggests that President Lincoln believed that although during peacetime he required permission from Congress for most things, by claiming a state of emergency he could increase his stature over national security without consulting the legislature.[43] In this way,

---

[40] Mary DeCredico, *Confederate impressment during the Civil War* (27 October 2015) Encyclopedia Virginia <http://www.EncyclopediaVirginia.org/Confederate_Impressment_During_the_Civil_War>

[41] William Robinson, *Justice in Grey: A History of the Judicial System of the Confederate States of America* (Harvard University Press, 1941) 626.

[42] Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (1978) 66.

[43] Randall, *Constitutional Problems Under Lincoln* (Smith, 1963) 514-16.

Lincoln succeeded in overcoming apparent constraints on executive power by pushing to prominence a flexible interpretation of the US Constitution, for example, by declaring a naval blockade surrounding the South's ports without congressional authorisation (although Congress did later fund his initiative).

An important advantage possessed by the Union was its use of blacks in the army. As William Anderson outlines, Lincoln wrestled the constitutional power to eliminate slavery from the Northern states, in effect pre-empting the later passage of the thirteenth amendment which abolished slavery.[44] Congress also overcame the traditional understanding which saw it as being barred from interfering with slavery in the states by passing the *Confiscation Act of 1862* and Lincoln followed up with executive orders –the Emancipation Proclamation of September 1862 and the Proclamation of January 1863 – that allowed for recruiting blacks into combat roles. The conclusion seems to be that the US constitution posed little constraint on the central government's ability to freely decide regarding the subject of African-American troops.

By contrast, the situation has been portrayed as starkly different in the Confederacy, in that most have suggested greater constitutional resistance was faced by its central government in imposing its will to construct railroads, break the blockade and raise troops. Bruce Levine's *Confederate Emancipation: Southern Plans to Free and Arm Slaves during the Civil War*, points out that while slaves were impressed for menial tasks from the beginning, President Davis doubted he had legal authority to utilise blacks as soldiers, given that there was a constitutional barrier which exhorted that property in slaves was to be respected.[45] In the closing months of the war, the CSA Congress overcame this constraint by passing legislation authorising slaves to be enlisted in the army – albeit even then relying on the voluntary consent of owners – but there was no time to make use of the policy change. The loss of opportunity from not using slaves in the military is assessed as negative among many, if not most, Civil War histories.

C. Civil liberties

[44] William Anderson, *The Nation and the states, rivals or partners?* (1955) 97.

[45] Bruce Levine, *Confederate Emancipation: Southern Plans to Free and Arm Slaves during the Civil War* (2006).

There is agreement among scholars that Lincoln did claim unprecedented executive power, and that his constitutional philosophy led to arbitrary arrests.[46] Most concur that overall the Confederate government better preserved basic freedoms than the Union.[47] On the issue of conscription of citizens serving in state militias into the federal army, the CSA states were in the past said to have put up a vigorous fight to protect their residents from being drafted into federal service. However, research contributions from 2000 onwards show that the state legislative and executive branches mostly failed in having their objections to conscription upheld, since the courts largely overruled their claims. Alfred Brophy in 2000 reached this conclusion for the state courts of Alabama, Virginia, North Carolina, Georgia and Texas.[48] In analysing decisions of the state of Alabama, John Norman observed in 2009: "The Alabama Supreme Court faced many different issues in regard to Confederate conscription, and the court almost always found in favor of broad national power'. He adds, "understanding the seriousness of the military situation, the court fell back on the principles that it had evolved from: the principles of Justice Marshall and federalism. The court knew the principle that, rather than state rights, 'self-preservation is the supreme law'".[49] Brophy and Norman demonstrate that the CSA actively pursued conscription and have inspired a revision of understanding surrounding civil liberties in this area.

Suspension of the writ of habeas corpus has generally been found to have occurred more frequently and with greater scope in the Union than in the Confederacy. Jonathan White has shown through analysis of *Ex parte Merryman*, in which Justice Roger Taney had issued

---

[46] Thomas DiLorenzo, *The Real Lincoln*, above n 29, 133: "Historians have long referred to Lincoln as a 'dictator', but they usually refer to him as a 'good' or even 'great' dictator, as Clinton Rossiter has done".

[47] Cf. Mark Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (1999) 1 who clarifies that the difference is less than commonly perceived: '[k]nowledge of the existence of thousands of political prisoners now reverses our basic understanding of the Confederate cause. Instead of protecting southern rights and liberty to which politicians had extravagantly pledged their society before the war, the Confederate government curtailed many civil liberties and imprisoned troublesome citizens. Moreover, many white Confederate citizens submitted docilely to being treated as only slaves could have been treated in the antebellum South'.

[48] Alfred Brophy, "'Necessity knows no law': vested rights and the styles of reasoning in the Confederate conscription cases" (2000) 69 *Mississippi Law Journal* 1165.

[49] John Norman, "'Self-preservation is the supreme law': state rights vs. military necessity in Alabama Civil War conscription cases" (2009) 60 *Alabama Law Review* 727.

a writ ordering military authorities to produce accused Confederate sympathiser John Merryman for a hearing, that Lincoln instituted martial law to prevent Maryland from seceding and joining the Confederacy. Comparable evidence of the takeover of an entire state's government by Davis is hard to find in the literature.

The impact of civil liberties upon military effectiveness remains contested. Judging by the relative dearth of literature that argues civil liberties and wartime efficacy are compatible however, most seem to echo Don E. Fehrenbacher's comment that the death of Justice Taney 'put an end to the anomaly of a nation's fighting a war with its highest judicial officer bound in sympathy to the enemy'.[50] Fehrenbacher's understanding was that Taney was a traitor who by upholding the Bill of Rights in *Merryman* had tried to use the courts to obstruct through judicial rulings the Union's ability to win.

IV EVALUATION

Which causal factor leading to Confederate defeat can be given the greatest weight without doing injustice to the facts? Different schools of thought place varying emphasis on poor financial management, internal dissent, faulty military strategy and the effects of the Northern blockade in terms of contribution to the overall situation.[51] However, there is also a distinct branch of inquiry that considers the constitutional underpinning of the aforementioned variables.

Within the constitutional school, Donald and Owsley have posited that state governments and individuals hindered effective management through advocacy for a system in which decentralisation and the Bill of Rights trump wartime necessity. But their analysis has lost its stature since the 1960s: Beringer et al conclude that '[t]he Confederate Constitution was strong enough to sanction ... effective war measures'[52] and find that '[t]ime and again the Confederate government over-ruled state objections to violation of state-rights principles; if the states had been getting their way they would not have had so much

[50] Don Fehrenbacher, *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective* (Oxford University Press, 1981) 298.

[51] McPherson, 'American Victory, American Defeat' in *Why the Confederacy Lost* (1992) 18.

[52] Beringer et al, *Why the South Lost the Civil War,* above n 12, 208.

complaint to voice'.[53] Nevertheless, smatterings of support for the Donald-Owsley idea that constitutions matter remains. As Wilfred Yearns observes, "While few historians still accept Owsley's idea that the Confederacy 'Died of State Rights', there is still a gnawing possibility that had the states cooperated better with Richmond the war somehow might have ended differently".[54]

Neely observed in 2015 that '[o]ver the last two hundred years, there have been two extremely valuable constitutional histories written about the North in the Civil War, but neither of them showed any interest in covering the Confederacy'.[55] This thesis will try to rectify such neglect. In contrast to Beringer et al who veer to one extreme in advocating a break from the Donald-Owsley paradigm, this study accepts interpretations that suggest the imposition of direct tax was delayed in the South due to legal constraints and that enrolling slaves in the army was stalled by the CSA Constitution. I further concur that on the question of railroads and civil liberties there was partial fettering of centralisation due to constitutional influence. In subsequent chapters however, I find that these restraints on management of the war were far outweighed in terms of influence by non-constitutional discretionary decision-making and so in this sense my thesis can be distinguished from either side of the debate.

[53] Ibid 208.

[54] Wilfred Yearns (ed) *The Confederate Governors (2010)* 9.

[55] Neely, *Lincoln and the Triumph of the Nation,* above n 23, 15.

2 ECONOMICS AND FINANCE

Economic and financial policy is an important part of winning wars. Robert Ekelund and Mark Thornton contend that '[g]rand battles, glory, heroism and military tactics make for great and inspiring stories, but the keys to modern war are more basic issues such as the allocation of capital and labor, international trade, the functioning of markets and the ability of an economy to provide logistical support'.[56] A wealthier nation necessarily has an advantage in warfare, since richer countries have more capital that can be depleted in pursuit of buying guns, food, clothing, medicine and other necessities of warfare.[57]

Governments have a range of financing mechanisms available. Taxation of incomes or property is the least distorting since it merely skims real wealth from the economy and does not add to debt. Borrowing from lenders defers the costs of war into the future, but this can damage a nation's credit rating and moreover causes servicing obligations due to interest. These two are usually tried first, and if revenue is found wanting then governments disregard monetary means and resort to outright seizure of property or persons (through slavery or a military draft). Finally, the government's printing press can be used to simply print enough currency to cover expenses. However, this causes massive price increases and may be the worst of all in terms of economic harmfulness.

In what follows, I assess the constitutional context of the economic policies of the Union and Confederate governments during the American Civil War. The question sought to be answered is how constitutional constraints impacted revenue, and ultimately, prospects for military success. Constraints are defined here not just as constitutional text, but also as interpretive opinion contributing to an ideological climate limiting what a central government can do. Since constitutional conventions are determined by the philosophical tenets held by

---

[56] Mark Thornton and Robert Ekelund, *Tariffs, Blockades and Inflation: The Economics of the Civil War* (Scholarly Resources, 2004) xxviii.

[57] Ludwig von Mises, *Human Action: A Treatise on Economics* (Ludwig von Mises Institute, 1998) 824: 'There is no record of a socialist nation which defeated a capitalist nation. In spite of their much glorified war socialism, the Germans were defeated in both World Wars'. The Chinese also believed productive resources were crucial to winning wars – see Matthew McCaffrey, 'The Economics of Peace and War in the Chinese Military Classics' (2015) 10 *The Economics of Peace & Security Journal*.

the public and governments, when individuals justify policy by citing legal reasons, their views become part of the constitutional institutions of concern to this thesis.

'The Congress shall have power…'	**US Constitution (1788)**	**CSA Constitution (1862)**
Taxation	To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;	To lay and collect taxes, duties, imposts, and excises for revenue, necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States; but no bounties shall be granted from the Treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises shall be uniform throughout the Confederate States.
Borrowing	To borrow Money on the credit of the United States	To borrow money on the credit of the Confederate States.
Spending	To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;	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.

Table 2: Economic provisions - US vs. Confederacy

In both jurisdictions, underlying the economic provisions of Table 2 were the broad textual presumptions in favour of state rights and inherent natural rights contained in the Ninth and Tenth amendments of the Bill of Rights in the US Constitution and scattered throughout the document in the Confederate Constitutions. The degree to which interpretive opinion recognised these as constraints is also evaluated. Two key interpretive actors during the war were President Jefferson Davis and his Northern counterpart Abraham Lincoln.

I REVENUE FROM INTERNATIONAL TRADE

The importance of trade to the Confederacy's military fortunes seems clear. Antebellum southerners produced tobacco, rice and cotton either for sale abroad or to the North to earn revenue.[58] Indeed more than 40 percent of the South's Gross National Product was tied up in the production of staples.[59] Southerners used the money they acquired from sale of agricultural products to outsiders to buy finished goods such as textiles or luxury items and capital goods like machinery imported from overseas. Thus, trade was a way to create wealth which then ultimately became a source of revenue for government.

[58] As Donald Livingston observes, '[a]s of 1860, approximately 76 percent of American exports were agricultural staples. Nearly all came from the South, and were exchanged for British and European manufactures'. Livingston, 'A Moral Accounting of the Union and Confederacy' (2002) 16 *Journal of Libertarian Studies* 73.

[59] Douglas Ball, *Financial Failure and Confederate Defeat* (University of Illinois Press, 1991) 22.

However, this system of mutually beneficial trade was dependent on the existence of low tariffs, minimal quotas and freedom to export. Experience with tariff reductions in 1846 and 1857 in the United States had demonstrated that lowering tariffs often increases revenue available to a government.[60] The punitive tariffs of the 1820s and 1830s were detrimental to southern consumers and businesses because they increased the cost of imported goods and resulted in a less developed economy by 1861 when the war began. Hence, any constitutional constraint that hindered the ability of a wartime government – and especially a Confederate wartime government given the agricultural economy of the South – to reduce trade barriers could therefore be considered a factor contributing to military defeat.

On the other hand, the North's economy was less dependent on low tariffs since its economic makeup was not predominantly agricultural and instead based upon manufacturing industry that relied less on cheap imports (in 1861, the Union had three times the South's railroad capacity and nine times its industrial production).[61] However it too would have benefited from free trade, as evidenced by the arguments of northern farmers and merchants who joined with southern planters in the 1820s and 1830s to oppose high tariffs.[62]

At least in terms of text, the founding documents of the US and the Confederate States of America allowed for low tariffs and quotas. The US Constitution mandates that duties be uniform throughout America, thereby centralising power over trade in the federal government. It lists three purposes for which revenue from duties may be utilised: first, to pay off public debt; second, to provide for military defence; and third for the 'general welfare' of the United States. The US Constitution does not however, prescribe a specific course of action on trade, instead leaving it to political discretion whether tariffs and quotas should be imposed and at what level. This means a major aspect of US trade policy was immune to constitutional constraints; most of the remaining Congressmen who had not defected to the South acknowledged at least implicitly that it was up to their discretion what trade policy to pursue, thus taking revenue outcomes from trade outside this chapter's scope.

---

[60] Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 1, 13.

[61] James McPherson, 'American Victory, American Defeat' in Gabor Boritt (ed), *Why the Confederacy Lost* 20.

[62] Clyde Wilson, 'Calhoun's Economic Platform' in Robert Paquette and Louis Ferleger (eds), *Slavery, Secession, and Southern History* (2000) 87-88.

Like the US Constitution, the Provisional Confederate Constitution in effect from February 1861 to February 1862 also permitted – and was acknowledged as allowing – complete congressional discretion on trade matters so will not be considered here. Conversely, the final Confederate Constitution in effect from February 1862 explicitly directs the government to support *low* trade barriers by restraining Congress from imposing tariffs for a protectionist purpose.[63] CSA tariffs – as instructed by article I, section 8 – had to be used for raising revenue rather than ulterior purposes such as protecting infant industries from foreign competition. The leaders of the Confederacy apparently realised that a sensible way to raise revenue is to lower tariffs.[64] Southerners drew on experience since 1824, the year when the first major tariff was put in place. In 1828 and 1832 tariffs were increased. In 1833, nullification and resistance from southern plantation interests gradually reduced tariffs till 1842 when tariffs were again increased. These increases were partially reversed in 1846. Finally, between 1857 and 1860 tariffs were again lowered. The general consensus is that there was relative prosperity from 1846 to the panic of 1857, a stretch when tariffs were lower than the average between 1824 and 1832. By writing their anti-protectionist stance into the Constitution, they recognised that to raise revenue tariffs would need to be at moderate levels since beyond a certain maximising point tariffs reduce total wealth and cause more harm than good – a concept that economic theory now calls the 'Laffer curve'.[65]

As in the North, power over international trade was given exclusively to the central government of the Confederacy. The CSA government interpreted its powers in a manner that resulted in tariffs averaging a seemingly revenue friendly 13.3 percent.[66] Prima facie, the average tariff rate suggests that prevailing constitutional influences constrained the CSA to implementing low tariffs. Yet by 1865, the Confederacy had collected a meagre $3.5 million

[63] Randall Holcombe, 'The Confederate Constitution' (1992) 10 *The Free Market.*

[64] Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 1, 22.

[65] Robert McGuire and T. Norman van Cott, 'The Confederate Constitution, Tariffs and the Laffer Relationship' (2002) 40 *Economic Inquiry* 428. McGuire and Cott observe that the Confederate Constitution in its wording confined tariff rates to the 'lower end of the Laffer curve'. They continue: 'the Confederate Constitution tells Confederate legislators to view promoting or fostering costs as the downside of raising tariff revenue. The resulting message is straightforward: tariffs above the revenue maximizing rate were unconstitutional'.

[66] Ibid 437.

in tariff revenue, which indicates that effective trade barriers were probably not low enough and that further reduction was needed to reach the constitutionally permissible level.[67]

Two non-constitutional factors seem significant in explaining the revenue outcome. First, the CSA faced a major non-constitutional obstacle to raising revenue from duties on trade in the form of a Northern blockade of its ports. This dampened the flow of taxable goods. Second, as mentioned, the CSA failed to make effective trade barriers pertaining to imports and exports low enough to stimulate the optimal revenue level. The failure to reduce barriers further was a discretionary decision unrelated to constitutional constraints textual or social. Debate at the time does not reveal participants suggesting that the Constitution forbids low trade barriers; rather, the opposite is true, since the convention that inserted the pro-free trade provision into the CSA Constitution was supportive of low tariffs.[68]

Discretionary decisions the central government took were at odds with its claimed objective of increasing revenue. First, the CSA impressed ships at below-market prices which, due to the consequent uncertainty over security of property rights, had the consequence of discouraging private production of ships and made the blockade harder to break. The federal government took over ships and attempted to run them, even though its constitution prohibited seizure of property without adequate compensation. Second, the Confederacy discouraged privateers from transporting goods across enemy lines by imposing onerous rules.[69] One such rule was the effective tax on blockade runner profits. This took the form of a dictate that 50 percent of space on ships had to be reserved for the Confederate government. This was a measure that made blockade running unprofitable and reduced the incentive to import needed goods into the war-torn South. Had the issue been litigated, there would have been a chance of overturning this rule since it was arguably outside the scope of CSA power given its protectionist effect. In February 1864, the Confederate Congress passed *An Act to Prohibit the Importation of Luxuries or of Articles Not Necessary or of Common*

[67] Mark Thornton and Robert Ekelund, "The 'Confederate' Blockade of the South" (2001) 4 *Quarterly Journal of Austrian Economics* 34.

[68] Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 1, 23; Jeffrey Rogers, *A Southern Writer and the Civil War: The Confederate Imagination of William Gilmore Simms* (2015) 67.

[69] Robert Ekelund and Mark Thornton, 'The Confederate Blockade of the South' (2001) 4 *The Quarterly Journal of Austrian Economics* 25.

Use which listed prohibited categories of imports and imposed price controls.[70] This federal legislation further hindered the flow of goods into the Confederacy by reducing the profit motive for blockade runners.[71] It banned spirits in spite of alcohol being essential for medical needs and a source of sustenance for soldiers. By adopting such measures, the CSA was reducing its prospects of victory by hampering imports of iron to repair railroads essential for transporting military supplies. Another example is when the CSA banned private citizens from trading with the North, even though doing so could have created mutually beneficial relationships between the Confederate border states of Missouri, Tennessee and Virginia and the Union and hence improved prospects for peace. An open policy in favour of trading with the enemy may have allowed the CSA to partially overcome the limitations of its cotton economy by receiving foodstuffs such as beef, pork, corn, flour, fruits, butter, and cheese.

The division of authority between local and central was a relevant constitutional factor, however the states did not constrain the federal government to a negative revenue outcome since for the most part had state views prevailed there would have been a beneficial expansion in trade.[72] For instance, Governor Joseph Brown had chartered the Little Ada to carry Georgia cotton to European markets, but became embroiled in conflict when President Davis tried to enforce the counterproductive law that reserved cargo space for the central government. Davis refused the ship clearance to run the blockade and during the ensuing squabble the ship was reported to the enemy, who in a surprise raid captured it in port. Ironically the Union was denied their prize by Davis, who had as part of his dispute with Brown ordered that the Little Ada not be allowed to leave and so had stationed artillery batteries nearby. This episode was caused by Davis overstepping textual constraints in the Constitution. Brown took the practical approach which could have aided war financing.

At times, however, state dissent did constrain the federal government in a way that reduced revenue from trade. Contrary to the Provisional Constitution's text which prohibits

---

[70] *An Act to Prohibit the Importation of Luxuries or of Articles Not Necessary or of Common Use* (Confederate Imprints, 1861-1865; Research Publications, 1974) 10-11.

[71] Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 1, 51.

[72] As noted by John Schwab, the state governments, and especially North Carolina, were particularly interested in cotton speculation abroad. Schwab, *The Confederate States of America, 1861-1865: A Financial and Industrial History of the South During the Civil War* (C Scribner's Sons, 1901) 234.

states from imposing export duties without congressional approval, the state governments imposed an embargo on cotton exports to Europe. By limiting exports as an official policy, the states hoped to put pressure on Britain and France – who were believed to be reliant on supplies from the South – to intervene on the Confederacy's behalf in the same way France had assisted the colonial American revolutionaries. Ultimately this was an unsuccessful strategy, not only because foreign intervention did not materialise, but also because it needlessly deprived southerners of export revenue at a time when their economic situation was dire. Exports fell by 85 to 90 percent in the first year of the war due to the embargo. Cotton exports reaching Europe in the first year of the war dropped to about one percent of its peacetime level, and output fell from 4.5 million bales to 1 million bales.[73]

President Davis failed to overrule local embargoes due to a respect for state rights even though he had the authority to take charge of international trade under the Constitution. Granted, it was difficult for the federal government to resist the states since no Supreme Court binding on the states was ever established. However, even in public pronouncements officials such as Judah P. Benjamin, Confederate secretary of state, irrationally hoped that an embargo on 'King Cotton' would force help from textile-producing countries. Instead, England just switched to alternative sources of cotton in Egypt and India.

In summary, while the Confederate Congress superficially supported a low-tariff approach consistent with the CSA constitution, quota policies had the result of pushing up trade barriers to a high level. In this, the federal government had only its discretionary choices to blame and it does not seem logical to say that constitutional philosophy was a constraining factor, since most acknowledged at the time that the Constitution required – at the minimum, in spirit – low trade barriers but politicians simply chose to ignore it.

Had the CSA encouraged international trade, its tariffs may have raised reliable revenue since there would have been a barrage of goods to tax. The Union blockade was porous, with Stanley Lebergott estimating the probability of capture for blockade runners

[73] Mark Thornton, 'The Union Blockade and Southern Strategy' (Speech delivered at the Auburn University Academy for Lifelong Learners, Auburn, 2 February 2005); Jeffrey Hummel, *Emancipating Slaves, Enslaving Free Men* (2013) 167.

smuggling into the South at 16.4 percent[74] and others agreeing that the risk to life faced by blockade runners were less than those encountered by Confederate soldiers in the field.[75] Hence it should have been possible to bring in goods and earn income from exports.

A counter-argument to the proposition that low trade barriers reap revenue is that the North raised $305 million from tariffs despite its high trade barriers.[76] However the Union's revenue outcome may have to do less with its tariff rates than with the non-constitutional factor that the North had a pre-existing resource advantage and hence coped better with the ill-effects of protectionism, in that it did not need to rely so heavily upon imported foreign ships to protect its ocean trade as did the CSA. Due to its existing industrial infrastructure allowing it to mobilise warships, Northern ports were less affected by Confederate attempts to destroy US merchant ships than was the South by the Union blockade.

II FISCAL POLICY

Fiscal policy pertains to spending and taxation measures undertaken by government. Since resources are scarce, economists advise that during a conflict governments should discourage private citizens from consuming goods required by the military and shift from civilian to military expenditure. Economist Murray Rothbard observes, '[m]obilization means that large quantities of resources must be shifted from the peace-time production of consumers' goods to the production of military goods. Factors of production, machine-tool factories, capital equipment, land, and labour force must be shifted from consumers to war industries'.[77]

---

[74] Stanley Lebergott, 'Through the blockade: the profitability and extent of cotton smuggling, 1861-1865' (1981) 41 *The Journal of Economic History* 874. The probability I cite is the combined rate for steamers in 1862 and 1863, and does not cover all the years of the war nor does it cover sailing ships (sailing ships had a higher rate of capture so including them would push up the capture rate). Lebergott derives a capture rate of 16.1 percent for steamers between 1862-1865. This suggests 16.4 is an indicative figure and useful for our purposes.

[75] Mark Neely, 'The Perils of Running the Blockade: The Influence of International Law in an Era of Total War' (1986) 32 *Civil War History* 101–18.

[76] A contrary view can be found in Craig Symonds, *The Civil War at Sea* (Oxford University Press, 2011). Symonds suggests that despite passage of regulations seemingly inhibiting blockade running imposed by the Confederate government, exports and imports continued at increased rates. If Symonds is correct, this would imply that the central government intervention had a positive, rather than a negative, impact.

[77] Murray Rothbard, *The Economics of War* (1950) Mises Institute <https://mises.org/library/economics-war-0> He notes that to discourage consumers buying up the food, clothing and medicines needed by soldiers, it is necessary to reduce private demand for these products by increasing the price (through taxes).

In terms of text, neither the US Constitution or the Confederate Constitutions constrained the warring parties to Rothbard's ideal. The US Constitution's provisions detailed the authority of Congress over taxation, borrowing money and regulating commerce; however, it contained few constraints, leaving it to the discretion of the legislature when and how much to borrow and proscribing no prohibition against subsidies or public works. The Provisional Constitution was like the US Constitution, in that it left tremendous discretion to the Congress on fiscal matters. The final Confederate Constitution was a mixed bag; while it granted discretion to borrow largely to Congress – thus partly taking the issue outside the constitutional realm of analysis – it did prohibit subsidies to industry and public works projects (the latter if adhered to would have restrained wasteful civilian expenditure by the federal government). An exception permitted infrastructure such as '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' however these were to be financed by taxing the shipping companies trafficking the waterways, rather than by burdening the Treasury.

A *Tax finance*

A major area of textual constraint common to the US Constitution and the Confederate Constitutions was that of direct taxation, which was required to be apportioned based on population. This requirement was inserted in response to fears that an unlimited taxing power given to the national government could be used to abuse regions. The apportionment clause makes it harder to levy taxes unfairly because it implies, for example, that if an amount of $20 million is to be raised by the federal government then the share each state contributes toward meeting that target is distributed to avoid overly burdening any one state. Ergo a state with one-third of the national population would contribute one third of the $20 million.[78]

An initial area of interpretive constraint concerned the definition of 'direct' tax. Traditionally defined as a tax on land or slaves, in the North some congressmen nonetheless wondered aloud whether an income tax was a direct tax or an indirect tax. If it was the former, then the constraint of apportionment based on population would apply, with said population

[78] Erik Jensen, "The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?" (2006) 398 *Faculty Publications* <http://scholarlycommons.law.case.edu/faculty_publications/398>

having to be measured by a recent census. Prior to the war, the American government was mostly funded from excise and customs duties and no precedent had ever been set authorising an income tax at the national level. Nevertheless, claiming necessity for revenue, the US Congress enacted an income tax in August 1861 and adjusted rates in following years. During the war, Congress and President Abraham Lincoln held that because an income tax did not touch property directly, it was an indirect tax and not constrained to requisitions proportionate to the population of each state. Constitutional challenges to the tax did not reach the Supreme Court until after 1865, and even if they had been allowed to earlier, would likely not have succeeded given that Lincoln appointed five Supreme Court justices favouring his theory of interpretation to the bench. Thus, the president and legislature's opinion was adopted and the only potential constraint in the field of taxation overcome.[79]

The North, though enjoying superior administrative institutions, did experience problems in state-federal relations when it came to collecting tax. For instance, when the *Revenue Act of 1861* containing the income tax was enacted (among several other types of tax embedded in the law) it was left to the governors to collect but nothing much was done by the state governments. These initial teething problems were quickly overcome however with the formation of the Bureau of Internal Revenue and enforcement mechanisms, so there does not seem to have been much overall constraint in the form of state rights resistance.[80]

In the South, for the first year the Confederacy operated under the Provisional Constitution which did not have an apportionment clause and (like the final Constitution) granted a slightly broader authority than the US Constitution by permitting taxes to be laid on exports and not just imports.[81] This meant that in theory, excepting issues of state rights or other interpretive constraints, the Confederate government had more freedom to tax than the Union. Taking advantage of the flexibility of its provisional document, on February 28, 1861 the CSA Congress levied duty of an eighth of a cent per pound of cotton exported. In August

[79] In 1880, the Supreme Court upheld the Civil War income tax law. However, its interpretation was questioned by a later Supreme Court in 1895 when it ruled that income taxes are direct taxes. Legal uncertainty led to passage of the Sixteenth Amendment to the US Constitution, which allowed for unapportioned income tax.

[80] Sheldon Pollack, 'The First National Income Tax, 1861-1872' (2014) 67 *Tax Lawyer* 10-11.

[81] Although some state constitutions did specify limits on taxation. See, e.g., Alabama Constitution of January 7, 1861.

1861, Congress implemented a War Tax of one half of a percent on real and personal property (including slaves). Yet neither was particularly successful, since in 1862 less than five percent of revenues was realised from this tax. Attempts at collection continued over the years, and 'not until 1864 did the War Tax account for even 10% of total revenues'.[82]

In its first year, the Confederate government derived 75 percent of its total revenue from treasury notes, less than 25 percent from bonds and under two percent from taxes.[83] This poor outcome can likely be attributed largely to non-constitutional factors of personality and poor leadership. Bad decisions were made by members of Congress who, wrongly believing the war would be short, underestimated the importance of taxation in the early stage of the conflict despite having power to pursue most types of tax. They taxed the wrong things, and left the right things untaxed. They delayed in setting up an administrative system.

Constraints imposed upon the federal government by the states were influential, however, when it came to collecting the War Tax. Governor Moore of Alabama on October 28, 1861 protested that '[t]he collection of this tax, by the state would be an onerous and unpleasant duty as it imposes upon the state the necessity of enforcing the laws of the Confederate government against her own citizens'.[84] Such reluctance to burden the public was reflected in the reality that most state governments, to meet their quota payments, resorted to taking out loans rather than directly taxing residents.[85] Due to the substitution of loans for taxes, the stock of money circulating in the economy increased and a rise in prices was stimulated, consequently undermining the intent and effectiveness of the federal tax program.[86]

---

[82] Richard Burdekin and Farrokh Langdana, 'War Finance in the Southern Confederacy, 1861-1865' (1993) 30 *Explorations in Economic History* 357.

[83] *The Civil War* Tax History Project <http://www.taxhistory.org/www/website.nsf/web/THM1861?OpenDocument> at 28 December 2016.

[84] Quoted in Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>

[85] With the exception of South Carolina, which collected duties from its citizens. Eric Nielsen, 'Monetary Policy in the Confederacy' (2005) *Region Focus* 41.

[86] Eugene Lerner, 'The Monetary and Fiscal Programs of the Confederate Government, 1861-65' (1954) 62 *Journal of Political Economy* 509.

From February 1862, the CSA Constitution came into effect and created a textual and practical barrier to levying direct taxes via its apportionment clause. The inability of Confederate armies to reliably hold territory precluded a reckoning of population through a census, and hence due to the terms of the clause Congress felt unable to target for revenue the two-thirds of wealth that was tied up in land and slaves. Military setbacks such as the capture of New Orleans in May 1862 also sparked demoralisation, which transformed into an additional constitutional constraint in the form of growing state level resistance.

Nevertheless, while internal loyalty was not as sturdy as during 1861, there was still scope in 1862 to implement a comprehensive *indirect* tax regime if the federal government had the foresight and determination to do so. Eventually, the CSA did try to utilise indirect taxes by side-stepping taxes on land and slaves to avoid the apportionment clause. On April 24, 1863 excise taxes on forest products, liquor, hotels and occupational and license fees were established, and a 10 percent tax on most profits, an income tax and a 'tax-in-kind' of one-tenth of farm produce was implemented.[87] The income tax was an onerous imposition which Edwin Seligman has pointed out was at higher rates than that of the Union, yet it failed to yield the desired revenue.[88] While the tax-in-kind was moderately successful, residents of locales overrun by the enemy were by virtue of collection difficulties exempt.

When faced with lacklustre revenue from indirect taxes, at the urging of President Davis, Confederate leaders in February 1864 repudiated the apportionment clause out of desperation at the state of their finances, including disregarding their own constitutional requirement for taking a population census. A five percent levy on land and slaves was consequently imposed, however this may have been too late to allow time for revenue generation given how overrun the South was by Union armies at this stage.

Why did the income tax fail to produce significant revenue? The outcome cannot be blamed on the constraint of state rights, since responsibility for collection (unlike the situation with the War Tax) was entrusted exclusively to federal officials. One reason may be

[87] William Barney (ed), *The Oxford Encyclopedia of the Civil War* (Oxford University Press, 2011) 99.

[88] Edwin Seligman, *The Income Tax: A Study of the History, Theory and Practice of Income Taxation* (Augustus M. Kelley Publishers, 1970) 486. Seligman's observation does not consider the US emergency income tax bill passed in July 1864 which imposed an additional tax of 5 percent on all incomes more than $600, on top of the rates set by previous income tax bills.

that the rates were set too high, since widespread tax evasion occurred. By the logic of the Laffer curve analysis discussed above, such evasion implies the balance between acceptable and unacceptable coercion had been breached and society was organically rejecting the imposition. Lowering the rate could have encouraged personal saving, capital formation and, over the long-term, revenue for government coffers. Regardless, tax rates were a non-constitutional discretionary factor because no rate was proscribed by the Constitution.

When the Confederate experience with constraints is viewed in totality the record appears a mixed one. On the one hand, the southern states had antebellum experience at the city and county level in taxing slaves that could in theory have eased development of federal taxation. Indeed by 1864 the CSA had institutions that rivalled the Union in centralisation and moreover states did not shirk in terms of paying tax, with an average rate of contribution between 62 percent and 87 percent throughout the war, even in later years when the Union controlled swathes of territory.[89] On the other, constitutional constraints partially inhibited development of a broader tax base due to provisions in the CSA Constitution such as the one ruling out the 'general welfare' as a justification for taxes by the federal government; the permissible reasons were restricted to revenue, paying off debt and defence.

On balance, when compared to the North, the South was constrained in its ability to tax to the detriment of its fighting ability.[90] This is suggested by the fact that the North raised 21 percent of its revenue from taxes whereas the South raised not more than 10 percent of total revenue from taxes (including tariffs). While the North made good use of direct and indirect taxes, the Confederacy was held back by its failure to circumvent its apportionment clause sooner. By contrast, the Union experienced few problems with its identical apportionment clause since a census had been taken in 1860 and it acted accordingly.

B. *Debt finance*

[89] Rose Razaghian, 'Financing the Civil War: The Confederacy's Financial Strategy' (Working Paper, Yale University, December 2004) 18.

[90] Paul Nelson, 'Cost of the Civil War' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) 442.

The people of the US and the Confederacy in their foundational documents authorised their respective central governments to borrow money on almost identical terms.[91] Thus the text of their borrowing clause generally left to the political branches the task of resolving its scope and offered no guidance as to whether, for example, a balanced budget should be the objective of fiscal policy. It simply stated that the Congress shall have the power 'to borrow money on the credit of the United States [or the Confederate States]'.

Yet the availability of credit was constrained, however, by the gold or silver standard enshrined in the constitutions of the United States and the Confederacy by provisions pertaining to coining money and the outlawing of anything but gold and silver coin as tender in payment of debts. In 1850, it was recognised in *United States v Marigold* that Congress under the US Constitution had been granted the 'trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union'.[92] Further, the Confederacy was bound by an additional textual constraint in its constitution's article I, section 8, clause 4, which was a provision guaranteeing repayment of debts.

The United States raised 64.5 percent of its revenue from borrowing over the course of the Civil War. By comparison, 21.3 percent of the Confederacy's total revenue was from debt.[93] In its first year, the CSA Treasury received $15 million from loans and bonds in February and $22.6 million from bonds in August.[94] But in August 1861, a $100 million issue of Treasury notes convertible to twenty-year bonds sold slowly. Prima facie, these facts suggest a material difference that invites inquiry as to whether text or interpretive constraints played a role in the Confederacy's lesser revenue from borrowing.

---

[91] Article I, section 8, clause 4 of the CSA Constitution states: 'To establish uniform laws of naturalization, and uniform laws on the subject of bankruptcies, throughout the Confederate States; *but no law of Congress shall discharge any debt contracted before the passage of the same* (emphasis added)'.

[92] *United States v Marigold* 50 US 560 (1850).

[93] John Godfrey, *Monetary Expansion in the Confederacy* (1978) 14. Some others estimate a higher percentage of somewhere between 32 and 40 percent of Confederate revenue from loans. See Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>; Paul Nelson, 'Cost of the Civil War' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) 442.

[94] Jefferson Davis, *The Rise and the Fall of the Confederate Government* (Thomas Yoseloff, 1881) vol 1, 485.

Some have maintained that the failure of the CSA to centralise sufficiently may have reduced its borrowing capacity. By way of comparison, it has been pointed out that the Union's expansive interpretation of its power resulted in the *National Banking Acts* of 1863 and 1864 which created federally chartered banks, taxed state banknotes to drive state banks out of existence and established a uniform national currency backed by government securities. Northern banks were required to deposit one-third of their capital for war bonds with the Comptroller of the Currency, and in exchange were given banknotes representing the market value of the bonds. In short, the system induced private banks to buy US bonds, making financing of the Civil War through borrowing easier for the Union government.

Unlike in the Union, the Confederate Congress did not establish a system wherein banking was systematically taken out of the hands of state governments. Yet this must be qualified by the observation that the federal government occasionally imposed its will on local populations to encourage them to lend assets to it. For example, the Confederate government induced banks in 1861 to lend specie to the Treasury. The central government later pressured the state banks to suspend specie payments because this allowed easier deficit financing, since suspension meant banks could lend more freely. On February 17, 1864, with its *Currency Reform Act*, the government attempted to force conversion of its interest-bearing Treasury notes into four percent bonds. Again, in November 1864, it targeted interest-bearing notes and coerced, with the threat of taxes, noteholders to exchange these notes for bonds.[95]

It should also be noted that the states played a supporting role in deficit financing. All states except for North Carolina and Georgia assisted in obtaining credit for the federal government by joining together to guarantee Confederate bonds to increase their value and attract foreign investors. Alabama's legislature on December 1, 1862 approved a resolution opining that 'it is the duty of each State of the Confederacy, for the purpose of sustaining the credit of the Confederate government, to guarantee the debt of that Government in proportion to its representation in the Congress'.[96] South Carolina's legislature passed a resolution in similar terms, and authorised the state's governor to endorse a share of $200,000,000 of Confederate bonds. Mississippi followed suit on January 3, 1863 when it authorised its

[95] Richard Burdekin and Marc Weidenmier, 'Interest Bearing Currency and Legal Restrictions Theory: Lessons from the Southern Confederacy' (2002) 22 *Cato Journal* 203.

[96] Richard Todd, *Confederate Finance* (University of Georgia Press, 2009) 69.

governor to endorse its share of $200,000,000. These efforts indicate that on the matter of loans state rights philosophy does not seem to have been a major hindrance.

Many governments enact internal taxation programs simultaneously when attempting to procure loans to instil confidence in investors that revenue is available for repayment. However, tax revenue was low in the CSA partly due to constitutional limitations. Without significant revenue from taxation, there was doubt among financial markets of the capacity of the CSA to pay its debts, and so money loans dried up (hence the impetus for the Confederacy's 1861 experiment with the produce loan scheme, which allowed food to be exchanged in return for bonds). Investors also look for victories on the battlefield to find assurance of repayment. Yet there were constitutional constraints preventing interference with slave property that hindered the CSA's ability to raise troops from the millions of slaves in its jurisdiction, and the resulting manpower shortage diminished its ability to match the numerical strength of Union armies.[97] In this sense, when it came to attracting lenders, the Constitution did partially operate as a constraint.

On the other hand, the amount of tariff revenue available to repay debts and secure lenders, as shown above, was primarily the result of non-constitutional discretion. In addition, high inflation, which was anathema to lenders because a devaluation of Confederate currency discouraged creditors from wanting to lend if they were to be repaid in worthless Confederate dollars (although some government bond contracts promised repayment in gold after the conclusion of the war), as I show in the next section, was also primarily the result of discretionary decisions not the Constitution. Treasury Secretary Christopher Memminger understood the negative effects of a debased currency, however he failed to convince Congress to control inflation and inspire faith in holding Confederate currency.[98]

Revenue from loans was consequently the result of multiple influences. On balance, I would suggest that the non-constitutional products – namely, tariff revenue and inflation rates

[97] Specifically, the CSA Constitution stated that '[n]o…law denying or impairing the right of property in negro slaves shall be passed'.

[98] See, e.g. Memminger's speech to the South Carolina House of Representatives on 9 December, 1848 outlining the effects of currency debasement and arguing that governments should not be involved in the business of banking. *Speech of Mr. C. G. Memminger, on the question of rechartering the bank of the state of South Carolina: delivered in the House of Representatives, December 9, 1848* (1849).

– were more influential. What cannot be disputed is that the possibility for securing loans had much to do with perceptions of underlying ability to repay, and here the Union had an advantage due to its credible internal tax revenue, assured tariff duties and lower inflation rate. The relatively favourable economic situation in the North allowed Philadelphia banker Jay Cooke (acting under direction of Treasury Secretary Salmon Chase) to successfully propagate bonds to not only the rich but hundreds of thousands of middle-class individuals.

Even if it had somehow succeeded in borrowing more, the CSA would still have struggled with debt servicing obligations due to a poor revenue base, which would have eventually resulted in a financial crisis either when the system collapsed under its own weight or when lenders discovered the essentially bankrupt Treasury. So, it is unclear whether more loans could have made a tangible impact allowing the CSA to finance victory. As an illustration consider that in 1861, war expenditure was 95 percent of the Confederacy's budget but by October 1864 actual spending on fighting the war fell to 40 percent of the budget since the rest (about 56 percent overall) constituted payments towards debt servicing. '[W]hen it succumbed [the CSA] was owing current floating debts estimated between $400,000,000 and $600,000,000 – owing soldiers their pay for many months and obligated to almost everybody for materials, rentals or services and for interest on the public debt', writes Ellis Coulter.[99]

C. *Expenditures*

A complete picture of fiscal policy necessitates an analysis of government expenditures and how effectively these were directed toward the prime objective of military defence. There was nothing in the US Constitution or Provisional CSA Constitution's text precluding wasteful spending, thus leaving constraints to be resolved in the realm of political discretion. But in the Confederacy from 1862, private companies were mostly responsible for building their own infrastructure since spending on public works was ruled out by the final CSA Constitution except for on ports, harbours, lighthouses and for dredging rivers. Taxes to raise revenue for the aforementioned had to be laid only on ocean or river going ships rather than on the general population (so too with the post office, which after March 1863 was to be

[99] Coulter, *The Confederate States of America, 1861-1865* (first published 1950; 1978 ed) 172.

funded from profits obtained by user fees).[100] Subsidies from the Treasury to specific companies were prohibited. However, an exception in article I, section 8, clause 17 allowed for construction of 'forts, magazines, arsenals, dockyards, and other needful buildings' for military defence.

In the North, the Republican Party won the 1860 election on a platform of subsidies for manufacturing and shipping industries. From 1861, President Lincoln's mercantilist beliefs shaped the agenda in the House of Representatives and Senate; their efforts led to the adoption of an interpretation permitting spending on internal improvements.[101] Influenced by the 'American System' proposed by Congressman Henry Clay, whereby hundreds of businesses collaborate with government and are paid by taxpayers for their efforts, the Lincoln administration in 1862 signed a bill for a transcontinental railroad from Omaha, Nebraska to Sacramento, California diverting millions of dollars even though that money could have instead been spent on bouncing back from the poor performance of Union armies during the first year of the war.[102] Instead of selling federal land to finance government, Congress did the opposite with the *Homestead Act of 1862* which gave away land at little or no cost, and the *Morrill Act of 1862* which granted 17.4 million acres to build colleges to teach agriculture and science. With respect to the latter, the US Constitution nowhere authorised expenditure on education by the federal government, but proponents argued it was implied from the authority over commerce under article I, section 8, clause 3. Also in 1862, a Department of Agriculture was created to dispense farm welfare. Such domestic largesse indicates allocation of resources away from war aims and minimal constitutional constraints on spending.

In the Confederacy, President Davis took advantage of the Provisional Constitution's absence of textual constraints and its unicameral legislature to advocate spending on constructing railroads. He gained congressional approval on February 10, 1862, with almost

[100] Additionally, like the US, a provision in the CSA Constitution prevents discrimination in regulation or taxing of ports, so all states were to be treated equally by the federal government. See article I, section 9, clause 7: 'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another'.

[101] Thomas DiLorenzo, *The Real Lincoln* (Crown Forum, 2003) 56.

[102] Ibid 83. California had nothing whatsoever to do with the fronts on which the war was fought.

two-thirds of the legislature supporting aid for a connection between Virginia and North Carolina. When the permanent constitution came into effect on February 22, 1862, the Confederate Congress continued to pass legislation authorising various public works projects and subsidies to business.[103] On October 2, 1862, Congress authorised a sum of $1,122,480 in bonds to be spent on construction of a railroad between Blue Mountain, Alabama and Rome, Georgia. In this way, the exception for military defence in article I, section 8, clause 17 for construction of buildings was stretched to support laying rail track too. Millions in subsidies were paid to iron foundries, textiles, and other industries that had little precedent in the antebellum agricultural South, further indicating that the CSA Constitution's textual constraints did not prevent the rise of what Louise Hill has labelled 'state socialism'.[104]

Had the Confederate government adhered to the spending constraints in its constitution, it would have left to the states (or at least, those without spending constraints in their constitutions) or the private sector the responsibility for infrastructure. This may have necessitated a frugal military strategy, for example, cooperating with the states fully and drawing the enemy into the deep south and away from northern supply lines. It is not certain that such an alternative approach would have been worse than the inefficient central government allocation of resources that was pursued.[105] As things stood, the government adopted an unconstrained big spending approach like the Union, albeit with the disadvantage of not having assured streams of revenue or as productive an economy. In other words, while it is true that given wartime pressures something had to be done to quickly close the gap in industrialisation vis-à-vis the North, it is not certain that additional budgetary expense while not having as secure a tax base to pay for such expense was the rational way forward.

[103] Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (1990) 148. Davis sidestepped the constitutional prohibition by claiming that the railroad fell within an exception for military purposes.

[104] Louise Hill, *State Socialism in the Confederate States of America* (Historical Publishing, 1936).

[105] Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 1, 75-6.

III MONETARY FINANCE

Monetary policy in the 19th century involved targeting the supply of money in the context of paper certificates entitling the bearer to redeem in a precious metal.[106] By contrast, monetary *finance* entailed suspending the metallic standard and emitting bills of credit (such as Treasury notes) which were then used by government to pay for goods and services without the need to tax in a visible manner. However, there is a limit to how much a government can create money out of thin air in this way, because when too much money exists relative to the supply of goods, the result is price inflation. The resulting price rises constitute a 'inflation tax' and can be harmful to civilian and military life due to the economic dislocation caused.

The main clause pertaining to monetary finance in the US and Confederate Constitutions declares that Congress shall have power to 'coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures'. This suggests that Congress had a right to coin money but could print money only if backed by a gold or silver standard; indeed, the word 'coin' implies a metallic standard.[107] Moreover, Congress is not granted authority to make its currency legal tender. The Provisional Confederate Constitution contains identical provisions and additionally prohibits states from emitting bills of credit.

There are two competing interpretations of Congress' power, one which supports the federal government issuing paper money unbacked by specie and another which opposes paper money.[108] The latter finds support in the historical record from the American framers who understood the harmful effects of inflation under the Articles of Confederation. Importantly, while the Articles had allowed the Continental Congress to 'emit bills', the framers subsequently removed this wording from the enumerated powers of the Congress,

---

[106] Hummel, *Emancipating Slaves, Enslaving Free Men*, above n 18, 224.

[107] 'Constitutional historians and scholars generally agree', writes Andrew Dahdal, 'that the framers of the US Constitution… intended to deny the federal government the power to issue paper money'. Andrew Dahdal, 'The Constitutionality of Fiat Paper Money in Australia: Fidelity of Convenience?' (2013) 2 *Journal of Peace, Prosperity and Freedom* 51. See *Hepburn v. Griswold* 75 US 603 (1870) which held that paper money is unconstitutional.

[108] Edwin Vieira, 'The Monetary Powers and Disabilities of the United States Constitution' (Research Paper for the Gold Commission, US Congress, 8 February 1982) 50.

calling into question the legality of emitting bills of credit and making them legal tender.[109] Arguably, the text was designed to be a constraint on creation of funds through monetary finance.

In the first year of the Civil War, the hard-money legacy of President Andrew Jackson constrained the US government's utilisation of the printing press, since the Treasury was restrained by the gold standard. Thus, it was necessary to subvert the existing legal order to raise revenue through monetary means. To do so the Union pursued a policy of creating demand notes and United States Notes (collectively known as Greenbacks). In 1861, Secretary Chase issued $33 million in demand notes while attempting to adhere to existing law by promising redemption in specie. However, as it dawned on banks that the conflict would be a long one and that there would be economic uncertainty in future, they suspended redemption for specie in December. In 1862, with the cost of war multiplying and loans being expensive due to high interest rates, Lincoln sought an alternative means of finance and so the idea to issue unbacked United States Notes was conceived. On February 25, Congress passed the *Legal Tender Act* and authorised $150 million in notes. These were made legal tender in all transactions except for paying customs duties, and were not immediately redeemable in specie. In March 1862, demand notes were also made legal tender. There was controversy over these policies and California and Oregon, in compliance with their state constitutions, refused to suspend gold based transactions.[110] However overall there was little effective constitutional constraint on US policy, with a total of $480 million in legal tender notes being issued.

Likewise, the CSA faced few constraints since – due to low tax revenue – heavy reliance was placed on currency issues.[111] The foundation of Confederate finance was its $1.5 billion in fiat money. Marc Wiedenmier finds that 'the Confederate money supply increased

---

[109] Edwin Vieira, 'The Monetary Powers and Disabilities of the United States Constitution', above n 56, 29: "By not including the language 'emit bills' that the Articles of Confederation contained, Article I, § 8, cl. 2 disables Congress from issuing paper currency of any sort". Justice of the Supreme Court Joseph Story said as much in *Commentaries on the Constitution of the United States*, where he noted that the purpose of the US Constitution was to stop 'the floods of depreciated paper-money, with which most of the States… were inundated'. Joseph Story, *Commentaries on the Constitution of the United States* (5th ed, 1891) vol 3, 212.

[110] Murray Rothbard, *A History of Money and Banking in the United States* (2002) 127-29.

[111] Coulter, *The Confederate States of America, 1861-1865*, above n 45, 158.

11.5 times between January 1861 and October 1864 while commodity prices increased 28 times in the same period'.[112] Confederate leaders made arguments based on necessity. Secretary Memminger claimed in a letter to New Orleans bankers in September 1861 that 'the necessity is most urgent that our Treasury notes be made available … the President, with the concurrence of his entire cabinet have directed me to ask your immediate adoption of the only measure which can secure the credit of the Government, namely, the temporary suspension of specie payments by the banks and the reception of treasury notes as currency'.[113] Belatedly, when faced with the negative consequences of his policy, Memminger proposed taking one-third of the currency out of circulation by repudiating it. Congress resisted, but finally in February 1864 it passed an act that produced a minor temporary drop in inflation.[114]

Unlike the Union however, there was no officially sanctioned legal tender in the Confederacy. Discussion at the time shows that the Confederate Congress purposefully adopted a constitutional interpretation that was pro-choice, meaning that different currencies circulated freely, partly because President Davis and Secretary of the Treasury Christopher Memminger believed legal tender status for Confederate currency would be unconstitutional.[115] In the CSA, state banknotes, US currency and Confederate notes initially circulated throughout the economy simultaneously until the federal government eventually banned use of Union currency.

State rights philosophy was of very little hindrance whatsoever. In fact, paper money issues occurred despite textual impediments in the Confederate Constitutions and state

[112] Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>

[113] Memminger in Raphael Thian, *Reports of the Secretary of the Treasury of the Confederate States of America, 1861-1865* (Privately published, 1878) 45-6.

[114] *Currency Reform Act of 1864*. The act took effect April 1, 1864 east of the Mississippi River, but did not take effect until July 1, 1864 in the west.

[115] Both Jefferson Davis and Secretary Memminger believed that making Confederate money legal tender would be unconstitutional. E. Merton Coulter, *The Confederate States of America, 1861-1865* (1978) 156.

constitutions.[116] The Louisiana constitution, for instance, prohibited bank specie payment moratoriums and the attorney-general was supposed to bring proceedings against any suspended bank. But this was ignored when suspension occurred in late 1861. Some states ignored the CSA Constitution's requirement to only make gold and silver a legal tender in payment of debts as well as the document's effective centralisation of monetary policy in an attempt to support the federal program.[117] They passed laws making Confederate currency legal tender (with the intention of forcing into circulation the depreciated money and encouraging investment with it) and several states interfered in the domain of monetary policy by issuing their own paper money which competed with the federal government's.[118] Their endorsement of fiat currency undermined the sound practices that had been pursued in America under the Jacksonian era of free banking and the gold standard, and contributed to the rampant inflation that most agree contributed to the downfall of the Confederacy.[119] Both the federal government and states contributed almost equally in this regard (although states issued fewer notes).[120]

The heavy reliance on note issue makes clear that constitutional constraints were largely ineffective in restraining either the Union or the Confederacy, with the one exception being that the Confederate government never made its notes legal tender. According to Hummel, this inability to make its notes legal tender was not detrimental to the CSA's prospects:

> Some attribute the Confederacy's monetary problems to a failure to make its currency legal tender in private transactions. In fact, as the monetary history of the American colonies makes clear, all that is necessary to get government paper to circulate is making it payable for taxes,

[116] Ball, *Financial Failure and Confederate Defeat,* above n 4, 167: 'The Provisional Constitution expressly forbade state governments to emit bills of credit. Yet by January 1862, every state in the Confederacy, excepting only Kentucky, Tennessee and South Carolina, had issued or authorised notes'.

[117] See US Constitution, article I, section 10.

[118] Ball, *Financial Failure and Confederate Defeat,* above n 4, 175.

[119] See, e.g., John Schwab, *A Financial and Industrial History of the South During the Civil War* (1901) 95; Jeff Hummel, *Emancipating Slaves, Enslaving Free Men* (2013).

[120] Coulter, *The Confederate States of America, 1861-1865*, above n 48, 170.

along with some restraint on the amount issued and good prospects that the government will survive.[121]

In other words, the CSA simply had to keep inflation under control and win military battles to bolster confidence in its monetary finance. The Union contained the cost of living at 180 percent above what it was in 1860, whereas the combination of rising money supply and diminishing quantity of goods (as Weidenmier observes, 'the South experienced a forty percent fall in real output during the war'[122]) led to near hyperinflation conditions in the CSA, with prices having increased 9000 percent on their prewar level by 1865.[123] Both countries experienced declining real wages and economy-wide distortions which hampered the ability of businesses to make reliable calculations and plan.[124]

Monetary finance is conjectured to have been unavoidable by some historians, who fail to see alternatives. Yet, there are scenarios wherein the Union and Confederacy could have respected their textual framework and successfully financed without excessive inflation.[125] William Sumner writes that '[t]he real financial question of the day was whether [the US] should carry on the war on specie currency, low prices, and small imports, or on paper issues, high prices, and heavy imports'.[126] Sumner points out that between November 1860 and December 1861, there was a window of opportunity for non-inflationary finance since most people were reducing debt and expenses to hedge against the uncertainties of war. As a result, prices fell, imports slowed, exports boomed and specie flowed in. Specie inflow would have allowed for issuing paper backed by gold, but instead Lincoln and Secretary Chase chose to pursue a policy based on fiat money. Similarly, the CSA could have prioritised taxation, borrowing and sale of assets to raise revenue rather than printing money. As Ekelund and

[121] Hummel, *Emancipating Slaves, Enslaving Free Men*, above n 21, 241

[122] Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>

[123] Paul Nelson, 'Cost of the Civil War' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (ABC-CLIO, 2013) 442.

[124] Ekelund and Thornton, *Tariffs, Blockades and Inflation,* above n 1, 69-75.

[125] In *Hepburn v. Griswold* 75 US 603 (1870), the majority found that printing greenbacks is unnecessary for fighting a war.

[126] William Sumner, *A History of American Currency* (Henry Holt, 1874) 189-192.

Thornton note, although such non-inflationary methods may have reduced resources available and forced adoption of a decentralised and defensive military strategy aimed at conserving capital, they are sustainable in the long-run since it avoids the ravages of inflation.[127]

IV COMPULSORY ACQUISITION

There was no explicit wording in the US or Confederate Constitutions that permitted the central government to seize private property as a means of gathering resources. However, forfeiture of property without compensation was permitted as a punishment for treason so long as appropriate court procedures were undertaken to determine the loyalty of an individual or group (legislation declaring an individual or group guilty of treason without trial was prohibited). Applying confiscation to non-treasonous citizens was precluded by the US Constitution's Bill of Rights (which was duplicated in the CSA) unless a warrant was obtained before taking property and unless 'just compensation' was provided to owners whose property was taken for public use. Thus, per the text, a narrow confiscation power existed.

During the war, compulsory acquisition came to be of two types: impressment and sequestration. Impressment entailed forcible taking of property for public purposes from those otherwise loyal to the ruling government; these affected persons were supposed to be compensated at market rates since they were innocent of treason but in practice this did not always occur. Conversely, sequestration was a confiscation measure taken against disloyal persons who were not compensated because they were presumed to be active combatants outside the scope of the constitutional protection requiring 'just compensation'. Sequestered property was seized and then sold, with the proceeds going to the Treasury.

A Union confiscation law targeting disloyal persons was passed in August of 1861. This legislation authorised sequestration of all rebel property (including slaves) directly used to aid the war effort. An act in July 1862 broadened the scope of confiscation by applying penalties against all persons who directly or indirectly supported the southern states, whether

[127] Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 1, 76: 'Noninflationary finance, in reducing the amount of resources available to the Confederate government, would have forced its officials to rely on a more decentralised and defensive military strategy. It might also have made them more cooperative with their state governments, the business community, the slave population and foreign nations and force them to make the tough decisions they were unwilling to face under inflationary finance until the final days of the war'.

by taking up arms, providing aid or moral comfort. Enforcement occurred through federal district or circuit courts, was limited to areas where the process of courts could reach and offered no financial compensation. Therefore, most successful prosecutions occurred in the North since the fighting made it impractical to hold hearings against persons residing in the South. This lack of enforcement must be qualified by the reality that Union military men engaged in imposed extra-legal martial law to consume or sell property.[128] Still, the auctioning of property, whether through legal or extra-legal means, did not yield much for the Treasury until after the war.[129] 'When all has been said,' explains James Randall, 'it is clear that there was not a sufficiently diligent and systematic enforcement of the acts to produce any marked effect other than a feeling of irritation and injury on the part of a few despoiled owners'.[130] Daniel Hamilton confirms that '[r]elatively little property was in fact confiscated, and the Second Confiscation Act was more or less ignored by Lincoln and the executive branch during the war'.[131]

The Union expropriated property of residents primarily where a link to aiding or abetting the rebellion could be shown.[132] Part of the reason for restraint among Northern legislators was their choice of constitutional interpretation. Lincoln and the Republican Party refused to admit that the Confederacy was a separate nation, preferring instead to adopt the view that the CSA was still part of the United States. Their interpretive choice implied that loyal citizens, whether residing in the Confederacy or in the United States, were eligible to claim protection from the Bill of Rights and its requirement that there be 'just compensation'.[133] Hence there was internal controversy as to whether the government should

---

[128] Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*, above n 53, 156. Until 1863, when an act relating to captured and abandoned property was passed, the military routinely exercised extra-legal influence. Even after 1863's legislation, the military continued in its old habits.

[129] James Randall finds that by May 1868, about $25 million had been raised under the *Captured Property Act*. This act was used to reach property that the Confiscation Acts could not reach. James Randall 'Captured and Abandoned Property During the Civil War' (1913) 19 *American Historical Review* 69.

[130] J.G. Randall, *Constitutional Problems under Lincoln* (Peter Smith, 1963) 291.

[131] Daniel Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (University of Chicago Press, 2007) 3.

[132] Ibid 1-3.

[133] Abraham Lincoln voiced objection to the 1862 bill on the grounds of it being a bill of attainder working corruption of blood (removing the right of heirs to inherit land after the rebel's death), although he ultimately

ignore Fifth amendment rights and it did not engage in any significant impressment from loyalists, preferring instead to rely on contracts offering commercial rates for use of their property.

In the Confederacy, impressment was pursued at first informally by the army, and then formally from 1863 when Congress backed the policy through legislation and appointed a quartermaster of each district to oversee progress. The Confederate government impressed from loyal residents their food, fuel, slaves, and machinery, among other things.[134] Power gravitated to the central government, which either immediately compensated property owners at below market prices, issued a promise to pay after the war or, in violation of the 1863 law, simply took the property without paying. While the Confederacy never established a Supreme Court as a binding court of appeal, most state courts nonetheless upheld the impressment law. Only the Georgia Supreme Court ruled major sections of the 1863 act unconstitutional. The relative judicial consensus undermines the notion that decentralist philosophy constrained supplies available to the military. Although prominent governors opposed impressment, they lost the legal battle and the Confederacy routinely took confiscation further than the Union by taking property without compensation from citizens without a connection to the enemy.

While not officially part of the impressment policy, confiscation was also effectively applied to loyal Confederates through the tax-in-kind law passed in April 1863, which allowed the federal government to take 10 percent of agricultural produce and livestock from farmers, with the cash value of the crop being allowed in lieu if it was not possible to deliver the actual goods. To ensure compliance, a penalty was imposed on those who failed to pay. This tax-in-kind was a reversion to a barter economy and fell heavily on the civilian population, who would have benefited instead from a tax that asked for payment in low-value Confederate currency. Despite administrative problems which caused food to be spoiled while waiting at depots, the tax-in-kind is estimated to have raised $140 million in goods and cash.[135]

---

signed the bill once Congress assured that it was not to apply beyond the life of the person affected. J.G. Randall, *Constitutional Problems under Lincoln* (Peter Smith, 1963) 280.

[134] 1st Congress 3rd Session, Act of March 26 1863 in *Statutes at Large of the Confederate States of America* (R.M. Smith, 1862) 102-04.

[135] John Schwab, *The Confederate States of America, 1861-1865* (Charles Scribner's Sons, 1901) 297.

In addition to impressment, the Confederacy used sequestration to take from belligerent residents their property – both tangible and intangible – located within its jurisdiction. From the beginning the CSA looked upon the Union sympathisers residing within its borders as alien enemies who were ineligible for just compensation. Therefore, the Confederate government proceeded swiftly and more severely in the matter of sequestration.[136] A May 1861 statute confiscated debts owed by Northerners to Southerners, while the August 1861 law sequestered the property of aliens directed toward hostile use. Although designed to hurt enemy aliens, sequestration had harsh effects on Confederate family members, business partners or debtors who had children or who had done business with Northerners. The antebellum association between geographical regions meant it was difficult to disentangle the two.

When it came to allocating scarce resources to military uses, a system of contracts with the private sector was utilised more often in the North than government possession.[137] In the Union, the rule of law restrained impressment. 'The situation could hardly have been more different in the South,' writes Bensel. 'In the Confederacy, the central state regulated almost all forms of production and manpower, often assuming direct control of private factories, impressing their production, and even constructing state-owned plants where private capacity was insufficient for the needs of the war effort'.[138] The South's denial of property rights was more comprehensive and yielded dividends that in the short-term helped in stretching the duration of its resistance. For instance, sequestration brought in millions for the CSA.[139] The Union raised less overall due to prevailing views restraining congressional and presidential power under the US Constitution and its Bill of Rights.

---

[136] Daniel Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War*, above n 77, 83.

[137] Bensel finds: 'Apart from the suppression of dissent in the North and plans to reconstruct the Southern political economy', explains Bensel, 'the Union relied on an unregulated capitalist market to supply resources and manpower'. He continues: 'While some of the financial measures that facilitated this reliance on market procurement had broader, largely unanticipated statist consequences…most Union policies fell comparatively lightly and transiently on civilian society and the economy'. Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge University Press, 1990) 233.

[138] Ibid 233.

[139] Nowlin Randolph, 'Judge William Pinckney Hill Aids the Confederate War Effort' (1964) 68 *The Southwestern Historical Quarterly* 17-18.

After four years of taking from its subjects without adequate compensation in probable violation of the constitutional requirement for 'just compensation', it was the CSA's policy that caused the most problems. Aside from the fall in morale because of perceived unfair treatment by CSA agents, there was an increase in uncertainty that contributed to a 50 percent reduction in consumption.[140] This environment precipitated reduced economic activity and in the medium to long-term would have resulted in smaller revenues from taxation. When property can be taken from residents without due process or fair compensation, it creates uncertainty that discourages future investment and production. Individuals cannot easily plan since they have no reliable method of knowing whether they will be the government's next target.[141]

V CONCLUSION

In this chapter, the provisions of the US Constitution and Confederate Constitutions were analysed to determine influence on the revenue available to the central government. I have emphasised not just the text but also interpretive opinion as reflected in the proxy of outward policies pursued by state and federal governments. The experience of the Union and the Confederacy suggests that the legal framework was not much of a constraint on the central government in terms of raising revenue since most issues were resolved in the non-constitutional domain, often at the expense of the text. Most major legal issues did not reach the Supreme Court of the United States until after the war, and the few litigated cases were decided in favour of the federal government.[142] Similarly in the Confederacy, the state courts mostly ruled in favour of the central government on the one issue that was litigated, namely, impressment. When it came to revenue from international trade, the Confederacy actively exercised non-constitutional discretion to ignore the text of its constitution by imposing

[140] Eric Nielsen, 'Monetary Policy in the Confederacy', above n 35, 41. Paul Escott has shown that government appropriation can diminish morale among affected persons, a sizable percentage of whom feel resentment over forfeiture. Paul Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (Louisiana State University Press, 1992; originally 1978) 66.

[141] On this point, see Robert Higgs, 'Regime Uncertainty: Why the Great Depression Lasted so Long and Why Prosperity Resumed After the War' (1997) 1 *The Independent Review* 563-64.

[142] *The Prize Cases* (1863) 67 US 635, which held the Northern blockade of the South was constitutional, was the only major Supreme Court decision affecting the economic realm during the war. Several important cases dealing with income tax, for instance, were only heard by the Court after the war's end.

quotas and taxes that undermined free trade. On fiscal policy, the Confederacy spent freely on public works projects in violation of the textual ban on such spending. On monetary policy, the antebellum consensus against fiat currency was overturned and both parties printed currency freely. On impressment, neither nation fully adhered to the constitutional mandate of 'just compensation' however the Confederacy was egregious in its seizure of property.

However, there were some real constraints. In the Union, these materialised in confiscation policy where controversy over diminishment of property rights played a constricting role and created a circumscribed impressment regime, while in the CSA the apportionment clause caused direct tax to falter until 1864 when it chose to ignore the clause. Thus, the Union raised less from confiscation and the CSA brought in less in taxes. In the South, only 10.5 percent of the revenue collected over the course of the war was from taxes, the printing press covered 61.7 percent and miscellaneous sources (donations, sequestration etc) raised 6.5 percent. The North raised 16.5 percent of its total revenue from taxes, currency issue covered 16.5 percent and other sources accounted for 2.5 percent.[143]

In many instances, adherence to the Constitution's text could have created more resources to direct toward the military. If the Confederacy had pursued a free-trade policy that exported cotton and avoided banning classes of goods it could have improved its financial position by the revenue gained from trade. Likewise, if it had restrained spending it could have saved money for military supplies and paying soldiers, and if it had stuck with a metallic standard it could have avoided the price increases that made it difficult for civilians to afford essential goods. Finally, to avoid uncertainty to business investment caused by impressment, the CSA could have pursued mutually beneficial contracts with private industry. These observations must be qualified, however, by the reality that war was a desperate situation and that some of these measures would have taken time to yield the desired revenue.

[143] John Godfrey, *Monetary Expansion in the Confederacy* (Arno Press, 1978) 14. Totals do not add to 100 because the remainder of revenue was raised from borrowing.

3 MILITARY POLICY

The fundamental question faced in military conflict is the same one that affects individuals at the household level: when and where should scarce resources be deployed so as to make efficient use of them? In war, as in peace, it is governments that decide on behalf of the nation how best to use assets in accordance with their political objectives. During the American Civil War, the warring parties were diametrically opposed in this respect. The central government of the twenty-three states of the United States wanted control over the eleven southern states, while the Confederate States of America had the goal of independence (a goal that included negotiating over Union property within CSA jurisdiction).

The Union and Confederacy had almost identical military technology, similar military training and comparable calibre military personnel.[144] Their differing political objectives however, naturally led to divergent strategy. Here, military strategy is defined as '[t]he art and science of employing the armed forces of a nation to secure objectives of national policy by the application of force or the threat of force'.[145] For the Union to achieve its mission, it would need to capture rebel territory, while victory for the CSA was possible if it could hold existing land or outlast Union resolve.[146] In 1861, US General Winfield Scott designed the 'Anaconda plan' which aimed to surround the South and constrict flows of goods and people, much like a snake squeezes its prey and deprives it of oxygen.[147] This was applied by advancing on multiple fronts (notably the western theatre, the lower seaboard and the eastern) and through a naval blockade. A secondary element involved splitting the Confederacy in two to weaken its sections, by sending Union forces down the Mississippi river.

---

[144] At the time of secession, many officers from the US Army defected to the South. Moreover, many Southerners had, like their Northern counterparts, been trained at West Point military academy. The two warring parties were essentially equally matched in this regard. Also, the North and South used similar military weaponry - namely, single shot rifles. Jeffrey Hummel, *Emancipating Slaves, Enslaving Free Men* (2014) 187.

[145] Jeremy Miller, *Unconventional warfare in the American Civil War* (Master of Military Art and Science Thesis, US Army, 2004) 5.

[146] Gary Gallagher, *The Confederate War* (Harvard University Press, 1997) 115.

[147] Brendan Wolfe, *Anaconda Plan* (2011) Encyclopedia Virginia <http://www.encyclopediavirginia.org/anaconda_plan> at 19 August 2016.

The Confederacy in its first year pursued a policy of cordon defence that spread troops thinly across its borders to protect against breach at as many points as possible. This was later abandoned and an 'offensive-defensive' strategy that concentrated forces at key locations and launched offensives when circumstances seemed favourable was adopted. As well, a 'King Cotton' strategy was executed (albeit mostly by the states rather than the federal government). This involved halting exports of southern cotton in order to induce Europeans who relied on cotton for their textile industries to break the Northern blockade by force. Finally, Confederate officials ordered harassment of Northern shipping.

This chapter discusses whether the CSA Constitutions hindered progress, or whether the US Constitution provided an advantage, when it came to implementing the logistical plans supporting military strategy. Questions arose over whether President Abraham Lincoln had usurped authority by acting without a congressional declaration on numerous instances. There was also resistance from states such as Maryland to the centralisation of decision-making. In the Confederate States, the controversy was similar, with the limits of President Jefferson Davis' legal authority being queried frequently by interested parties.

From the perspective of constitutional text, differences between the Yankees and Rebels are less obvious than in Chapter 3's discussion of contrasts in economic provisions. This is because, as Table 3 outlines, the text of the war powers was the same across both jurisdictions. Article I of the US Constitution and the final Confederate Constitution make clear that authority over initiating war lay with Congress, which could declare war, call forth the militia, raise armies and a navy and make rules concerning captures on land and water. Article II clarifies that the President then wages war, providing necessary discretion and speed but adhering to any funding or procedural controls imposed by Congress.[148] There were textual differences in provisions relating to railroad construction, with the CSA Constitution prohibiting such work even though railroads are useful for supplying armies in the field. Aside from this however, the provisions pertaining to military policy were similar.

[148] Louis Fisher, 'Basic principles of the War Power' (2012) 5 *Journal of National Security Law and Policy* 319-337.

The Congress shall have power:
• To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. • To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years. • To provide and maintain a navy. • To make rules for the government and regulation of the land and naval forces. • To provide for calling forth the militia to execute the laws of the Confederate States [or United States], suppress insurrections, and repel invasions. • To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States [or United States]; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

Table 3: Congressional war powers of the US and the CSA

Like all provisions discussed throughout this thesis, such war powers must be read in conjunction with the constraints found in the US and Confederate Bill of Rights, which limit the exercise of congressional and presidential decrees. As mentioned in the introductory chapter, the Confederate Constitutions contained restrictions beyond the US version that are inconsistent with a full exercise of the war power – including a right of secession which all Confederate states reserved in case the central government became oppressive.[149]

As I will show, the main difference when it came to constitutional influence on military coordination lay in interpretation, rather than text. After the Battle of Fort Sumter in April 1861, President Lincoln without congressional approval called forth the militia, increased the size of the army and navy, expended funds for purchasing weapons and instituted a blockade.[150] By contrast, President Davis took care to seek congressional approval for almost every major act of his presidency pertaining to military management, even though he was operating under similar textual constraints as his counterpart. The topics considered below were selected due to their prominence as casual factors in the literature as

[149] Marshall DeRosa, *The Confederate Constitution of 1861* (1991) 52-54, 77-78.

[150] Frank Williams, 'Abraham Lincoln and Civil Liberties in Wartime' (Speech delivered at the Heritage Foundation, Washington DC, 5 May 2004).

well as because of their direct link to specific constitutional provisions. Certain provisions pertaining to railroads and slavery are not typically considered part of congressional 'war powers', but were nonetheless material to the supply and manpower aspect of the Civil War.

I CONSTRUCTION AND REGULATION OF RAILROADS

In war, troops need access to supply lines of food, weapons and men. The most fuel-efficient way to transport supplies during the 19th century – besides steam boat – was via railroad, of which the Confederacy in 1861 possessed 9,000 miles of local track that rarely crossed state boundaries because the system was designed to link to ports for export rather than ship goods internally. Despite ranking third in the world in sheer miles of track (behind Britain's 10,000 and the North's 21,000), President Davis described southern railroads during the war as 'insufficient in number', 'poorly furnished' and 'mainly dependent upon Northern foundries and factories for their rails and equipment'. Davis observed that '[e]ven the skilled operatives of the railroads were generally Northern men, and their desertion followed fast upon every disaster which attended the Confederate arms'.[151]

By contrast, Northern railroads were during the war superior in that the network was larger, more interconnected, and better maintained. From a logistical perspective, this allowed the Union to transport men and supplies hundreds of miles away from a base, secure in the knowledge that armies would be adequately and quickly supplied with the resources to fight. However, the Union's efficacious rail system was also at times a disadvantage, because '[t]hrough the first three years of the war, the Confederacy had little trouble predicting where Union offensives would come – along navigable water and along rail lines'.[152] To improve the element of surprise, the Union began unpredictable raids that relied on obtaining sustenance from the local population rather than from food and materials brought over land or sea.

---

[151] Jefferson Davis, *The Rise and Fall of the Confederate Government* (first published 1881, 1958 ed) vol 1, 315.

[152] Christopher Gabel, *Railroad Generalship: Foundations of Civil War Strategy* (Command and General Staff College Press, 1997) 9.

In the Confederacy, the Provisional Constitution in force between February 1861 and February 1862 contained no prohibition on subsidies to industry. However, given that constructing railroad is a lengthy activity and would have pushed into the final CSA Constitution's period of operation, in November 1861, Davis pre-emptively urged Congress set aside constitutional qualms to fund a link between Virginia and North Carolina:

> If the construction of this road should in the judgment of Congress, as it is in mine, be indispensable for the most successful prosecution of the war, the action of the Government will not be restrained by the constitutional objection which would attach to a work for commercial purposes, and attention is invited to the practicability of securing its early completion by giving the needful aid to the company organized for its construction and administration.[153]

Davis adopted an interpretation that saw the textual constraint on public works in the Confederate Constitution as only applying during peacetime. He urged the House and Senate to think of the railroads as military necessities so that their members would sidestep legal concerns about subsidising industry. Congress was happy to comply, and the bill became law on February 10, 1862. Only a small minority including Congressman Robert Rhett and Robert Toombs felt the law was unconstitutional and unnecessary.[154]

Article I section 8 of the permanent constitution did bar public works by the central government. Although article I, section 8, clause 17 permitted 'erection of forts, magazines, arsenals, dockyards, and other needful buildings', under a literal interpretation railroad tracks are not 'buildings' and could not be constructed under this exception. However, in April 1862 the CSA Congress approved funding for a line between Texas and Louisiana, despite the

[153] Jefferson Davis, 'To Congress of the Confederate States: November 18, 1861' in Lynda Crist and Mary Dix (eds), *The Papers of Jefferson Davis* (Louisiana State University Press, 1992) vol 7.

[154] *Journal of the Congress of the Confederate States* (Government Printing Office, 1904) vol 1, 781-82.

permanent constitution's apparent prohibition against subsidies.[155] Many other linkages were sanctioned and in 1865 a blanket appropriation for railroad was passed into law.[156]

The Confederate government also took steps to exert dominance over companies running the railroads. During the first two years, informal pressure was exerted during negotiation of contracts for carriage. The central government as early as 1862 believed it possessed the authority to seize track: when Secretary of the Navy Stephen Mallory wrote to the Secretary of War George Randolph for permission to remove track from the Portsmouth and Weldon railroads, Randolph replied that the orders had been given to remove the iron but that Union military pressure made the operation impractical.[157] While an informal capacity to dominate companies in this manner existed, it was not formalised until May 1863 when legislation was passed granting the executive branch discretionary power over operations, schedules and the impressment of railroad property. 'By February 1864', observes Richard Bensel, 'the Confederate Army could directly control all private rail operations if it wished to do so'.[158] During late 1864 and early 1865, Congress enacted legislation confirming that the Secretary of War retained control and could take possession of the railroads at any time and subject rail employees to military discipline. Since a Supreme Court was never established, the support of the President and Congress was sufficient to enforce such legislation, contingent on the decision of state governments as to whether to comply.

Michael Powell finds that while a framework allowing for virtual nationalisation of the railroads was in place, 'Confederate officials … particularly President Davis, were loath to enforce the law'. However, this reluctance was due to the government not possessing the

---

[155] 'An act to aid in the construction of a certain line of railroad in the States of Louisiana and Texas: 19 April 1862' in James Matthews (ed), *Public Laws of the Confederate States of America, passed at the First Session of the First Congress* (RM Smith, 1862) 34.

[156] A blanket appropriation falls foul of the CSA Constitution's requirement in article I, section 9, clause 10 that each bill must specify an amount and object. For discussion of approved projects see Charles Ramsdell, 'The Confederate Government and the Railroads' (1917) 22 *American Historical Review* 803.

[157] Joseph Durkin, *Stephen R. Mallory: Confederate Navy Chief* (1954) 171.

[158] Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge University Press, 1990) 149.

institutional expertise to manage the system rather than because of constitutional constraints. As Powell notes: '[e]ven when armed with appropriate legislation, Davis did not articulate any constitutional concerns, but rather appeared more worried about the practicalities of managing the railroad system and seemed willing to concede management of the railway system to the railroad companies'.[159] In addition, Powell finds that, with the exception of Governor Joseph Brown of Georgia, the Confederate governors were largely silent on the subject of central government interference into the railroad industry.

It is true that the governors mostly complied when the Confederate government intervened. When in the spring of 1864 the War Department impressed rail from the Florida Railroad, the president of the railroad David Yulee secured an injunction from a state circuit court judge to prevent appropriation of the property, yet Florida's Governor John Milton offered no aid and sided instead with the Davis administration which successfully ignored the judge's ruling.[160] Governor Milton was reluctant to order his sheriffs to enforce a judicial ruling against Confederate agents and preferred to defer constitutional niceties until after the war had been won. Indeed, it had been Milton's idea to tear up what was left of the track and use the iron for a link between Florida and Georgia that could bring in food. Similarly, Governor Letcher of Virginia – presiding over the critical eastern theatre – was so compliant with the central government's wishes that the state's legislature initiated an investigation into the propriety of his subservience on the issue of impressment.[161]

Nonetheless, there were barriers arising out of the fact that many of the railroad companies had come into being because of injections of capital by state governments, and these governments seeking to preserve their investments interpreted as a constraint upon the federal government the provision in the CSA Constitution that declared '[t]he powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof'. North Carolina's Governor

[159] Michael Powell, *Confederate federalism: a view from the governors* (PhD thesis, University of Maryland, 2004) 198.

[160] W. Buck Yearns, 'Florida' in W. Buck Yearns (ed), *The Confederate Governors* (University of Georgia Press, 1985) 66.

[161] F. N. Boney, 'Virginia' in W. Buck Yearns (ed), *The Confederate Governors* (1985) 224.

Zebulon Vance resisted construction of the aforementioned forty-mile link between Virginia and North Carolina – which ended up being important in supplying Confederate General Robert Lee's Army of Northern Virginia – partly because doing so would have detracted from protection of another nearby line, and under his leadership the state government's acquiescence to planters who wished to withhold slaves from work on the project delayed completion, so that '[n]ot until the latter part of May 1864 were trains running over this track'[162]. And in Georgia, where the state owned the Western and Atlantic Railroad, Governor Brown had a hand in frustrating the Confederate government's attempted seizure of track.[163]

Given prevailing constitutional philosophy, it is likely that part of the reason the CSA government employed a light touch was because of anticipated resistance by the states, and so in this sense there was an element of constraint. As Paul Escott writes, Davis 'tried to soften [his proposals'] impact' and was sensitive to 'southern traditions or habits of mind'.[164] Christian Wolmar concludes that '[t]he administration of Jefferson Davis never managed to impose itself on the railroad companies, partly because of the power of the states relative to the government in Richmond, informed by the ideology which had led them to break away in the first place'.[165] In sum, due to practical considerations such as lack of expertise in managing railroads and state rights philosophy espoused by companies and acquiesced in by

[162] E. Merton Coulter, *The Confederate States of America 1861-1865* (first published 1950, 1978 ed) 271.

[163] F. N. Boney, *Joseph E. Brown (1821-1894)* (2016) New Georgia Encyclopedia <http://www.georgiaencyclopedia.org/articles/government-politics/joseph-e-brown-1821-1894>. Davis was careful to avoid giving the appearance of undermining state rights, indicating there were constitutional constraints imposed upon him by Georgia's governor. In a letter dated March 20, 1863, he apologises to the Governor for the actions of General Braxton Bragg who had threatened to seize the state railroad at Atlanta to transport military supplies. Davis writes: 'Such action on the part of the officers of the Confederate Government is much to be regretted; although force, as I am glad to learn, was not used in this case. Genl. Bragg has been directed in the event of similar difficulties hereafter arising, to call upon you for assistance'.

[164] Paul Escott, *After Secession: Jefferson Davis and the failure of Confederate nationalism* (1978) 70.

[165] Christian Wolmar, 'The Iron Horse at War' in Ted Widmer (ed), *Disunion: Modern Historians Revisit and Reconsider the Civil War* (Black Dog & Leventhal, 2013) 203.

local governments, the CSA left primary responsibility over management of 'railroads, along with their maintenance, rates, and schedules [to the] cartel of railroad owners'.[166]

What about the United States? Wolmar repeats the orthodoxy when he finds that the Union was comparatively unrestrained by constitutional barriers and so could exercise dominance over the railroad industry so that military concerns were prioritised:

> The North was … quicker to realize the importance of controlling the railroads, which at the time were all in private hands. Congress federalized all railroads in January 1862 and appointed an experienced railwayman, Daniel McCallum, as military director and superintendent of the railways with total power over them.[167]

But Wolmar does not tell the full story, because under the Federal approach to management, ownership in most of the country continued to rest in private hands, with state governments maintaining regulatory influence (the main exception was in relation to captures of rolling stock and track in hostile territory in the South).[168] Importantly, the Union did not nationalise the civilian railroad industry so much as forge voluntary and mutually beneficial contracts; the North's economic policies generated the wealth to pay railroad companies adequate amounts for them to turn a profit, whereas the South paid minimal amounts in debased currency and naturally faced more resistance to military prioritisation due to an inability to compensate at market rates.[169] Indeed, US Brigadier General Herman Haupt advocated that railway personnel should oversee train movements, including deciding on the timetable, rather than military officers who would not understand the workings and limitations of the railway. Records indicate businesses continued to use railroads in the North, thereby providing commercial incentive for repair work to be undertaken, whereas in the Confederacy civilian use was practically non-existent.

---

[166] Michael Powell, *Confederate federalism* (PhD thesis, University of Maryland, 2004) 199.

[167] Christian Wolmar, 'The Iron Horse at War', above, 203.

[168] Christian Wolmar, *Engines of War* (Atlantic Books, 2010) 42–48.

[169] Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America* (1990) 150-151.

However, while the Union did not rely on nationalisation as heavily as commonly claimed, the Confederate government was indeed more constrained by constitutional influences in terms of its ability to construct and regulate the railroads. Christopher Gabel has determined that '[t]he North added approximately 4,000 miles of tracks during the war … The Confederacy, on the other hand, could only attempt to close small gaps between existing railroads', indicating that there was a quantitative difference that likely could be partially attributed to constitutional barriers in the South that slowed down coordination.[170]

And yet, there is reason to think that despite constitutional constraints in relation to railroads, these constraints made little difference to the South's military performance. It is widely acknowledged that the Confederate armies performed well in 1861 and 1862, even though these years are the period when it is usually said not enough centralisation occurred. According to Gabel, 'the evidence suggests that the Confederate railroads performed adequately through the first two years of the war. Despite the various inefficiencies inherent to poor coordination and less-than-effective centralized control, no Confederate army lost a battle in that period because of a failure of rail support'.[171] For instance, at the First Battle of Manassas in Virginia, the Confederates in 1861 used the local railroad to bring in reinforcements and launched a successful counterattack. Or consider Lieutenant General James Longstreet's movement in 1863, which was a feat of transportation across 16 railroads on a 1,247-kilometre route to shift 13,000 men and win the Battle of Chickamauga, Georgia.

Moreover, even if the CSA had imposed itself on the railroad companies sooner, owing to the long-term deterioration of track it is unlikely it could have overcome the shortage of materials required to maintain a network because of its inability to break the Union blockade. For the reasons discussed in Chapter 2, there was a shortage of supplies from abroad and this sealed the fate of the railroads, which could neither be repaired nor expanded. The South's less developed network can be attributed primarily to poor leadership – a non-constitutional influence – specifically, the failure to encourage imports of iron by blockade runners as well as to liberate captured harbours. In addition, the central government

[170] Christopher Gabel, *Rails to oblivion: the decline of Confederate railroads in the Civil War* (Command and General Staff College Press, 2002) 13.

[171] Ibid 9.

misallocated more resources to manufacture of rifles than railroad.[172] As John Clark observes, '[e]ven had [William Wadley of the Confederate Railroad Bureau] possessed the authority, by September 1863, he could not have created parts and equipment out of the air'.[173]

II WATER BASED WARFARE

Like railroads, ships travelling over waterways and oceans were used to provide logistical support for armies during the Civil War as well as to independently undermine the logistical plans of the enemy by attacking their vessels. Here the North enjoyed the upper hand in the quantity of ships and shipyards that it could utilise to perform its constitutional function to 'provide and maintain a navy'. The Federal Navy had 42 warships in commission at the start of the war, and 48 laid in the wings waiting for crew to be organised.[174] On the other hand, in April 1861 the Confederate States government had no commissioned ships and only a handful of shipyards. At the time, there were about ten oceangoing iron-based ships (some of which were held privately) remaining in the Confederacy.

The logistical plan of the CSA was complicated by President Lincoln's proclamation on April 19, 1861 in which he announced without congressional approval a naval blockade to prevent imports into the 180 ports of entry of the South. Lincoln faced a textual barrier since the US Constitution requires that only Congress 'declare war', and a blockade was by all accounts an act of war. To overcome the obstacle, Lincoln argued quick unilateral action was needed to suppress the southern insurrection. Congress was persuaded by his reasoning, and retrospectively approved Lincoln's action in July 1861 thereby bringing the situation back into line with the constitutional text. The Supreme Court in its ruling in the *Prize Cases* also upheld the legality of the blockade. Hence, the Constitution was deemed flexible by key actors, and there was no domestic pathway to impede Lincoln's blockading manoeuvre.[175]

---

[172] The government's ordnance bureau was a relative success, as pointed out in James McPherson, *Battle cry of freedom: The Civil War era* (Oxford University Press, 1988) 319-20.

[173] John Clark, *Railroads in the Civil War: The Impact of Management on Victory and Defeat* (2001) 105.

[174] Jeffrey Hummel, *Emancipating Slaves, Enslaving Free Men* (2014) 162.

[175] Timothy Huebner, *The Taney Court: Justices, Rulings, and Legacy* (ABC-CLIO, 2003) 139.

The Confederacy had the option to build up its naval capacity and break the blockade itself. In this regard, the CSA enjoyed several advantages. First, the initial seven southern states to secede were given a reprieve of between one and two months by predecessor President James Buchanan until Lincoln's inauguration in March 1861. Buchanan believed the US Constitution precluded military action and did nothing to act forcefully against the South, thereby allowing time to gather resources. Second, the CSA operated under its Provisional Constitution from February 1861 till February 1862, and this document contained few restrictions, for instance allowing the Congress to amend it by a simple two-thirds vote without the need for ratification by the states.[176] Third, because Lincoln had acted hastily, Congress was slow to provide funding to patrol southern harbours, and consequently for the first year the blockade was lightly enforced.[177] The US Congress gifted the Confederates an advantage by not approving ironclad ships, the most powerful technology of the time, straight away; only in October 1861 did construction of ironclads begin in the North.

Yet the first southern states that seceded failed to act quickly to prepare for possible war while Lincoln had not yet been inaugurated. It was these first few months that were crucial for the Confederacy for building warships at its facilities in Norfolk and New Orleans as well as for purchasing them from abroad. The failure to act swiftly to acquire warships contributed to a situation where by April 1862 the Confederacy's 5,500 kilometres of coastline was largely lost. At that stage, as Ethan Rafuse points out, 'only [the ports of] Wilmington, North Carolina and Charleston, South Carolina remained under Confederate control'.[178] This had little to do with constitutional constraints and instead demonstrated a lack of foresight as to the potential direction of the coming war.

Likewise, although the Provisional Constitution came into force on February 8, 1861, in the month or so until Lincoln's inauguration not much was done to secure ironclad ships or gunboats though patriotic fervour was high and there were few socio-legal barriers hindering

---

[176] Article V of the *Constitution of the Provisional Government of the Confederate States of America* states: 'The Congress, by a vote of two-thirds, may, at any time, alter or amend this Constitution'.

[177] William Barney, *The Oxford Encyclopedia of the Civil War* (Oxford University Press, 2011) 37.

[178] Ethan Rafuse, *CSS Virginia* (7 September 2016) Encyclopedia Virginia <http://www.encyclopediavirginia.org/c_s_s_hi_rend_italic_virginia_hi>

political leaders.[179] It was only on February 21, 1861 that the CSA Congress passed legislation establishing a navy. In addition, the Congress did not confirm a Secretary of the Navy until March 1861, and this delay meant valuable loss of initiative. European nations would have been willing to deliver vessels aiding the Confederacy early, but later, it became too risky for foreigners to contract with the CSA due to pressure placed on them by the United States. As Coulter observes in the case of Britain, 'it was the threat of war by the United States that made the British interpret their own law in special instances into withholding [ships]'.[180]

Can the CSA Constitution or the states' interpretation of it be blamed for shortcomings in naval capacity? By a resolution of the Confederate Congress on March 15, 1861, all the state navies and United States arsenals left behind were to be handed over to the central government.[181] This recommendation was largely complied with. For instance, Virginia in April 1861 agreed to place her naval operations under 'the chief control and direction of the President of the Confederate States'.[182] The state of Georgia purchased two steamers and tendered them to the Confederate Navy, and others such as Alabama and North Carolina offered similar help.[183] However, as Andrew Duppstadt points out, '[t]hese state navies … only consisted of about a dozen small ships, mounting few guns'.[184] Even

[179] Joseph Durkin, *Stephen R. Mallory: Confederate Navy Chief* (University of North Carolina Press, 1954) 131.

[180] E. Merton Coulter, *The Confederate States of America 1861-1865* (1978 ed) 303.

[181] Resolution 19 in reference to forts, dock-yards, reservations and property ceded to the Confederate States in *The Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862* (University of North Carolina at Chapel Hill, 2001).

[182] Joseph Durkin, *Stephen R. Mallory: Confederate Navy Chief* (University of North Carolina Press, 1954) 149.

[183] Report of the Secretary of the Navy dated 26 April 1861 in *Official Records of the Union and Confederate Navies* (The National Historical Society, 1987) vol 2, 51.

[184] Andrew Duppstadt, *Confederate States Navy (in North Carolina*) North Carolina History Project <http://northcarolinahistory.org/encyclopedia/confederate-states-navy-in-north-carolina>

supposing all states had contributed to their utmost capacity, their ships were too weak to be able to assist the Confederate government withstand the Union navy in any case.[185]

Given that the states had few vessels to contribute, another way they could aid Secretary Mallory would have been to cooperate in securing raw materials. The problem was that the states had not much iron in the first place, unless one counted their rail tracks which could be melted and used by the Navy for ships. Governor Vance has been criticised for his intransigence, but at least when it came to providing iron there was some willingness to cooperate. Two weeks after the contract for the CSS *Neuse* was signed on 17 October 1862, Secretary Mallory wrote Governor Vance requesting iron belonging to the Atlantic and North Carolina Company and this request was granted. And in May 1863, several rails were acquired from the Wilmington and Weldon Railroad. Vance further negotiated the release of privately owned rails belonging to the Wilmington, Charlotte and Rutherford Company.[186] Powell finds that the governors were muted in their objections to activities undertaken by the central government, and where they did protest did so because they believed that impressment was being applied unfairly (rather than challenging the constitutionality of the entire system) or because a state plant was already producing the required material and federal interference was not needed. He concludes that while there was a level of constraint upon the Confederate government, the predominantly agricultural economy meant that the states had less incentive to object to interventions in manufacturing. This is not to suggest that the states were always cooperative, however their objections were often overruled in practice (as discussed in Chapter 2's section on compulsory acquisition).

When it came to constructing factories for example, the CSA government frequently overruled the states. When the Navy Department in 1863 tried to erect a distillery in South Carolina to manufacture whiskey, Governor Milledge Bonham objected that the action violated state laws. Over the protests of the Governor however, the Confederate government supported the distillery, justifying it under the constitutional power 'to provide and maintain a navy' because whiskey was used as an antiseptic and anesthetic. Attorney-General George

[185] Ibid. See also Maxine Turner, 'Confederate Navy' in John Whiteclay Chambers (ed), *The Oxford Companion to American Military History* (2000) 176.

[186] William Still, "The Career of the Confederate Ironclad 'Neuse'" (1966) 43 *The North Carolina Historical Review* 5.

Davis argued that '[a] state cannot prevent Congress from providing a navy by prohibiting the building of ships … [n]either can it prevent the maintenance of a navy already provided for by prohibiting the procurement of the necessary supplies'.[187]

More important than the states were the discretionary decisions made by Confederate leaders free from legal constraint and within the non-constitutional domain. Under Mallory's leadership from March 1861 onwards, while there was a push to acquire metal-skinned ships to overpower wooden Union frigates, by the time contracts were secured foreign nations were reluctant to sell ships due to a desire remain neutral. Delay in contracting meant that Mallory was unable to obtain the *Gloire*, a French armored vessel. David Surdam concludes that '[a]side from some commerce raiders and one ironclad warship, the *CSS Stonewall*, the Confederacy was unable to augment its naval power with European-built warships'.[188]

Focus shifted to constructing ships locally, but this was difficult owing to the shortage of iron brought about by earlier non-constitutional decisions. Specifically, Davis never seemed to appreciate the importance of exporting cotton, either as collateral for buying supplies or to earn export income. During 1861, the inbound-outbound capture rate was less than five percent and the CSA had it within its legal authority to encourage illicit trade, but owing to misguided belief in a 'King Cotton' strategy failed to do so.[189] In his address of November 18, 1861 Davis presented an irrationally upbeat message, telling Congress that agricultural production had increased, manufacturing had expanded and that munitions and weapons were available. But a realistic analysis would have shown that the South was nowhere near the level it needed to be to wage a war of attrition against Northern will. Blockade runners could have imported iron in sufficient quantities during 1861 in order to last for the duration of a protracted war, since in later years '[s]o strapped were the rolling mills for raw iron that even with virtual monopolization by the military of southern output,

[187] Joseph Durkin, *Stephen R. Mallory: Confederate Navy Chief* (1954) 332.

[188] Ibid 115.

[189] Commercial ties with Bermuda, Nassau, and Cuba did much to sustain domestic logistics, and these could have been expanded. Robert Ekelund and Mark Thornton, *Tariffs, Blockades and Inflation: The Economics of the Civil War* (2004) 37.

the available ore was insufficient to meet the navy's needs for iron plating'.[190] Partly because of shortages, over the course of the war the Confederacy completed only 21 ironclads, whereas the Union fully constructed 42. By war's end the Confederate Navy managed to put 130 ships into service, far less than the 670-vessel US Navy.

Since ironclads were expensive and time-consuming to build, Raymond Luraghi suggests that the CSA could have instead prioritised secondary weapons such as submarines, torpedo boats and mines.[191] For instance when the torpedo boat CSS *David* attacked the USS *New Ironsides* on October 5, 1863, the damage inflicted caused the Union ship to be out of commission for a year. And mines sank or disabled at least 50 Federal ships and protected several ports from amphibious operations.[192] However decision-makers within the CSA did not in this manner efficiently allocate resources to the most quickly acquired and cheapest tools of naval warfare despite having constitutional power to do so.

Many of the ships in the Confederate Navy were acquired from private citizens by the central government. Impressment outside textual constraints (as discussed in Chapter 2) gave rise to waste by the military, which hoarded these ships but did not make good use of them. Some of the best quality vessels were sunk in the James River to serve as obstructions to protect Richmond. For example, the CSS *Thomas Jefferson* was sunk in 1862 after only carrying out a few missions. Similarly, the cargo ship *Northampton* was sunk in 1862 as an obstruction.[193] The CSS *Patrick Henry*, also seized from civilians, was used as a naval academy to train sailors at a time when there was a shortage of active duty ships. Another – the CSS *Neuse* – was of hardly any use, due to the poor training of its crew which managed to get her stuck in the mud of the inland waters of North Carolina. In this way, many ships did not see much action due to discretionary decisions. These could have instead been outfitted as blockade runners exporting cotton and bringing back weapons and marine engines.

---

[190] Surdam, 'The Confederate naval buildup: could more have been accomplished?' (2001) 54 *Naval War College Review* 111.

[191] Raimond Luraghi, *A History of the Confederate Navy* (1996) 261-2.

[192] Milton Perry, *Infernal Machines: The Story of Confederate Submarine and Mine Warfare* (Louisiana State University Press, 1965) 37.

[193] Arthur Wyllie, *The Confederate States Navy* (2007) 171.

A final illustration of discretionary decision-making acknowledged at the time to be in the non-constitutional realm comes from President Davis and the Congress in relation to commerce raiders. Both constitutions allowed for granting letters of 'marque and reprisal', that is, hiring pirates to attack and seize enemy ships, with a certain percentage of the capture's value being kept by the privateer. The choice to implement the letters of marque provision by rewarding those who harassed Northern commerce on the seas was a decision that had negative resource ramifications because it diverted Southern ships away from running the blockade to bring in supplies. It was also a fruitless endeavour since it needlessly antagonised affected Europeans who had their trade beleaguered on route to Northern ports.[194] The ostensible aim of this policy was to divert the Union Navy away from blockading duties and toward defending their commercial vessels. However, because most privateer ships were modestly armed, they were incapable of engaging the Union Navy and many were themselves captured or sunk, leading to the loss of valuable vessels. Surdam argues that the choice to encourage commerce raiders was a distraction from building ironclads:

> [T]he initial reliance upon privateering and commerce raiding gave the Confederacy little advantage and diverted the Confederate navy's energy and resources from obtaining ironclad warships; also, the purchase of European-built commerce raiders contributed to the Europeans' tightening of neutrality rules so as to prevent the Confederacy from obtaining ironclad warships.[195]

In total, the CSA captured or sank just over 100 Union ships, but it was not enough to break the blockade or protect harbours from capture.[196] Part of the reason for this was likely because of the distraction with privateers, which ended up being ineffective in any case.

---

[194] David Surdam, 'The Confederate naval buildup: could more have been accomplished?' (2001) 54 *Naval War College Review* 117.

[195] David Surdam, 'The Confederate naval buildup: could more have been accomplished?' (2001) 54 *Naval War College Review* 126 argues: 'Davis did not hinder Mallory's efforts in building a navy, but he did not encourage the Confederate Congress to help Mallory. Davis apparently never understood the importance of the navy, aside from commerce raiding and keeping the ports open'.

[196] Arthur Wyllie, *The Confederate States Navy* (2007) 3.

Overall, the size and quality of the Confederate Navy can best be explained not by constitutional constraints but rather because of a lack of recognition on the part of policymakers that winning the war on water equally as important as the land war since feeding, clothing and arming soldiers in the land campaigns partly depended on availability of supplies brought by river or sea. This is suggested by the fact that during the first 18 months of the war the CSA spent only $14,605,777 on its navy, a relatively small portion out of a total budget of $347,272,958.[197] In addition, the Confederate Army was given priority when using railroads, to the detriment of naval shipments. Two points buttress my conclusion that non-constitutional factors were relevant. First, since constitutional text pertaining to naval power was identical in both the US and Confederacy, the divergent outcomes were likely attributable to the differing judgements of political and military leaders rather than any legal reason. Second, within the Confederacy, in most cases the states cooperated in turning over their naval facilities for central government use, and where they did not it made little difference to naval performance since a shortage of domestic supplies meant states did not in any case have enough iron or ships to make a dent against the US Navy.

III USE OF SLAVES AS SOLDIERS

There is an argument that the Confederate States of America was weakened by its refusal to accept slaves to serve in its armed forces. According to the 1860 census, the South had a population of 9,103,332 of which 3,521,110 were slaves, while the Northern states had 22,339,989 of which 432,651 were slaves. Although slaves were used as labourers, teamsters, medical orderlies and skilled workers in factories, the Confederacy did almost nothing to enlist them as soldiers until March 1865. In failing to enlist slaves early, the Confederate armed forces lost a valuable human resource that could have alleviated their armies' numerical disadvantage. This assumes, of course, that the CSA would have been able to provide sufficient training, arms, salary, food and clothing to every new enlistee.

The text of the US Constitution and Confederate Constitutions acknowledged the existence of slavery, but the Confederate documents did so explicitly. The Provisional Confederate Constitution and the US Constitution were essentially identical, with the major

[197] Joseph Durkin, *Stephen R. Mallory: Confederate Navy Chief* (University of North Carolina Press, 1954) 145.

constraint in both being an effective prohibition of the international slave trade. However, the final CSA Constitution contained more textual constraints hindering federal government interference with slavery than either the Provisional Constitution or the US Constitution. All documents make clear that the state governments were to be the ultimate arbiters of slavery, and included a 'fugitive slave' clause so that if a slave escaped from one state into another, the state in which the slave was harbouring was obligated to return him or her to the owner. In the Provisional Confederate Constitution, that provision read:

> 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.

Free states could be admitted into the Union and the Confederacy; however, in the CSA it was explicitly provided that free states could not prevent the citizens of slave states who were temporarily passing through from bringing their property right with them.

The US Supreme Court in its *Dred Scott* decision of 1857 confirmed only states had the authority to decide whether to permit or prohibit slavery, with the federal government having little say on the matter.[198] Lincoln acknowledged that in peacetime it was unconstitutional for the federal government to intervene in slavery, however he believed that during war it was possible to circumvent this in the interests of security.[199] Just as the British had freed the slaves of the American revolutionaries during the American War for Independence as a military strategy, Lincoln wished to emancipate Confederate slaves to place greater economic burden on the South by removing the advantage of African-American labour in southern fields and forcing white southerners away from the battlefield.

---

[198] *Dred Scott v. Sandford* 60 US 393 (1857).

[199] In his first inaugural address, Lincoln said: 'I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so'. However, in a letter to Salmon P. Chase, he justified a departure from this promise by citing military necessity. David Reynolds (ed), *Lincoln's Selected Writings* (WW Norton & Company, 2016).

In the North, a review of legislative and executive acts suggests that there were few substantial impediments to recruiting slaves as soldiers. The First Confiscation Act of August 1861 authorised the taking of slaves whenever judicial proceedings declared them as property *directly* supporting rebellion. But it was not until July 17, 1862 that the Second Confiscation Act decreed that fugitive slaves fleeing from the South were not be returned to their owners and became property of the Union army (after appropriate court hearings). Section 9 of that act stated that slaves escaping from the Confederacy 'shall be forever free of their servitude, and not again held as slaves' and section 11 noted that 'the President of the United States is authorized to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion, and for this purpose he may organize and use them in such manner as he may judge best for the public welfare'.

Following up on these legislative acts, the Emancipation Proclamation, an executive order issued January 1, 1863, declared free all slaves in the South but none in the loyal northern slave-holding states.[200] While temporary, Lincoln's proclamation paved the way for incorporating negroes into Union ranks and recruitment of coloured peoples began in full force from January 1863. Prior to 1863, negroes were inconsistently utilised depending on the discretion of local commanders, but Lincoln's proclamation laid out a consistent policy. Because of these efforts, the United States Colored Troops at their peak numbered 178,000, of which 18,000 were in the Navy. The numbers were significant and comprised about 10 percent of the Union Army and 16 percent of the Navy. The Colored Troops included not just African-Americans but also Native Americans, Pacific Islanders and Asian-Americans.

What about the CSA? While it is true that seven of the seceding states explicitly cited protection of slavery as one of their main reasons for secession, not all the southern states seceded out of a desire to protect property in slaves from interference by government. The states of Arkansas, Tennessee, North Carolina and Virginia only seceded in protest at the threatened use of force by the US government after Lincoln's call up of 75,000 troops. Far

[200] The Proclamation did not emancipate slaves in the Northern slave states of Delaware, Maryland, Kentucky and Missouri, and also did not guarantee that slavery would not be restored after the end of the war. James McClellan, *Liberty, Order and Justice: An Introduction to the Constitutional Principles of American Government* (Liberty Fund, 2000) 70; Lerone Bennett, *Forced into Glory: Abraham Lincoln's White Dream* (Johnson Publishing Company, 2000).

from wanting to protect slavery, the voters of these four states had initially rejected the idea of secession until it was realised the coming war would force them to choose sides.[201]

During 1861, the Confederacy operated under its Provisional Constitution which was flexible in that it did not explicitly deny a right for the federal government to utilise slaves. However, nothing was done to exploit constitutional ambiguity before Lincoln's Emancipation Proclamation encouraged the South's slaves to flee to the North and become spies for the Union. The first year would have been a perfect time, because supplying additional troops would also have been easier since many ports remained open. Had Davis possessed the foresight to ally with the majority who did not own slaves and who had no self-interested motive to oppose incorporation of blacks, he may have been able to convince the remaining one-third of southerners who owned slaves to sell them to the federal government. Or, if Davis found it legally objectionable to interfere in slavery due to state rights' concerns, he could have persuaded the governors to instigate the purchases themselves.

Nonetheless, the Confederate government, like the Union, managed to find a wartime loophole in its constitutional framework allowing it to reach into state jurisdiction, however it followed a slower path. Initially, the states took the initiative since there was less controversy about local action. Bernard Nelson observes, '[d]uring the first two years of the Civil War, the Confederate government stood quietly by and merely encouraged the policy of state action' in the field of slave impressment.[202] Through impressment, the central government drafted tens of thousands of slaves into non-combat roles, since there was less ill-feeling about using blacks if they were not armed.[203] Clearly, Confederates never saw their constitution as being a barrier to renting slaves to the federal government under its impressment policy. This lends further credence to the notion that Davis could have persuaded southerners to extend their existing logic to arming slaves too.

---

[201] Donald Livingston, 'A Moral Accounting of the Union and the Confederacy' (2002) 16 *Journal of Libertarian Studies* 85.

[202] Bernard H. Nelson, 'Confederate Slave Impressment Legislation, 1861-1865' (1946) 31 *The Journal of Negro History* 393-4: 'Six of the eleven Confederate states enacted laws regulating the impressment of their slave property between 1862-1864'.

[203] William Brown, 'Blacks and the Confederate Military Effort' in Paul Finkelman (ed), *Encyclopedia of African American History 1619-1895* (Oxford University Press, 2006) 323.

After February 1862, the CSA Constitution's article I, section 9 hampered action because of its exhortation to Congress that '[n]o … law denying or impairing the right of property in negro slaves shall be passed'. Even so, from 1862 there is evidence that the federal government informally armed blacks. For example, the diary of Lewis Steiner, inspector of the US Sanitary Commission, contains an observation that he saw about 3,000 mostly armed negro soldiers in Confederate lieutenant-general Stonewall Jackson's army and that they were 'manifestly an integral portion of the Southern Confederate Army'.[204] Steiner wrote that this fact was 'interesting when considered in connection with the horror rebels express at the suggestion of black soldiers being employed for the National defence'. Some scholars have also discovered that slaves served in the Confederate Navy with their master's consent.[205] Although anecdotal accounts suggest that black troops served even in the early years, there was no official policy and so the numbers were relatively small.

During December 1863, as desertions and absenteeism thinned ranks, Confederate general Patrick Cleburne proposed arming black soldiers. President Davis did not endorse the plan at the time despite support for the proposal from prominent politicians and generals who endorsed arming slaves from 1864 onwards, including Secretary of the Treasury Judah Benjamin, General Robert E. Lee, Governor William Smith of Virginia, General Joseph E. Johnston, General Daniel Govan, General John Kelly, General Mark Lowrey and Congressmen Ethelbert Barksdale and Duncan Kenner (the latter being one of the largest slaveholders in the South). Eventually, in 1865, the Confederates found a way to divorce themselves from state sovereignty concerns and adopted a wartime exception allowing interference with property in slaves. Their March 1865 legislation was less coercive than the Union Confiscation Acts, because only slaves who were voluntarily freed by their owners could enlist. It authorised the President to 'ask for and accept from the owners of slaves, the services of such number of able-bodied negro men as he may deem expedient, for and during the war, to perform military service in whatever capacity he may direct'. The patriotism of owners produced 200 newly freed slaves who were incorporated into the army in Virginia,

[204] Lewis Steiner, *Diary kept during the rebel occupation of Frederick and an account of the operations of the US Sanitary Commission during the campaign in Maryland, September 1862* (Anson DF Randolph, 1862) 19.

[205] JH Segars (ed), *Black Confederates* (Pelican Publishing, 2004) 4.

but by this stage there was not enough time to make an impact and moreover slaves were less willing to fight since they saw a direct route to freedom: wait for the Union to defeat the Confederacy. Lee's surrender to Union General Ulysses Grant at Appomattox on April 9, 1865 essentially ended the struggle in the minds of most southerners.

Larry Tise suggests that most Americans at the time, whether in the North or South, thought slavery was immoral but that it must be suffered out of practical necessity since blacks were mentally incapable of handling the responsibilities accompanying freedom.[206] Unlike the US Constitution however, the CSA Constitution better protects property rights in slaves, and this influenced the reluctance of Davis to interfere in state prerogative. Furthermore, there was a belief that if slaves were used in the military there would be a diversion of labour from tending to crops because they were a bedrock of the plantation system and could not be spared for armed service where their tour of duty may take them outside their home state. Plantation owners were disproportionately influential, despite two-thirds of the Confederacy's white population being non-slaveholders. In this regard, James McPherson has found that large numbers of non-slaveholders were willing to let blacks enjoy the relative comforts of labourer work while white men died on the battlefield.[207]

Yet while there was some degree of constitutional constraint, more could have been done to treat free blacks equally and encourage them to participate in defending their homeland.[208] In other words, even if slaves were out of bounds for the federal government, there were 261,918 free blacks – 6.2 percent of the total African-American population in the South – who could have been lawfully recruited. At the time of secession, approximately half of the free blacks in America lived in the South. Three Confederate states authorised free

[206] Larry Tise, *Proslavery: a history of the defense of slavery in America, 1701-1840* (University of Georgia Press, 1987) 3-4.

[207] James M. McPherson, *For Cause and Comrades: Why Men Fought in the Civil War* (Oxford University Press, 1997).

[208] There was a belief even after the fall of Richmond on April 3, 1865 that somehow independence could still be won. This naïve faith in the ability of the Confederate armies to supply themselves in spite of the capture of Wilmington prevented a radical incorporation of slaves in all aspects of the resistance. Herman Hattaway and Richard Beringer, *Jefferson Davis, Confederate President* (University Press Kansas, 2002) 357.

blacks to enlist in state militia units, however the federal government did nothing and its War Department even rejected an offer from free blacks who had volunteered to serve.[209]

IV STATE WITHOLDING OF TROOPS

According to Frank Owsley, disagreements between states and the Confederate government resulted in states withholding men from national service, and contributed materially to defeat by limiting available options for the CSA.[210] To understand Owsley's claim, it should be noted that the Confederate Constitutions had given Congress two distinct powers: (1) the authority to call forth the state militias to help repel invasions and (2) to raise an independent central army and navy. The state militias and the federal army were separate institutions, however article 1 provided that the central government may 'provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederacy, *reserving to the States respectively the appointment of the officers*, and the authority of training the militia according to the discipline prescribed by Congress'. The US Constitution gave its Congress almost identical powers.

Did Article 1 mean that regiments tendered to the central government were to be commanded by state-appointed officers, and kept separate from the general army? President Davis suggested that this could not be correct since in war the central government and the states compete for the same population of men to enroll. Although he acknowledged that states had a right to form militias in peacetime, the Confederate Constitutions provided under its Supremacy Clause (as did the US Constitution) that the federal government was dominant in the field of war powers. Davis concluded that the men provided by states were no longer militia once they entered federal service and states had no right to appoint officers.[211]

---

[209] Mike Henry, *Black history: more than just a month* (Rowman & Littlefield, 2013) 29; Susanna Lee, *Free blacks during the Civil War* (27 October 2015) Encyclopedia Virginia <http://www.encyclopediavirginia.org/Free_Blacks_During_the_Civil_War>

[210] Frank Owsley, *State Rights in the Confederacy* (1925; 1961 ed) 104-109.

[211] Article 6 of the Confederate Constitutions provided that '[t]his Constitution, and the laws of the Confederacy which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the Confederacy, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding'.

Governor Brown of Georgia responded that even if the central government and the states were recruiting from the same population of civilians, this did not mean that states gave up all rights over soldiers once transferred into federal service. Brown preferred that state troops be kept separate from the general armies of the Confederacy, and be commanded by separate men. Of course, the president as commander-in-chief would ultimately control state militia incorporated into the Confederate military, but Brown argued this did not preclude all officers immediately under the president from being appointed by the states.

Such disagreement played out to some extent in the Union too. At the time of Lincoln's inauguration on March 4, 1861, the regular army of the United States was composed of only 16,000 men. The early republic did not need a massive central force since state governments were supposed to provide their militia in times of emergency. In this way the principle of state sovereignty permeated defence arrangements.[212] When Lincoln on April 15, 1861 requested 75,000 volunteers, he relied on the states to make the necessary arrangements, with the federal government reimbursing some of the expenses entailed.[213] It was only during May 1861 that Lincoln in consultation with Congress began to create a national army made up of state units but under centralised command and subject to federal laws. Notably however, until 1863 all volunteers were recruited and tendered through state governors.

The initial two years of decentralisation was characterised by states resisting orders to transfer troops to the US government. According to Michael Benedict, local officials 'tried to force changes in military policy and administration and to exercise influence over assignments and promotions' due to a perceived inequitable distribution of burden and influence.[214] As a slave-holding state that was appalled by Lincoln's desire to use coercion against the South, Maryland was divided in its loyalties. In response to the Baltimore riots of 1861, when residents had attacked US troops passing through the state, the legislature tried to maintain Maryland's neutrality by denying Union troops further access. But by September

[212] Fred Albert Shannon, *The Organization and Administration of the Union Army, 1861–1865* (Arthur H. Clark, 1928) vol 1, 17.

[213] William B. Hesseltine, *Lincoln and the War Governors* (Alfred A. Knopf, 1955) 166.

[214] Michael Benedict, *Abraham Lincoln and Federalism* (1988) Journal of the Abraham Lincoln Association <http://hdl.handle.net/2027/spo.2629860.0010.103>

1861 Lincoln had ordered the arrest of one-third of members of the state legislature, a US Congressman representing Maryland and suspected Confederate sympathisers among local government, police and civilians.[215] Martial law prevented the state's secession, however thousands nevertheless fled and fought in the Confederate Army. Kentucky too had refused to cooperate, with Governor Beriah Magoffin replying to Lincoln's requisition by telegraphing 'I will send not a man nor a dollar for the wicked purpose of subduing my sister Southern states'.[216] But Kentucky was firmly within the Union by September 1861.

Other examples of internal dissent illustrate the potential constitutional challenges faced by the US government. The election of anti-war Democrat legislatures in Illinois and Indiana during 1862 resulted in delays in recruiting troops. And the Union faced tremendous political discontent once the war goal changed from preserving the nation to abolishing slavery. New York City draft riots in 1863 led by Irish immigrants unhappy about emancipated blacks competing for their jobs resulted in 120 deaths and destruction of property. Although the riot was crushed by diverting several thousand men from the Army of the Potomac to supplement the New York Police department, it slowed down recruiting.

The experience in Maryland, Kentucky and New York shows that when state rights ideology became a problem for the Union, its federal government was not constrained by the US Constitution in its ability to respond vigorously. In Maryland, Lincoln suspended the writ of habeas corpus and ignored the ruling of Justice Roger Taney of the Supreme Court rebuking him for doing so. This meant that dissidents could be held without trial. In spite of the imposition of martial law, Lincoln won the support of Marylanders in the November 1864 presidential election with 55.1 percent of the vote. In Kentucky, Lincoln authorised US navy lieutenant William Nelson to surreptitiously support the Unionists as well as recruit within the state. Nelson's measures were successful in gradually undermining Kentucky's neutrality, which was a victory for Lincoln. Although in the election of 1864 Kentuckians turned against Lincoln and he obtained no electoral votes from that state, the steps taken demonstrate how constitutionally free he was to influence political events within a state. President Lincoln did,

---

[215] William Gienapp, *Abraham Lincoln and the Border States* (1992) Journal of the Abraham Lincoln Association < http://hdl.handle.net/2027/spo.2629860.0013.104>

[216] Robert Powell, *Kentucky Governors* (1976) 52.

however, have to concede some authority to Maryland and Kentucky, in that an agreement he negotiated contained a 'qualified guarantee that the militia would not have to serve beyond state lines in return for their incorporation into the Union army'.[217]

Ultimately, the Union raised 2.1 million individuals to serve in its army between April 1861 and April 1865.[218] This was partly due to an important asset not available to the South, one which had little to do with constitutional factors. What helped the Union was importing immigrants to fight: about 25 percent of Union soldiers were foreign born, compared to the Confederate Army's 9 percent.[219] Hummel notes, ''[a]pproximately 800,000 immigrants arrived in the North during the war, and some of them had enlisted in the military before crossing the ocean'.[220] This combined with its flexible constitution which allowed the US government to easily suppress dissent gave Northerners an advantage.

In the Confederacy, centralisation proceeded at about the same pace. Bensel confirms that 'both states moved to transfer appointment power from governors to the president in roughly the same way'.[221] The Provisional Congress of the Confederate States voted on March 8, 1861 that 100,000 volunteers be enlisted for one year, however volunteers were to be received 'by consent of their State'.[222] Soon after, on May 8, both the term of service and number of soldiers was expanded and the president gained the right to accept any number of volunteers for the duration of the war. However, state consent was still required to be obtained. On May 11, the president was freed from the burden of obtaining state consent before accepting troops. Then in August 1861, the president was given power to accept as many emergency volunteers as he wished for any term of service he desired. Finally, an act

[217] Richard Bensel, *Yankee Leviathan*, above, 122.

[218] EB Long and Barbara Long, *The Civil War Day by Day: An Almanac, 1861-1865* (Doubleday, 1971).

[219] Herman Hattaway, Richard Beringer and William Still, *Why the South lost the Civil War* (University of Georgia Press, 1986) 11.

[220] Jeff Hummel, *Emancipating Slaves, Enslaving Free Men,* above n 1, 253.

[221] Richard Bensel, *Yankee Leviathan,* above, 120.

[222] An enabling act was passed on February 28, 1861. Coulter, *The Confederate States of America, 1861-1865*, above, 308.

passed during January 1862 clarified that all state militia received into Confederate service were to serve three years or the duration of the war. Vandiver describes how "[e]arly congressional legislation followed [President Davis'] leadership … and soon gave to the Confederate government control of military forces and operations – hardly a 'state rights' program!"[223] When combined with conscription, which was upheld by the state supreme courts, a great deal of centralisation had been achieved by the end of 1862.

States represented by governors who protested against the Confederate government ironically also contributed significantly. Georgia supplied 120,000 soldiers, sailors and marines by the end of the war out of a total estimated 750,000 men who served in the Confederate armies, well above its proportional share if all states had contributed equally.[224] Indeed, out of the 11 states of the Confederacy, Georgia was one of the top contributors. Similarly, North Carolina, whose Governor Vance frequently criticised the Davis administration in public, nevertheless tendered 129,000 – more than any other state (40,000 died, the highest toll of any Confederate state).[225] When compared to the Union's 55 percent of military age men enrolled in its army, the Confederacy performed better since somewhere between 75 to 80 percent of all Southern white males of military age served in its armies.[226]

The South raised the men that could be expected given its smaller population and economic problems. 'The devils seem to have a determination that cannot but be admired', wrote Union General Sherman in March 1864. 'No amount of poverty or adversity seems to shake their faith – niggers gone – wealth and luxury gone, money worthless, starvation in view within a period of two or three years, are causes enough to make the bravest tremble,

[223] Frank Vandiver, Introduction in Lynda Crist and Mary Dix (eds), *The Papers of Jefferson Davis* (Louisiana State University Press, 1992) vol 7.

[224] Randolph McKim, *The numerical strength of the Confederate army* (Neale Publishing, 1912) 56.

[225] Theodore F. Davidson (Speech, Raleigh, 10 May 1904) quoted in John Arthur, *Western North Carolina: A History (from 1730 to 1913)* (1914) 600: 'She [North Carolina] was next to the last state to secede from the Union, and in February, 1861 she voted against secession by 30,000 majority; yet, with a military population of 115,365, the State of North Carolina furnished to the Confederate army 125,000 men'; John Inscoe and Gordon McKinney, *The Heart of Confederate Appalachia: Western North Carolina in the Civil War* (University of North Carolina Press, 2003) 9.

[226] William Barney, *The Oxford Encyclopedia of the Civil War* (Oxford University Press, 2011) 18.

yet I see no sign of let up – some few deserters – plenty tired of war, but the masses determined to fight it out'.[227] Diverting more men into the military would likely have created labour shortages in industries such as armaments, manufacturing and wool. Near the end, the Confederates still had significant numbers of active troops, as Pollard points out: 'It is true that the armies of the Confederacy had been dreadfully depleted by desertions; but in the winter of 1864-5, the belligerent republic had yet more than a hundred thousand men in arms east of the Mississippi River'.[228] However, it was unable to reliably feed, clothe or arm the 174,223 men remaining in the field by April 1865.[229] In this sense, it cannot be said that the CSA Constitutions were a constraint; the CSA had the men, but it could not supply them.

Even supposing that the Confederate government had received more men, it is not clear that this would have led to strategic improvements. Governor Brown argued correctly that Davis had spread troops too thinly and that this detracted from defence of coastal areas.[230] In hindsight, given how little Davis prioritised breaking the blockade, one should not assume that the states were wrong in their concerns about central government blunders. Indeed, Davis once stated that the blockade was a good thing since it would make the South more self-sufficient, thereby revealing he did not understand the importance of trade in alleviating pressure on domestic supplies and would not have allocated men to the coastal regions.[231]

V CONCLUSION

This chapter has found that in only one instance did the constitutional orders of the Union and Confederacy undeniably lead to starkly different constraints upon military logistics and

[227] Adam Smith, *The American Civil War* (Palgrave Macmillan, 2007) 177.

[228] Edward Pollard, *The Lost Cause: A New Southern History of the War of the Confederates* (E.B. Treat & Co Publishers, 1866) 726.

[229] E. B. Long, *The Civil War Day by Day: An Almanac, 1861–1865* (Doubleday, 1971) 711.

[230] *Correspondence between Governor Brown and President Davis on the constitutionality of the Conscription Act* (Atlanta Intelligencer Print, 1862).

[231] Jefferson Davis, 'Address to Congress of the Confederate States' (Speech, Richmond, 18 November 1861); Paul Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (Louisiana State University Press, 1978) 60.

planning, namely, when it came to utilising slaves as soldiers by rewarding them with freedom for military service. The CSA was delayed in its efforts to recruit black soldiers due to state rights ideology underpinned by a final Confederate Constitution that, through its text, imposed an administrative protection for the right of property in slaves more unambiguously than the US Constitution. Because one of the realities of military strategy is the need to shape tactical decisions around the number of men available for fighting, one can assume that this negatively impacted the CSA. The moral force behind Lincoln's Emancipation Proclamation was an act of strategic brilliance and, overall in this regard, the Union pursued a smarter policy because once casualties began mounting it moved in 1863 to portray itself as a friend of slaves and encouraged them to join its ranks or act as spies.

Another constraint that affected the South was its inability to fully direct the railroads in a centralised manner, with most of the network being managed by the companies under the protection of the state governments. In this respect, Davis probably could not have taken punitive measures as were taken by Lincoln against Maryland without being condemned given the stronger sense of localism among Confederates. The CSA Constitution, unlike its US counterpart, provided for impeaching federal officials whose duties were limited to a state and this may have served as a deterrent for central government dominance even though the provision was never invoked. Lincoln on the other hand simply silenced his opposition in the border states by force without losing the support of most Northern states and congressmen.

However, this chapter has found that even though there were constraints preventing nationalisation of the railroads, the hindrance did not have much practical effect since in any case there was a shortage of iron precluding expansion or repair of the network. Moreover, as Chapter 2 has suggested, this shortage of iron arose primarily because of non-constitutional discretionary decisions made by political leaders with regards to the blockade. In sum, aside from the recruitment of slaves as soldiers, the relative importance of constitutional factors has been overstated since lack of resources or poor judgement were at least as important.

4 CIVIL LIBERTIES

At Gettysburg, Pennsylvania in 1863, President Abraham Lincoln justified the American Civil War by citing the need to uphold 'government of the people, by the people, for the people'. He explained that the conflict was being fought to carry on the work of the American founding fathers, who had conceived the United States in liberty and dedicated themselves to the proposition that 'all men are created equal'. One way to interpret his Gettysburg address is that Lincoln was committed to a system of government that protected the freedoms of ordinary Americans, irrespective of the race or creed of the individual concerned.

About a century later however, David Donald argued that the Confederate States, not the United States, 'represented the democratic forces in American life'.[232] He contends that the US was less constrained by respect for individual liberties, and was rewarded handsomely with victory. Donald writes that democratic forces in the South undermined its potential for success due to constitutional constraints on military organisation, management of civilian affairs and political rights: 'The real weakness of the Confederacy was that the Southern people insisted upon retaining their democratic liberties in wartime'. Donald eliminates other factors from consideration, opining that deficient economic resources, insufficient manpower, defective strategy and weak political leadership were handicaps, but 'none was fatal'.[233]

As noted in Chapter 1, Donald's work remains relatively unpersuasive to most. Nonetheless a significant minority continue to doubt the military efficacy of constitutional provisions that grant civil liberties during wartime, such as freedom of press and free and fair elections or the protection afforded by state interposition on behalf of citizens against the federal government.[234] In the US Constitution and Confederate Constitutions, the provisions

[232] David Donald, 'Died of Democracy' in David Donald (ed), *Why the North Won the Civil War* (1960) 78.

[233] Ibid 90.

[234] Escott approves the notion that Davis should have seized control of all the railroads in violation of economic liberty, while DeRosa writes that 'a centralized decision-making process is more efficient in maximizing the utilization of resources than a decentralized one'. Paul Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (1978) 73; Marshall DeRosa, *The Confederate Constitution of 1861* (1991) 104-105.

dealing with these subjects are found in the Bill of Rights. With respect to state rights, provisions in the constitutions explicitly reserved power to the states and the people of the states. The documents also made clear that there are individual rights that exist outside the Bill of Rights; that is, '[t]he enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people of the several States'.

Previous literature about constitutional influence on military performance suggests that pertinent subjects in evaluating the influence of civil liberty constraints upon military success include whether conscription is impeded, the writ of habeas corpus, media freedom and electoral integrity. The present chapter considers each in turn, with emphasis on constitutional text and practical application by key actors in the constitutional domain.

I CONSCRIPTION

Under the *Second Militia Act of 1792,* the states of the Union and Confederacy had long conscripted able-bodied white males between the ages of 18 and 45 into the local militia, however at issue during the Civil War was whether conscription should be centralised by the federal government. An initial attempt to centralise conscription occurred during the War of 1812, when President James Madison attempted to coerce 40,000 men to fight the British. In 1814, Congressman Daniel Webster pointed out that there is no language authorising centralised conscription: '[w]here is it written in the Constitution, in what article or section is it contained, that you may take children from their parents, and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it?'.[235] Due to disagreement between the House and Senate on the terms of the bill, Madison's proposed measure failed.[236] Nor is there any explicit language authorising centralised conscription in the Confederate Constitutions. Rather, President Lincoln and Confederate President Jefferson Davis implied it via construction of the power to 'raise armies'; they held that since there is no textual limitation on the methods available to raise armies, the clause was a plenary one that could be construed to include forced service.

[235] *Daniel Webster on the Draft: Text of a Speech Delivered in Congress, December 9, 1814* (American Union Against Militarism, 1917).

[236] Carl Skeen, *Citizen Soldiers in the War of 1812* (1999) 36.

Based on an expansive interpretation of its war powers, the CSA was the first to implement centralised conscription of men into the armed forces. Its Congress enacted a military draft on April 16, 1862 and initially targeted white males between 18 and 35 before later extending the draft to men between 17 and 50 years. As an inducement, the CSA paid a $100 bounty to those who volunteered before they were formally drafted, although this amount was essentially meaningless because of inflation which had devalued the currency.[237]

An indicator of conscription's success is that 20 to 33 percent of the CSA's military manpower was directly drawn from its implementation as compared to only 7 percent in Northern armies.[238] It is difficult to say that the South performed better however, since there were reasons why the North raised a lower percentage of its troops from conscription that had little to do with constitutional constraints. Specifically, the Union had the foresight in 1861 to enlist troops for a longer term of service of up to three years and so the practical need to implement conscription came a year later than in the Confederacy.

Governor Zebulon Vance of North Carolina cooperated despite reservations about central government overreach. In Vance's inaugural address he vowed to fight on until the South obtained independence, and promised to support enforcement of conscription.[239] Vance also kept at bay the anti-war opposition that threatened to take North Carolina out of the CSA and forge a separate peace. And Governor Joseph Brown met quotas, if not all the time then at least enough of the time to exclaim in 1864, '[w]hen did she [Georgia] fail to furnish more than her full quota of troops, when she was called upon as a State by the proper Confederate authority?'.[240] Brown was willing to aid other Confederate states and reinforced Florida with Georgian troops in 1864. As well, the *New York Times* in 1864 observed that Brown remained dedicated to the idea of Southern independence despite friction on conscription.[241]

---

[237] William Barney, *The Oxford Encyclopedia of the Civil War* (2011) 256-57.

[238] Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America* (1990) 138.

[239]Richard Yates, 'Zebulon B. Vance as War Governor of North Carolina, 1862-1865' (1937) 3 *Journal of Southern History* 70.

[240] *Message of Joseph Brown to the Extra Session of the Legislature 10 March, 1861* (State Printer, 1864).

[241] *New York Times* editorial, 14 November 1864.

On the judicial front, supportive rulings buttressed the CSA's policy.[242] John Robbins notes that in the Confederacy 'the greatest support for conscription came from courts, usually state courts'.[243] As Alfred Brophy confirms, '[t]he Confederate courts aggressively protected the right of the Congress to compel military service from its citizens'.[244] Punitive measures, such as the execution of deserters who tried to evade conscription, was also undertaken by the Confederacy via court-martial especially during the final two years of the conflict.[245]

However, the CSA faced some constitutional constraints. Frank Owsley finds that:

> As a result of … opposition by the states to conscription, 15,000 to 20,000 in North Carolina, 8,000 in Georgia, about half as many in Mississippi and Virginia, about 5,000 in Texas, 2,000 or more in Alabama and South Carolina escaped Confederate military service during the latter part of the war.[246]

This constraint is reflected in the way that the Confederate government shaped its policy to allow the states to exempt men from service. Whereas the Union did not permit occupational exemptions, aside from senior government officials, the CSA enacted a broad range of exemptions partly because of pressure by the likes of Governor Joseph Brown, who asserted that the draft was the 'essence of military despotism' and unconstitutional.[247] Brown exempted most civil officials within Georgia, however it is doubtful that all were needed for administering the state government and could not have been spared for military service. In

---

[242] John Norman, "'Self-preservation is the supreme law': State rights vs. Military Necessity in Alabama Civil War Conscription Cases" (2009) 60 *Alabama Law Review* 727-49.

[243] John Robbins, 'Confederate Nationalism: Politics and Government in the Confederate South, 1861-1865' (PhD dissertation, Rice University, 1964) 108-9.

[244] Alfred Brophy, "'Necessity knows no law': Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases" (2000) 69 *Mississippi Law Journal* 1179.

[245] Thomas Cutrer, *Military executions during the Civil War* (2015) Encyclopedia Virginia <http://www.encyclopediavirginia.org/Military_Executions_During_the_Civil_War>

[246] Frank Owsley, *State Rights in the Confederacy* (1925) 280.

[247] *Message of Joseph Brown to the Extra Session of the Legislature 10 March, 1861* (State Printer, 1864).

this way, there was abuse of the exemptions system. In addition, the North Carolina Supreme Court released men from conscription utilising a state rights interpretation of the law. The case of *In re Bryan*[248] is an example. Even federal judges at times overruled the executive branch, however their reasoning was less explicitly pro-state rights and tended to be based on finding loopholes inherent in Congress' legislation. For instance, the Confederate District Court for the Eastern District of Virginia in *Ex Parte Lane* and *John H. Leftwich v Major TG Peyton* applied an interpretation that excluded the petitioners from service despite protest by the government's counsel.[249] Although most exemptions were abolished in November 1864, in the interim they hindered recruitment by enrolling officers.

Meanwhile, the North initially tried to place responsibility for conscription upon the states with its *Militia Act* enacted on July 17, 1862. After the apparent failure of states to implement that act, the Congress decided to centralise conscription. On March 3, 1863 Lincoln signed the *Enrolment Act,* which required every male between the ages of 20 and 45 (who was also a citizen or immigrant who had filed for citizenship) to register for military service. The only exceptions were for physical or mental disability, or if one was a breadwinner for dependent children, the only son of a widow or the son of infirm or indigent parents. Anyone else could evade his obligation by hiring a substitute to attend in his place, or by paying $300 to the War Department.

In the Union, the draft was part of a carrot and stick approach that aimed to indirectly stimulate volunteer enlistments. Many tried to avoid being imprisoned for failure to comply with the draft by volunteering instead, and were encouraged to do so by generous bounties. The Congress in 1863 provided $300 to three-year enlistees and $400 to five-year recruits. Northern local governments would sometimes pay more than $1,000 to entice men to enlist. Given that the average wage at the time was around $30 per month, American pecuniary largesse was a non-constitutional decision that helped make the Union draft economically

[248] *In re Bryan*, 60 N.C. 1 (1863).

[249] *Decisions of Hon. James D. Halyburton, Judge of the Confederate States District Court for the Eastern District of Virginia, in the cases of John B. Lane and John H. Leftwich* (Ritchie & Dunnavant Printers, 1864).

rational and less damaging to morale.[250] From 1861 to 1865, a total of $750,000,000 in bounties was paid by federal, state and local government in the US.[251]

In spite of bounties, the Union faced constraints in implementing aspects of conscription. In Congress 88 percent of Democrats voted against the policy,[252] the governor of New York, Horatio Seymour, attacked conscription's constitutionality, Pennsylvania rarely met its quotas to the federal government and enrollers visiting districts were attacked and sometimes killed by residents.[253] The Supreme Court of Pennsylvania ruled conscription unconstitutional in 1863 and granted injunctions to restrain Provost-Marshals – the Union's military police – from proceeding. Though this decision was later overturned, it delayed recruitment. The threat to officials implementing conscription was such that in Pennsylvania, Ohio, Illinois and New York the federal government diverted troops to provide security in affected regions.[254]

Although the Confederacy faced constraints, overall its experience with conscription was comparable to the Union's. Several governors in the CSA executed a local draft even though they simultaneously objected to centralisation of the draft. Though recruitment from conscription was not a complete success, it provided a respectable 90,000 men for Confederate ranks. Owsley's finding that about 40,000 men were withheld from conscription because of state interference must be viewed in proportion to the total 750,000 that served.

---

[250] Milton Friedman, 'Why not a volunteer army?' in *New Individualist Review* (1981). The average wage is estimated from the daily wage of unskilled labourers in Clarence Long, *Wages and Earnings in the United States, 1860-1890* (1960) 99.

[251] Encyclopedia Britannica, *Bounty System* (1998) <https://www.britannica.com/event/Bounty-System>.

[252] James McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford University Press, 1988) 608.

[253] Stewart Mitchell, *Horatio Seymour of New York* (Harvard University Press, 1938) 283–336.

[254] Robert Sterling, 'Draft resistance in Illinois' (1971) 64 *Journal of the Illinois State Historical Society* 244-60; Arnold Shankman, 'Draft resistance in Civil War Pennsylvania' (1977) 101 *The Pennsylvania Magazine of History and Biography* 190-200; Kenneth Wheeler, 'Local autonomy and Civil War draft resistance: Holmes County, Ohio' (1999) 45 *Civil War History* 147-150.

Many enforcement shortcomings in the South came about not because of state rights provisions but due to loss of territory to Union forces, which closed off areas for enrolling officers. In Arkansas, the Union victory at the Battle of Pea Ridge in 1862 meant that the pro-Confederate administration of Governor Henry Rector no longer had full autonomy statewide, and the loss of Vicksburg in 1863 cut off the western part of the Confederacy from the eastern theatre. These individual battles were themselves the result of a mix of constitutional and non-constitutional factors, and could be supposed to have been influential given losses in 1863 and 1864. At Vicksburg, constitutional influence came about when the commander in the field John Pemberton listened to President Davis' advice – as he was constitutionally obliged to do since Davis was the commander-in-chief – to hold the town.[255] Obeying Davis was a mistake, because once Pemberton retreated into Vicksburg he became trapped during the following siege. The impending starvation of Pemberton's troops however, was because of earlier non-constitutional decisions. Ironically, there was plenty of food in the countryside that was sustaining Union General Ulysses Grant's troops. However, because of the policy of impressment implemented in the Confederacy through non-constitutional discretion (as discussed in Chapter 2), little of this had been brought into Vicksburg due to the perverse incentives created by impressment laws; farmers were not willing to risk food being seized by marketing in the town.[256] This illustrates the complex multi-casual nature of the numerical outcome in relation to conscription.

II WRIT OF HABEAS CORPUS

The Great Writ of habeas corpus allows an individual to compel authorities to bring him or her before a court so that an inquiry into the legality of detention can proceed. The US Constitution says, '[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it', while the same is contained in the Provisional Confederate Constitution and the final Confederate Constitution. Suspending the writ allows indefinite detention and permits sidestepping legal impediments involved with imprisoning suspected enemy sympathisers. It is sometimes said

[255] Michael Ballard, *Vicksburg, The Campaign that Opened the Mississippi* (University of North Carolina Press, 2004) 318.

[256] Andrew Smith, 'Did hunger defeat the Confederacy?' (2011) 13 *North & South – The Official Magazine of the Civil War Society* 41.

that suspension is essential for stimulating soldier recruitment, since without it the ability to detain conscripts for trying to escape military service would be undermined.

In April 1861, spurred on by rapidly developing hostilities including the Battle of Fort Sumter, Lincoln secretly suspended the writ of habeas corpus in the corridor between Philadelphia and Washington DC. Subsequently, he expanded suspension to Kentucky, Maryland, Missouri and Maine. On September 24, 1862, it was announced that at Lincoln's discretion the writ could be suspended anywhere in the United States. Throughout the war, Federal troops ignored attempts by state judges and the Chief Justice of the Supreme Court Roger Taney to rein in suspension.[257] Although Democrats picked up congressional seats during the 1862 elections and increased their criticism of Lincoln and courts entertained suits for damages against federal officers that had suspended the writ, these were ineffective in constraining the executive branch. Finally, in March 1863, Congress formally authorised Lincoln to suspend the writ and lent political credence to his actions. The Union faced few constraints and imposed a rigorous regime of indefinite detention; somewhere between 10,000 to 30,000 citizens were held in military prisons without trial, some of them for years.

By contrast, Jefferson Davis was cautious about acting unilaterally and sought permission from the Confederate Congress, which agreed to suspend the writ from February 1862 to February 1863 in places where there was 'such danger of attack by the enemy as to require the declaration of martial law for their effective defence'. This period of constricting civil liberties saw rising discontent from Vice-President Alexander Stephens, congressmen and states who all cited constitutional objections, but the level of dissent was not sufficient to prevent suspension from being reauthorised. From February to June 1864 the writ was again suspended,[258] and for a total of 17 months Davis officially had the power to suspend the writ.

Yet unofficially, imprisonment of political prisoners had been going on long before the first legislation was passed. William Robinson finds that through surreptitious extra-legal action, the military did not allow itself to be checkmated by the courts or lack of legal

[257] See, e.g., *Ex parte Merryman* (1861).

[258] David Currie, 'Through the Looking Glass: The Confederate Constitution in Congress, 1861-1865' (2004) 90 *Virginia Law Review* 1328.

authority.[259] This did not always occur with Davis' knowledge, and he was quick to rescind arbitrary action once he discovered what had happened. Mark Neely points out however that the law was not much of a constraint, noting that 'there seems to be no difference in the arrest rate in those periods when the Confederate Congress refused to authorise suspension of the writ of habeas corpus and those periods when suspension was authorised'.[260]

Owsley argues that '[d]eserters and draft-dodgers, with the aid of judges like Pearson of North Carolina, Hill and Gray of Texas, Halyburton and Fuller of Virginia, obtained writs of habeas corpus and escaped service'.[261] Yet while Judge Richmond Pearson was an annoyance, his influence was limited to a few dozen cases and moreover his judicial colleagues disagreed with him. When Pearson tried to hinder the conscription law of 1864, Congress was prompt in overriding him.[262] And Judge William Hill's obstruction when it came to the writ is partially negated by his supportive stance on the matter of sequestration.[263] A bird's eye perspective suggests that despite facing some obstruction the CSA made thousands of arbitrary arrests too, as Neely has found.[264] The efforts of state governments in the CSA to round up men for service merit mention in this regard. For example, Texas,

---

[259] William Robinson, *Justice in Grey: A History of the Judicial System of the Confederate States* (Harvard University Press, 1941) 385.

[260] Mark Neely, *Confederate Bastille: Jefferson Davis and Civil Liberties* (Marquette University Press, 1993) 11.

[261] Frank Owsley, *State Rights in the Confederacy* (1925) 278.

[262] Gordon McKinney, *Zeb Vance: North Carolina's Civil War Governor and Gilded Age Political Leader* (2005) 142.

[263] Nowlin Randolph, 'Judge William Pinckney Hill Aids the Confederate War Effort' (1964) 68 *The Southwestern Historical Quarterly* 14. 'By the exercise of their power to seize and confiscate property of alien enemies (the United States and its citizens)', says Randolph, '[CSA circuit courts] funnelled into the treasury large sums of money and property, including, in the case of at least one court, United States ships'.

[264] Mark Neely, *Confederate Bastille,* above, 10. Neely finds 2,672 confirmed civilian arrests by Confederate military authorities, but is unable to reconstruct a definite total figure due to incomplete records. Nevertheless, he believes 'civilian prisoners trickled into Confederate military prisons whether the writ of habeas corpus was suspended or not'. See also Barton Myers, *Rebels Against the Confederacy: North Carolina's Unionists* (2014) 63.

Georgia and North Carolina (which provided more conscripts than any other state) imposed martial law on their own initiative.

Still, the Confederate Constitutions did matter because suspension of the writ was constrained by its text which stipulates that permission be obtained from Congress. Even though Davis took the precaution of securing legislative support, the likes of Vice-President Stephens were furious at the suspension of habeas corpus, indicating that in the realm of interpretive opinion Davis was more constrained than his Union counterpart. Stephens feared that to allow Davis to make 'arbitrary arrests' conferred 'more power than the English Parliament had ever bestowed on the king. History proved the dangers of such unchecked authority'.[265] One can only imagine how seriously Davis would have undermined internal cooperation had he, like Lincoln, unilaterally suspend the writ as he pleased. Already, with his restrained suspension program, opposition of growing intensity culminated in the Senate denying Davis a renewal of his suspension authority during late 1864, on the grounds that the proposed suspension bill of the House might have unwarranted state rights implications.[266]

In terms of the impact of the slightly more limited suspension regime in the South, evidence suggests that desertion in the Confederacy occurred at about the same rate as in the North until the final two years. While the constitutional constraints upon the Davis administration between April 1863 to April 1865 cannot be denied, it is doubtful that by this late stage suspension would have provided major benefits since so much territory had already been conceded and economic difficulties had compounded. The fact remains that Davis had the privilege of suspension during much of 1862, at a time when critical cities such as Vicksburg were still in Confederate possession. After this initial period, suspension likely would have amounted to fiddling around the edges since other non-constitutional decisions that had created inflation, for instance, demoralised citizens and hindered recruitment.

[265] George Rable, *The Confederate Republic: A Revolution against Politics* (University of North Carolina Press, 1994) 258-259.

[266] Georgia Lee Tatum, *Disloyalty in the Confederacy* (University of Nebraska Press, 2000) 20; Wilfred Yearns, *The Confederate Congress* (University of Georgia Press, 2010) 159-60.

III FREEDOM OF PRESS

The highest man-made laws in the two Americas during the Civil War guaranteed that 'Congress shall make no law … abridging the freedom of speech, or of the press'. Soon enough, however, claims of military necessity brought about the undermining of this provision in the United States. Union General Ambrose Burnside declared, '[f]reedom of discussion and criticism which is proper … in time of peace, becomes rank treason when it tends to weaken … confidence [in the government]'.[267] Lincoln sanctioned over 300 Northern newspapers, 'including the *Chicago Times*, the *New York World*, and the *Philadelphia Evening Journal*' which 'had to cease publication for varying periods' for expressing 'unpatriotic views', with their owners and editors being imprisoned for disloyalty.[268] In addition, telegraph lines were thoroughly censored.

In the South, there was also a tendency to stifle free speech. Early on, the military ordered suppression of information that revealed campaign plans to the enemy and during January 1862 legislation was enacted that forbade publication of unauthorised news of troop movements. The government likewise declared that telegraphs required approval by the War Department, and the Army suppressed news of popular uprisings such as the Richmond Bread Riot – when food shortages led to looting during April 1863 – due to its unfavourable impact on morale. Near the end of the war, Congress abolished draft exemptions for newspaper editors, a measure which was interpreted by Stephens as a means to 'put a muzzle upon certain presses' such as the anti-war *Raleigh Standard*.[269]

The mainstream literature is correct to observe, however, that less censorship occurred in the South due to greater constitutional fidelity.[270] That there were constraints imposed seems clear from the reality that national authorities closed only one newspaper, which indicates that the fears of Vice-President Stephens were probably overblown. In July

---

[267] *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (US Government Printing Office, 1899) vol 5, 740.

[268] Jeffrey Hummel, *Emancipating Slaves, Enslaving Free Men* (2014) 256.

[269] Quoted in Louis Pendleton, *Alexander H. Stephens* (1908) 313.

[270] William J. Cooper, *Jefferson Davis, American* (Vintage, 2001) 349-519.

1862, Confederate General Earl van Dorn issued a martial order applying to sections of Louisiana and Missippi directing that newspaper editors who published material 'calculated to impair confidence in any of the commanding officers' were subject to fine, imprisonment and having their papers suspended. Worth noting is that Van Dorn withdrew the order shortly afterward, likely because of the backlash from the press to impairment of their freedom.[271]

Often neglected to be mentioned is that there was little need for censorship thanks to 'consistent support for the Confederate government on the part of newspaper editors'.[272] Richard Bensel observes that 'opponents of the Davis administration, by and large, differed over how, not whether, the war should be fought' and therefore 'the Confederate state could tolerate dissent and still mobilize the southern nation'.[273] Neely suggests there was a 'basic unity' underlying the Confederate effort and that 'dissent on political-constitutional questions in the Confederacy was marginal or so expressed as to make allowance for the circumstance of desperate warfare'.[274] The southern bread riots were mild compared to the Union's draft riots, since in the former few died. In addition, when the draft law of 1864 was passed most Southern newspapers applauded the event.[275] The *Richmond Enquirer* commented:

> The prompt and patriotic action of the army in re-enlisting for the war, together with the various bills passed by the Congress for the increase of the army, have infused new life and spirit into the people; and, with improvement in the finances, and with renewed energy and renovated patriotism on the part of the people, the Spring campaign will open with that determination for success which is the sure harbinger of victory.[276]

---

[271] James Underwood, 'An Editor is Censored' in *Deadly Censorship: Murder, Honor, and Freedom of the Press* (University of South Carolina Press, 2013).

[272] Steven Woodworth, *Civil Liberties and Censorship* (2008) Gale Library of Daily Life <http://www.encyclopedia.com/history/applied-and-social-sciences-magazines/civil-liberties-and-censorship>.

[273] Richard Bensel, *Yankee Leviathan,* above, 230.

[274] Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (University of North Carolina Press, 2015) 241.

[275] Gary Gallagher, *The Confederate War* (1997) 94.

[276] *Richmond Enquirer*, 5 February 1864.

This can be contrasted with the North where '[a] significant segment of the northern Democratic party … opposed the Union war effort outright'.[277] Much of the Union's censorship occurred in border states where loyalties were divided. Even if some dispute that there was an underlying Confederate unity that reduced the need to arrest journalists, from a practical point of view publishing in the South faced logistical challenges that are acknowledged to have reduced newspaper circulation and hence influence on military campaigns.[278]

For the Confederate government to have cracked down on free speech would have required expenditure of resources it did not have and which could have instead been better used in fortifying its defences. This lack of economic resources, as mentioned in Chapter 2, was in part the product of non-constitutional decisions and limited the ability of the CSA to suppress civil liberties. By contrast, '[t]he abundance of material and manpower available to the Union allowed the Lincoln administration to forgo a full mobilization of the North and, instead, exploit the political advantage of branding the minority as traitorous'.[279]

IV FREE AND FAIR ELECTIONS

The constitutions of the United States and the Confederate States established a republican polity where executive government was to be constrained by decentralisation of power among states and division of power among three central branches of government. Under this decentralised arrangement, the Civil War was punctuated by state and federal elections that presented administrative challenges in protecting the right to vote due to unrest in various locations. Each state determined voter qualifications for federal elections, thereby perhaps

[277] Richard Bensel, *Yankee Leviathan,* above, 230.

[278] SJ Lange, 'Censorship' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) vol 1, 333.

[279] Richard Bensel, *Yankee Leviathan,* above, 230.

making voter fraud less likely than if voting procedures were controlled by a single entity.[280] When it comes to elections, it was suggested by contemporaries during the Civil War that federal governments during conflict are hampered by democracy and should subvert voting rights where it threatens to produce candidates not wedded to the war effort.[281]

In the North, the question of whether constitutional constraints prevented the federal government from interfering with election results it did not like is best illustrated by measures that it took which indirectly reversed voting outcomes at the state level. The state election of 1863 in Indiana produced a hostile Democratic legislature that threatened to cut off cooperation with President Lincoln, however the result was effectively overturned by the Republican Governor Oliver Morton, who cooperated with Lincoln and Secretary of War Stanton to obtain $250,000 of War Department funds, which Morton used to run the state government without resorting to the usual legislative appropriation process.[282]

The US presidential election of 1864 likewise was characterised by federal intervention into state prerogative. When some states permitted soldiers to vote on the battlefield, the army – loyal to the central government – allowed Republican canvassers to enter military camps but delayed Democrats.[283] Jonathan White finds that in many cases leave of absence was granted to Republicans while Democrats were placed on the front to prevent them from voting.[284] After the war, Assistant Secretary of War Charles Dana admitted that, 'all the power and influence of the War Department … was employed to secure the re-election of Mr Lincoln'.[285] Furthermore, it was decided by the Republican Congress to

[280] Article I, sections 2 and 4 of the CSA Constitution provide the states authority over determining who the electors shall be ('the electors in each State shall be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature') as well as the 'times and places of choosing Senators'.

[281] Jonathan White details opinions by pro-Lincoln soldiers who took it upon themselves to take steps to secure Lincoln's re-election in *Emancipation, the Union Army and the Re-election of Abraham Lincoln* (2014).

[282] James McPherson, *Battle Cry of Freedom: The Civil War Era,* above, 596.

[283] David Donald, 'Died of Democracy' in *Why the North Won the Civil War*, above, 87.

[284] Jonathan White, *Emancipation, the Union Army and the Reelection of Abraham Lincoln* (2014) 4.

[285] Charles Dana, *Recollections of the Civil War* (University of Nebraska Press, 1996) 261.

create the state of West Virginia from Virginia even though article 4 of the US Constitution decrees that 'no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress'. In West Virginia, sentiment was pro-Union and its electoral votes were expected to (and did) go to Lincoln.

In the Confederacy on the other hand, Davis was constrained from interfering directly in state or federal elections. He did not lobby for the defeat of his critic Governor Brown in the 1863 gubernatorial election or the peace candidate William Holden in the 1864 North Carolina election. Davis largely let dissent run its course, and did not intervene in the Congressional elections of November 1863 which produced a contingent of anti-administration congressmen when incumbents in Georgia and North Carolina were ousted. Vice-President Stephens was a thorn in Davis' side who claimed that the President intended to suppress peace meetings in North Carolina and to control elections, and this public rebuke may also have incentivised a commitment to free and fair elections.[286] However, the reluctance of the Confederate government to interfere must be qualified by the reality that in an environment of forced military service, arbitrary arrests and censored speech, the elections held in both countries were from the outset not fully protective of civil liberties.

The actions of the US government in manipulating elections did aid in enforcing its will. Still, it is difficult to say that interference made a direct impact on the outcome of the 1864 presidential election, since Lincoln likely would have won re-election regardless of voter fraud. Even if one grants his opponent George McClellan victory in all the states with close margins of victory under five percent (New York, Connecticut and Pennsylvania), Lincoln would have still won 147 electoral votes to 86. If we exclude West Virginia from the United States, Lincoln would have had 142 electoral votes to McClelland's 86, once again securing victory. And if we give the states of Indiana (where there was a high percentage of

[286] Alexander Stephens, 'The Great Speech of Hon. A.H. Stephens' (Speech delivered at the Georgia Legislature, Milledgeville, 16 March 1864).

soldier vote susceptible to fraud) and Maryland (a border state with extensive evidence of repression of civil liberties) to McClellan, Lincoln would have still won 122 to 106.[287]

Likewise, the greater commitment to fair elections did not greatly affect the South. Though the result of 1863 was a rebuke to the administration, by comparison to the elections of November 1861 a larger percentage of incumbents were re-elected. The First Confederate Congress formed out of the 1861 elections had 33 percent of its House members carry over from the Provisional Congress, a lower percentage than the 53.8 percent of incumbents returning in the Second House.[288] After the 1863 elections, Davis still retained Congress' support and saw much of his recommended legislation enacted in the Second Confederate Congress which began February 1864. While the Union enjoyed more constitutional flexibility to interfere in elections, the negative impact of free elections in the Confederacy was minimal because Davis maintained just enough legislative support until April 1865 when the main southern army led by General Lee collapsed (likely due to a combination of constitutional and non-constitutional factors unrelated to elections).[289] As Bensel points out, '[t]he evidence supports the existence of a relatively sophisticated statist coalition led by Jefferson Davis, thus demonstrating effective presidential leadership in the absence of a formal party system'.[290] Many southerners simply wished to soften the impact of harsh policies such as impressment without giving up the struggle for independence.

V CONCLUSION

In seeking to discover the influence of constitutions on how civil liberties were protected during the Civil War, I have discussed formal documents and interpretive opinions (the latter are 'the fundamental and durable procedures and constraints through which laws and public

[287] *1864 Presidential Election Interactive Map* 270 to Win <http://www.270towin.com/1864_Election/interactive_map> at 26 January 2017.

[288] Kenneth Martis, *The Historical Atlas of the Congresses of the Confederate States of America: 1861-1865* (Simon & Schuster, 1994) 74.

[289] Although, as Owsley points out, had another election been held in 1865, with all else remaining equal, it is likely Davis would have lost his majority support. Owsley, *State Rights in the Confederacy*, above n 32, 270.

[290] Bensel, *Yankee Leviathan,* above, 230.

policies are adopted'[291]) and have found that, first, the South adopted a comparable conscription policy that left the door open for influencing labour-relations in the economy using conscription's occupational exemptions. In other words, Confederate conscription was more interventionist because it allowed the federal government to shape both economic and military outcomes. Through occupational exemptions it could decide which industries and employees were favoured and which were not. Second, that the CSA was somewhat more constrained in its ability to suspend the writ of habeas as indicated by President Davis' reluctance to unilaterally impose martial law. Third, that media freedom was greater in the Confederacy, indicating the effectiveness of the constitutional guarantee of free speech. Fourth, that the greatest difference between the two was in conducting free and fair elections, since the Union government was less constrained in its attempts to sway votes.

My conclusions must be qualified by Neely's research on arbitrary arrests which undermines the traditional view that suggests Confederate suspension of the writ of habeas corpus and free speech restrictions were used sparingly. Neely has reminded us through analysis of arrest records that 'there was never a moment in Confederate history when pro-Union opinions could be held without fear of government restraint'[292], an assessment that suggests that there was little difference between the Union and the Confederacy in terms of constitutional constraint and hence requires us to temper Donald's arguments.

Overall, the stakes were higher in the North when it came to civil liberties issues since the Democratic Party's platform explicitly called for peace, whereas in the South there was less need to suppress civil liberties since individual anti-administration figures were ineffective, disorganized and still supported the notion of independence but merely sought a different means of prosecuting the war.[293] In this sense, although there were more constitutional constraints hindering central government action in the South, these are likely to have been secondary to other influences in shaping the outcome of the war.

---

[291] Roger Congleton and B. Swedenborg (eds), *Democratic Constitutional Design and Public Policy* (2006) 2.

[292] Mark Neely, *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (University Press of Virginia, 1999) 87.

[293] Proof of underlying loyalty to southern independence partly comes from one of the most obstructionist of all, Governor Brown of Georgia. When Union general Sherman contacted Brown offering an independent peace for the state, Brown rejected the offer. Joseph Parks, *Joseph E. Brown of Georgia* (1999) 296-97.

CONCLUSION

> *Now, our Constitution is new; it has gone through no perils to test and try its strength and capacity for the work it was intended to perform. Should it happen that the powers granted to it by the Government are insufficient to meet a dangerous crisis, what ought the Government to do? Exercise the requisite power and save or try to save the nation, or hold its hand and let the Constitution and the nation perish?*
>
> Sidney Fisher[294]

The purpose of this thesis has been to compare the US Constitution with the Confederate States Constitutions, and to investigate each document's impact upon prospects for military success during the American Civil War. Since it has been suggested by Frank Owsley and David Donald that the South's constitutional philosophy operated as a barrier to military success, I have identified three types of constraints to analyse. First, the Ninth and Tenth amendments to the US Constitution, which were duplicated in the Confederate Constitutions, directed that there was a domain of state and individual rights that the central government could not interfere with. Second, the Bill of Rights contained in the US Constitution and carried over to the Confederate Constitutions as well as other provisions scattered throughout protected against warrantless searches and uncompensated seizure of property. Finally, there were various administrative constraints dealing with the structure of Congress.

In terms of economic policy, Chapter 2 discovered that the Confederate government was rarely, if at all, constrained by constitutional provisions that required it to implement free trade and avoid protectionist policies. Key actors within the central government disregarded the spirit of the permanent constitution of 1862 and enforced a self-imposed blockade at odds with its text. By seizing ships through impressment, the Confederates inadvertently created uncertainty, undermined private ship production and made it harder for blockade runners to bring in valuable goods. The Davis administration also did not do enough to discourage the cotton embargo advocated primarily by the state governments. My conclusion contradicts that of Douglas Ball. Ball in *Financial Failure and Confederate Defeat* wrote that it was adherence to a state rights philosophy by the CSA Treasury Secretary that caused the shortfall in tariff revenue. I side instead with Jeff Hummel, who argues in favour of open trade in

[294] Sidney Fisher, *The Trial of the Constitution* (JB Lippincott & Co, 1862) 77.

Emancipating Slaves, Enslaving Free Men: '[b]ecause of the South's weaker industrial base, an unrestricted exchange of cotton across the lines clearly would have helped its war effort'.[295]

With respect to debt and monetary finance, constitutional text was similar across both jurisdictions and interpretation in practice was also similar. The approach taken by the Union and Confederacy toward debt was reliant on discretionary judgements, since neither polity's constitution stipulated rules on how much debt should be acquired nor on how it should be done. The US Constitution and Confederate Constitutions did offer limited textual guidance on monetary finance however, through a preference for commodity-backed currency. Yet the evidence shows unbacked fiat currency was utilised to satisfy revenue needs, indicating constraints imposed upon monetary finance were largely ignored.

When it came to expenditure, the Republican Party wanted internal improvements like subsidies for railroads, shipping and canal-building. The Confederacy also spent on these items, and in the process circumvented its constitutional constraints on government spending.

Confiscation of property was restrained by a requirement for 'just compensation' in the North and South, but this directive does not appear to have been relevant in practice. Contrary to what one might expect given early protests by the secessionist cadre about the abuses of power by America's central government, ironically it was the South that went further down the path of outright seizures of property from loyal residents in disregard of protections enshrined by constitutional text. The North was comparatively restrained and relied more on voluntary transfers of property from loyal citizens.

One area of economic policy where constraints operated successfully upon the CSA was that of taxation. Although both documents allowed the respective central governments to directly tax individuals residing in the states, judging by its unreliable revenue from taxation the Confederacy was obstructed by the states and by its apportionment clause which required a census be taken before imposing direct taxes on property and slaves. A census was impracticable due to wartime conditions, and it was not until 1864 the CSA disregarded this constitutional constraint. Although there is some contrary research by Rose Razaghian that

[295] Jeff Hummel, *Emancipating Slaves, Enslaving Free Men* (Open Court, 2014) 247.

suggests the CSA was increasing tax revenue year by year, even Razaghian concedes that there was initially a delay in setting up tax revenue systems.[296] Not only was the Confederacy hampered in direct taxation, even when it came to indirect taxes (where it enjoyed fewer restrictive provisions), the CSA fell short of economist Murray Rothbard's sustainable system in which wars ought to be financed through consumption taxes.[297]

Chapter 3 found that in the realm of military coordination, the constitutions were likewise only partially relevant. Across a host of areas, such as construction of railroads, development of a navy and state provision of troops to the federal government, constitutional factors did not reach the level of causal influence. Rather, the pattern of discretionary judgement in allocation of resources continued to play a more important role. The clearest example of this was when not enough was done by the South to either open captured ports so that trade could resume or to defend ports in the first place. Although Galveston, Texas was liberated in 1863, there was little effort to liberate other harbours in a similar manner despite constitutional authority existing for diversion of navy resources toward such an objective.

Under both constitutions, the federal government was not delegated power to prohibit slavery. While slaves were nonetheless partially liberated by Abraham Lincoln for service in the Union military, the Confederates' stronger textual constitutional protection for slavery hampered Jefferson Davis' ability to raise troops from the population of African-Americans residing in the South and contributed to the CSA's numerical inferiority on the battlefield. Certainly in the early stages of the war when supplies of food, clothing and weapons for soldiers was relatively plentiful, the failure to enlist thousands of African-Americans placed the Confederates at a tactical disadvantage. Later in the war, however, enlisting African-Americans would have been ineffective since the Confederates would have lacked the ability to feed or clothe them (an indication of the lack of resources available to properly supply soldiers comes from the fact that even white Confederate soldiers, who were ostensibly paid 11 dollars per month, often went long stretches without pay).

[296] Rose Razaghian, 'Financing the Civil War: The Confederacy's Financial Strategy' (Working Paper, Yale University, December 2004) 18.

[297] Murray Rothbard, *The Economics of War* (1950) Mises Institute <https://mises.org/library/economics-war-0>

In Chapter 4, discussion of constitutional influence was extended to the subject of political liberties and individual freedom. It was found that on the issues of conscription, the writ of habeas corpus and freedom of press there was a slight, but not significant, constraint on the Confederate government's capacity to intervene forcefully. There was a bigger constraint on the Davis administration's ability to interfere in the fair conduct of elections however, and nothing comparable to Lincoln's takeover of Maryland's legislature occurred in the South.[298] James Randall aptly comments that '[i]t would not be easy to state what Lincoln conceived to be the limit of his powers'.[299]

What lawyer Sidney Fisher wrote in 1862 about the US Constitution sums up what occurred in both jurisdictions: 'the war has shed new light on the principles and meaning of our Constitution, and revealed in it imperfections, perhaps also powers, scarcely perceived by its makers, and hidden from the superficial and unsuspecting glances of the people, during our long period of prosperity and peace'.[300] Through such newly discovered power, there was increased centralisation compared to the pre-war period. Thus, Wilfred Yearns observes: '[O]f the twenty-eight Confederate governors, fifteen cooperated with the war policies of the central government to a commendable degree. In fact, several of them were so much more nationalistic than their legislatures or their citizenry that they suffered politically for it'.[301]

The problems the Confederacy experienced were likely because of the non-constitutional factor of poor leadership in civilian and military affairs. In other words, the CSA's constitutions were suited to the task of waging war and gave sufficient power to the central government, but there was a failure of discretionary leadership to exercise available power rationally. For example, the Provisional Constitution had a unicameral legislature which made it easier to pass legislation and this flexibility could have helped the CSA in its first year. But as Chapter 3 showed with respect to the navy, it was not taken advantage of.

---

[298] This assertion must be qualified by the CSA's extensive use of secret sessions of Congress and internal restrictions on freedom of movement through its passport system. David Currie, 'Through the looking-glass: The Confederate Constitution in Congress, 1861-1865' (2004) 90 *Virginia Law Review* 1272.

[299] James Randall, *Constitutional Problems under Lincoln* (Smith, 1963) 513.

[300] Sidney Fisher, *The Trial of the Constitution* (1862) vi.

[301] Wilfred Yearns, *The Confederate Governors* (University of Georgia Press, 1985) *9-10.*

Few great legal controversies developed during the war, since the state courts of appeal in the areas of conscription and impressment sided in favour of the central government for the most part. As Charles George comments, '[a]fter similar decisions had been made by the courts of a number of states, the case would be so thoroughly analyzed that the courts of the other [Confederate] states would follow the precedent established and make the same decisions'.[302] While counterexamples of obstruction by Confederate states do exist, these must be weighed against the North's own anti-war movement which damaged the Union effort.[303]

Perhaps with different personalities holding the reins of existing broad constitutional power, the South could have won? Some earlier literature tends to support such a historical counter-factual. Joseph Stromberg in 1979 suggested that:

> [T]he CSA died of overcentralization, West Point strategy… and very 'unSouthern' policies of 'war socialism' which wasted the morale of the people. The Confederate Revolution suffered an early 'Thermidor' at the Montgomery convention which dispossessed the secessionist cadre… and put legalistic conservatives like Davis in charge… The ever more desperate reliance by Richmond on measures such as conscription, large armies, bureaucracy, taxes in kind, tithes, confiscations, socialization of the cotton crop, paper money inflation… profoundly alienated the people and failed to achieve their purposes.[304]

As suggested by Stromberg, one of the reasons for the lack of Southern constitutional fidelity was the difference between the composition of the leaders at the 1861 constitutional convention and the ones who ultimately took control of the levers of power in the central government. Radicals like Vice-President Alexander Stephens and Robert Rhett were dumped in favour of lukewarm secessionists and conservatives like Davis. Although the radicals did not seem to have a coherent theory of how to win a war either, they likely would have interpreted certain provisions more strictly to the benefit of morale.

---

[302] Charles George, 'The Supreme Court of the Confederate States of America' (1920) 6 *The Virginia Law Register* 599.

[303] Jennifer Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (Oxford University Press, 2006).

[304] Joseph Stromberg, 'The War for Southern Independence: A Radical Libertarian Perspective' (1979) *Journal of Libertarian Studies* 44.

Paul Escott in 1978 concluded it was natural for state leaders to resist a central government that was reducing quality of life through policies that pushed up prices, and were motivated not by parochialism but by the failure of the Davis administration to minimise inflation.[305] Like Stromberg, he contends that Davis failed to nurture Confederate will.

Of course, it would still have been an uphill battle to overcome the resource disadvantage the South faced in comparison to its wealthy and industrialised enemy. Leaving this aside, my principal finding is that constitutions were often ignored during the Civil War. As Mark Neely confirms, 'the idea of fixed constitutionalism was as much a part of the Lost Cause myth as were white unity, the loyal slave and the loss of the war to superior numbers and resources. As always, nation and constitution were intertwined though not identical'.[306]

More generally, the loose hold of wartime constitutions raises the question of whether institutions are by necessity a secondary factor, or whether the right leadership and supportive public opinion could make constitutions more influential in democracies under siege. Robert Higgs' *Crisis and Leviathan*, and other work like it, hold important lessons in this regard.[307] Higgs explains how ideological predispositions among a population can affect policy outcomes, and cites the World Wars to argue the Supreme Court of the United States deferred to prevailing sentiments in Congress and the executive branch that the war must be won even if it meant sacrificing constitutional provisions. While the course of history does suggest a trend toward flexibility rather than adherence to fixed rules, the thesis that ideology predisposes legal interpretation supports the idea that a different group of leaders could have created the conditions for greater constitutional fidelity in the Confederacy.

---

[305] Paul Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (Louisiana State University Press, 1978) 147-48.

[306] Mark Neely, *Lincoln and the triumph of the nation: constitutional conflict in the American Civil War* (University of North Carolina Press, 2011) 309.

[307] Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oxford University Press, 1987); John Hasnas, 'The Myth of the Rule of Law' (1995) *Wisconsin Law Review* 199-233.

My research clarifies that constitutions were, nonetheless, at times an important constraint between 1861 and 1865. The greatest fidelity was in the areas of taxation, slavery, and aspects of civil liberties; these were subjects on which many southerners felt strongly and underlying belief was reflected in interpretive practices. Although it is perplexing that Confederates chose leaders who did not fully embrace antebellum localism, this can perhaps be explained by an expedient desire to project credibility to potential allies in Europe by elevating conservatives who had political experience in the pre-war US government. In sum, constitutions, while not pivotal, did play a part in shaping the result of the Civil War.

BIBLIOGRAPHY

1. Articles/Books/Reports

Alexander, Bevin *How the South Could Have Won the Civil War: The Fatal Errors that Led to Confederate Defeat* (Crown, 2007)

Amlund, Curtis *Federalism in the Southern Confederacy* (Public Affairs Press, 1966).

Anderson, William *The Nation and the states, rivals or partners?* (1955).

Arthur, John *Western North Carolina: A History (from 1730 to 1913)* (1914)

Ball, Douglas *Financial Failure and Confederate Defeat* (University of Illinois Press, 1991).

Ballard, Michael *Vicksburg, The Campaign that Opened the Mississippi* (University of North Carolina Press, 2004).

Barney, William (ed), *The Oxford Encyclopedia of the Civil War* (Oxford University Press, 2011) 99.

Benedict, Michael *Abraham Lincoln and Federalism* (1988) Journal of the Abraham Lincoln Association <http://hdl.handle.net/2027/spo.2629860.0010.103>

Bennett, Lerone *Forced into Glory: Abraham Lincoln's White Dream* (Johnson Publishing Company, 2000).

Bensel, Richard 'Southern Leviathan: The Development of Central State Authority in the Confederate States of America' (1987) 2 *Studies in American Political Development* 135.

Bensel, Richard *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge University Press, 1990).

Beringer, Richard Hattaway, Herman Jones, Archer and Still, William *Why the South Lost the Civil War* (1986).

Boney, F. *Joseph E. Brown (1821-1894)* (2016) New Georgia Encyclopedia <http://www.georgiaencyclopedia.org/articles/government-politics/joseph-e-brown-1821-1894>

Brophy, Alfred "'Necessity knows no law': vested rights and the styles of reasoning in the Confederate conscription cases" (2000) 69 *Mississippi Law Journal* 1165.

Brown, William 'Blacks and the Confederate Military Effort' in Paul Finkelman (ed), *Encyclopedia of African American History 1619-1895* (Oxford University Press, 2006).

Burdekin, Richard and Langdana, Farrokh 'War Finance in the Southern Confederacy, 1861-1865' (1993) 30 *Explorations in Economic History* 352-76.

Burdekin, Richard and Weidenmier, Marc 'Interest Bearing Currency and Legal Restrictions Theory: Lessons from the Southern Confederacy' (2002) 22 *Cato Journal* 203.

Charles Ramsdel, *Behind the Lines in the Southern Confederacy* (1997).

Chong, Dennis 'Collective action' in William Darity (ed), *International Encyclopedia of the Social Sciences* (MacMillan Reference USA, 2008).

Clark, John *Railroads in the Civil War: The Impact of Management on Victory and Defeat* (2001).

Congleton, Roger and Swedenborg, B. (eds), *Democratic Constitutional Design and Public Policy* (2006) 2.

Cooper, William *Jefferson Davis, American* (Vintage, 2001).

Coulter, E. *The Confederate States of America 1861-1865* (Louisiana State University Press, first published 1950; 1994 ed).

Current, Richard 'God and the Strongest Battalions' in David Donald (ed), *Why the North Won the Civil War* (Louisiana State University Press, 1960).

Currie, David 'Through the looking-glass: The Confederate Constitution in Congress, 1861-1865' (2004) 90 *Virginia Law Review* 1272.

Cutrer, Thomas *Military executions during the Civil War* (2015) Encyclopedia Virginia <http://www.encyclopediavirginia.org/Military_Executions_During_the_Civil_War>

Dahdal, Andrew 'The Constitutionality of Fiat Paper Money in Australia: Fidelity of Convenience?' (2013) 2 *Journal of Peace, Prosperity and Freedom* 51.

Dana, Charles *Recollections of the Civil War* (University of Nebraska Press, 1996).

Davis, Jefferson *The Rise and the Fall of the Confederate Government* (Thomas Yoseloff, 1881) vol 1.

DeCredico, Mary *Confederate impressment during the Civil War* (27 October 2015) Encyclopedia Virginia <http://www.EncyclopediaVirginia.org/Confederate_Impressment_During_the_Civil_War>

DeRosa, Marshall *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* (University of Missouri, 1991).

DiLorenzo, Thomas *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda and an Unnecessary War* (Crown Forum, 2003).

Donald, David 'An Excess of Democracy: The American Civil War and Social Process' in David Donald (ed), *Lincoln Reconsidered: Essays on the Civil War Era* (1956).

Donald, David 'Died of Democracy' in David Donald (ed), *Why the North Won the Civil War* (Louisiana State University Press, 1960).

Duppstadt, Andrew *Confederate States Navy (in North Carolina*) North Carolina History Project <http://northcarolinahistory.org/encyclopedia/confederate-states-navy-in-north-carolina>

Durkin, Joseph *Stephen R. Mallory: Confederate Navy Chief* (University of North Carolina Press, 1954).

Eaton, Clemont *A History of the Southern Confederacy* (1954)

Encyclopedia Britannica, *Bounty System* (1998) <https://www.britannica.com/event/Bounty-System>.

Escott, Paul *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (1978).

Fehrenbacher, Don *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective* (Oxford University Press, 1981).

Ferrino, Paul *The Idea of union: From the revolutionary covenants of the 1776 Pennsylvania constitution and the 1781 articles of confederation and perpetual union to the Nationalist Compacts of the 1780 Massachusetts constitution and the 1787 constitution of the United States*' (Masters thesis, Southern Connecticut State University, 2011).

Fisher, Louis 'Basic principles of the War Power' (2012) 5 *Journal of National Security Law and Policy* 319-337.

Fisher, Sidney *The Trial of the Constitution* (JB Lippincott & Co, 1862).

Friedman, Milton 'Why not a volunteer army?' in *New Individualist Review* (1981).

Gabel, Christopher *Railroad Generalship: Foundations of Civil War Strategy* (Command and General Staff College Press, 1997).

Gabel, Christopher *Rails to oblivion: the decline of Confederate railroads in the Civil War* (Command and General Staff College Press, 2002).

Gallagher, Gary *The Confederate War* (Harvard University Press, 1997).

George, Charles 'The Supreme Court of the Confederate States of America' (1920) 6 *The Virginia Law Register* 599.

Gienapp, William *Abraham Lincoln and the Border States* (1992) Journal of the Abraham Lincoln Association < http://hdl.handle.net/2027/spo.2629860.0013.104>

Godfrey, John *Monetary Expansion in the Confederacy* (Arno Press, 1978).

Goff, Richard *Confederate Supply* (Duke University Press, 1969).

Hamilton, Daniel *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (University of Chicago Press, 2007).

Hasnas, John 'The Myth of the Rule of Law' (1995) *Wisconsin Law Review* 199-233.

Hattaway, Herman and Beringer, Richard *Jefferson Davis, Confederate President* (University Press Kansas, 2002).

Henry, Mike *Black history: more than just a month* (Rowman & Littlefield, 2013)

Hesseltine, William *Lincoln and the War Governors* (Alfred A. Knopf, 1955).

Higgs, Robert 'Regime Uncertainty: Why the Great Depression Lasted so Long and Why Prosperity Resumed After the War' (1997) 1 *The Independent Review* 563-64.

Higgs, Robert *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oxford University Press, 1987)

Hill, Louise *State Socialism in the Confederate States of America* (Historical Publishing, 1936).

Holcombe, Randall 'The Confederate Constitution' (1992) 10 *The Free Market.*

Huebner, Timothy *The Taney Court: Justices, Rulings, and Legacy* (ABC-CLIO, 2003).

Hughes, Charles *Addresses of Charles Evans Hughes: 1906-1916* (GP Putnam's Sons, 1916).
Hummel, Jeffrey *Emancipating Slaves, Enslaving Free Men* (Open Court, 2014).

Inscoe, John and McKinney, Gordon *The Heart of Confederate Appalachia: Western North Carolina in the Civil War* (University of North Carolina Press, 2003).

Jensen, Erik "The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?" (2006) 398 *Faculty Publications* <http://scholarlycommons.law.case.edu/faculty_publications/398>

Kerby, Robert 'Why the Confederacy Lost' (1973) 35 *Review of Politics* 326-45.

Lange, S 'Censorship' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) vol 1.

Lebergott, Stanley 'Through the blockade: the profitability and extent of cotton smuggling, 1861-1865' (1981) 41 *The Journal of Economic History* 874.

Lee, Susanna *Free blacks during the Civil War* (27 October 2015) Encyclopedia Virginia <http://www.encyclopediavirginia.org/Free_Blacks_During_the_Civil_War>

Lerner, Eugene 'The Monetary and Fiscal Programs of the Confederate Government, 1861-65' (1954) 62 *Journal of Political Economy* 509.

Levine, Bruce *Confederate Emancipation: Southern Plans to Free and Arm Slaves during the Civil War* (2006).

Livingston, Donald 'A Moral Accounting of the Union and Confederacy' (2002) 16 *Journal of Libertarian Studies* 73.

Long, Clarence *Wages and Earnings in the United States, 1860-1890* (1960).

Long, EB and Long, Barbara *The Civil War Day by Day: An Almanac, 1861-1865* (Doubleday, 1971).

Luraghi, Raimond *A History of the Confederate Navy* (1996).

Martis, Kenneth *The Historical Atlas of the Congresses of the Confederate States of America: 1861-1865* (Simon & Schuster, 1994).

McCaffrey, Matthew 'The Economics of Peace and War in the Chinese Military Classics' (2015) 10 *The Economics of Peace & Security Journal*.

McClellan, James *Liberty, Order and Justice: An Introduction to the Constitutional Principles of American Government* (Liberty Fund, 2000)

McGuire, Robert and Cott, T. 'The Confederate Constitution, Tariffs and the Laffer Relationship' (2002) 40 *Economic Inquiry* 428.

McKim, Randolph *The numerical strength of the Confederate army* (Neale Publishing, 1912).

McKinney, Gordon *Zeb Vance: North Carolina's Civil War Governor and Gilded Age Political Leader* (2005).

McPherson, James 'American Victory, American Defeat' in *Why the Confederacy Lost* (Oxford University Press, 1992).

McPherson, James *Battle cry of freedom: The Civil War era* (Oxford University Press, 1988).

McPherson, James *For Cause and Comrades: Why Men Fought in the Civil War* (Oxford University Press, 1997).

Memminger, Christopher in Raphael Thian, *Reports of the Secretary of the Treasury of the Confederate States of America, 1861-1865* (Privately published, 1878).

Miller, Jeremy *Unconventional warfare in the American Civil War* (Master of Military Art and Science Thesis, US Army, 2004).

Mises, Ludwig *Human Action: A Treatise on Economics* (Ludwig von Mises Institute, 1998)

Mitchell, Stewart *Horatio Seymour of New York* (Harvard University Press, 1938).

Myers, Barton *Rebels Against the Confederacy: North Carolina's Unionists* (2014).

Neely, Mark 'The Perils of Running the Blockade: The Influence of International Law in an Era of Total War' (1986) 32 *Civil War History* 101–18.

Neely, Mark *Confederate Bastille: Jefferson Davis and Civil Liberties* (Marquette University Press, 1993).

Neely, Mark *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (University of North Carolina Press, 2011).

Neely, Mark *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (University Press of Virginia, 1999).

Nelson, Bernard 'Confederate Slave Impressment Legislation, 1861-1865' (1946) 31 *The Journal of Negro History* 393-4.

Nelson, Paul 'Cost of the Civil War' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013).

New York Times editorial, 14 November 1864.

Nielsen, Eric 'Monetary Policy in the Confederacy' (2005) *Region Focus* 41.

Norman, John "'Self-preservation is the supreme law': state rights vs. military necessity in Alabama Civil War conscription cases" (2009) 60 *Alabama Law Review* 727.

Owsley, Frank *State Rights in the Confederacy* (University of Chicago Press, 1925).

Parks, Joseph *Joseph E. Brown of Georgia* (1999).

Pendleton, Louis *Alexander H. Stephens* (1908).

Perry, Milton *Infernal Machines: The Story of Confederate Submarine and Mine Warfare* (Louisiana State University Press, 1965).

Pollack, Sheldon 'The First National Income Tax, 1861-1872' (2014) 67 *Tax Lawyer* 10-11.

Pollard, Edward *The Lost Cause: A New Southern History of the War of the Confederates* (E.B. Treat & Co Publishers, 1866).

Powell, Michael *Confederate federalism: a view from the governors* (PhD thesis, University of Maryland, 2004).

Powell, Robert *Kentucky Governors* (1976).

Rable, George *The Confederate Republic: A Revolution against Politics* (University of North Carolina Press, 1994).

Rafuse, Ethan *CSS Virginia* (7 September 2016) Encyclopedia Virginia <http://www.encyclopediavirginia.org/c_s_s_hi_rend_italic_virginia_hi>

Rafuse, Ethan *Robert E. Lee and the Fall of the Confederacy, 1863-1865* (Rowman & Littlefield, 2009).

Ramsdell, Charles 'Book Review – *State Rights in the Confederacy*' (1927) 14 *The Mississippi Valley Historical Review* 107-110.

Ramsdell, Charles 'The Confederate Government and the Railroads' (1917) 22 *American Historical Review* 803.

Randall, James 'Captured and Abandoned Property During the Civil War' (1913) 19 *American Historical Review* 69.

Randall, James *Constitutional Problems under Lincoln* (Peter Smith, 1963).

Randolph, Nowlin 'Judge William Pinckney Hill Aids the Confederate War Effort' (1964) 68 *The Southwestern Historical Quarterly* 17-18.

Razaghian, Rose 'Financing the Civil War: The Confederacy's Financial Strategy' (Working Paper, Yale University, December 2004).

Report of the Secretary of the Navy dated 26 April 1861 in *Official Records of the Union and Confederate Navies* (The National Historical Society, 1987) vol 2.

Reynolds, David (ed), *Lincoln's Selected Writings* (WW Norton & Company, 2016).

Richmond Enquirer, 5 February 1864.

Robbins, John 'Confederate Nationalism: Politics and Government in the Confederate South, 1861-1865' (PhD dissertation, Rice University, 1964) 108-9.

Robinson, William *Justice in Grey: A History of the Judicial System of the Confederate States of America* (Harvard University Press, 1941).

Rogers, Jeffrey *A Southern Writer and the Civil War: The Confederate Imagination of William Gilmore Simms* (2015).

Rothbard, Murray *A History of Money and Banking in the United States* (2002).

Rothbard, Murray *The Economics of War* (1950) Mises Institute <https://mises.org/library/economics-war-0>

Schwab, John *The Confederate States of America, 1861-1865: A Financial and Industrial History of the South During the Civil War* (C Scribner's Sons, 1901).

Segars, J (ed), *Black Confederates* (Pelican Publishing, 2004).

Seligman, Edwin *The Income Tax: A Study of the History, Theory and Practice of Income Taxation* (Augustus M. Kelley Publishers, 1970).

Shankman, Arnold 'Draft resistance in Civil War Pennsylvania' (1977) 101 *The Pennsylvania Magazine of History and Biography* 190-200

Shannon, Fred *The Organization and Administration of the Union Army, 1861–1865* (Arthur H. Clark, 1928) vol 1.

Skeen, Carl *Citizen Soldiers in the War of 1812* (1999).

Smith, Adam *The American Civil War* (Palgrave Macmillan, 2007).

Smith, Andrew 'Did hunger defeat the Confederacy?' (2011) 13 *North & South – The Official Magazine of the Civil War Society* 41.

Steiner, Lewis *Diary kept during the rebel occupation of Frederick and an account of the operations of the US Sanitary Commission during the campaign in Maryland, September 1862* (Anson DF Randolph, 1862).

Sterling, Robert 'Draft resistance in Illinois' (1971) 64 *Journal of the Illinois State Historical Society* 244-60

Still, William "The Career of the Confederate Ironclad 'Neuse'" (1966) 43 *The North Carolina Historical Review* 5.

Story, Joseph *Commentaries on the Constitution of the United States* (5th ed, 1891) vol 3.

Stromberg, Joseph 'The War for Southern Independence: A Radical Libertarian Perspective' (1979) *Journal of Libertarian Studies* 44.

Sumner, William *A History of American Currency* (Henry Holt, 1874).

Surdam, David 'The Confederate naval buildup: could more have been accomplished?' (2001) 54 *Naval War College Review* 111.

Symonds, Craig *The Civil War at Sea* (Oxford University Press, 2011).

Tatum, Georgia *Disloyalty in the Confederacy* (University of Nebraska Press, 2000)

The Civil War Tax History Project <http://www.taxhistory.org/www/website.nsf/web/THM1861?OpenDocument> at 28 December 2016.

Thornton, Mark 'The Union Blockade and Southern Strategy' (Speech delivered at the Auburn University Academy for Lifelong Learners, Auburn, 2 February 2005)

Thornton, Mark and Ekelund, Robert "The 'Confederate' Blockade of the South" (2001) 4 *Quarterly Journal of Austrian Economics*.

Thornton, Mark and Ekelund, Robert *Tariffs, Blockades and Inflation: The Economics of the Civil War* (Scholarly Resources, 2004).

Tise, Larry *Proslavery: a history of the defense of slavery in America, 1701-1840* (University of Georgia Press, 1987).

Todd, Richard *Confederate Finance* (University of Georgia Press, 2009).

Turner, Maxine 'Confederate Navy' in John Whiteclay Chambers (ed), *The Oxford Companion to American Military History* (2000).

Underwood, James 'An Editor is Censored' in *Deadly Censorship: Murder, Honor, and Freedom of the Press* (University of South Carolina Press, 2013)

Vandiver, Frank Introduction in Lynda Crist and Mary Dix (eds), The Papers of Jefferson Davis (Louisiana State University Press, 1992) vol 7.

Vieira, Edwin 'The Monetary Powers and Disabilities of the United States Constitution' (Research Paper for the Gold Commission, US Congress, 8 February 1982).

Weber, Jennifer *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (Oxford University Press, 2006).

Weidenmier, Marc *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>

Wheeler, Kenneth 'Local autonomy and Civil War draft resistance: Holmes County, Ohio' (1999) 45 *Civil War History* 147-150.

White, Jonathan *Emancipation, the Union Army and the Re-election of Abraham Lincoln* (2014).

Williams, Frank 'Abraham Lincoln and Civil Liberties in Wartime' (Speech delivered at the Heritage Foundation, Washington DC, 5 May 2004).

Wilson, Clyde 'Calhoun's Economic Platform' in Robert Paquette and Louis Ferleger (eds), *Slavery, Secession, and Southern History* (2000).

Wolfe, Brendan *Anaconda Plan* (2011) Encyclopedia Virginia <http://www.encyclopediavirginia.org/anaconda_plan> at 19 August 2016.

Wolmar, Christian 'The Iron Horse at War' in Ted Widmer (ed), *Disunion: Modern Historians Revisit and Reconsider the Civil War* (Black Dog & Leventhal, 2013).

Wolmar, Christian *Engines of War* (Atlantic Books, 2010).

Woodworth, Steven *Civil Liberties and Censorship* (2008) Gale Library of Daily Life <http://www.encyclopedia.com/history/applied-and-social-sciences-magazines/civil-liberties-and-censorship>.

Wyllie, Arthur *The Confederate States Navy* (2007).

Yates, Richard 'Zebulon B. Vance as War Governor of North Carolina, 1862-1865' (1937) 3 *Journal of Southern History* 70.

Yearns, Wilfred (ed), *The Confederate Governors* (University of Georgia Press, 1985).

Yearns, Wilfred *The Confederate Congress* (University of Georgia Press, 2010).

2. Case Law

Dred Scott v. Sandford 60 US 393 (1857).

Decisions of Hon. James D. Halyburton, Judge of the Confederate States District Court for the Eastern District of Virginia, in the cases of John B. Lane and John H. Leftwich (Ritchie & Dunnavant Printers, 1864).

Ex parte Merryman (1861).

Hepburn v. Griswold 75 US 603 (1870)

In re Bryan, 60 N.C. 1 (1863).

The Prize Cases (1863) 67 US 635

United States v Marigold 50 US 560 (1850).

3. Legislation

'An act to aid in the construction of a certain line of railroad in the States of Louisiana and Texas: 19 April 1862' in James Matthews (ed), *Public Laws of the Confederate States of America, passed at the First Session of the First Congress* (RM Smith, 1862).

1st Congress 3rd Session, Act of March 26 1863 in *Statutes at Large of the Confederate States of America* (R.M. Smith, 1862) 102-04.

Alabama Constitution of January 7, 1861.

An Act to Prohibit the Importation of Luxuries or of Articles Not Necessary or of Common Use (Confederate Imprints, 1861-1865; Research Publications, 1974).

Confederate States of America Constitution

Constitution of the Provisional Government of the Confederate States of America

Currency Reform Act of 1864.

United States Constitution

4. Other Sources

Alexander Stephens, 'The Great Speech of Hon. A.H. Stephens' (Speech delivered at the Georgia Legislature, Milledgeville, 16 March 1864).

Correspondence between Governor Brown and President Davis on the constitutionality of the Conscription Act (Atlanta Intelligencer Print, 1862).

Daniel Webster on the Draft: Text of a Speech Delivered in Congress, December 9, 1814 (American Union Against Militarism, 1917).

Jefferson Davis, 'Address to Congress of the Confederate States' (Speech, Richmond, 18 November 1861)

Journal of the Congress of the Confederate States (Government Printing Office, 1904) vol 1.

Memminger, Christopher *Speech of Mr. C. G. Memminger, on the question of rechartering the bank of the state of South Carolina: delivered in the House of Representatives, December 9, 1848* (1849).

Message of Joseph Brown to the Extra Session of the Legislature 10 March, 1861 (State Printer, 1864).

Resolution 19 in reference to forts, dock-yards, reservations and property ceded to the Confederate States in *The Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862* (University of North Carolina at Chapel Hill, 2001).

Robert Lee, General Order No. 9, 10 April 1865.

The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (US Government Printing Office, 1899) vol 5.

1864 Presidential Election Interactive Map 270 to Win <http://www.270towin.com/1864_Election/interactive_map> at 26 January 2017.