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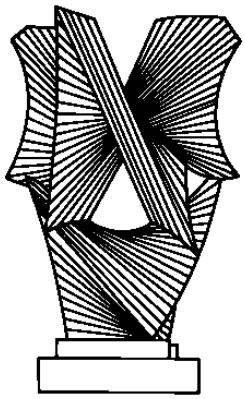

CONTINUITY IN SECESSION: THE CASE OF THE CONFEDERATE CONSTITUTION

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Speaking before the Young Men's Lyceum of Springfield, Illinois, in 1838, Abraham Lincoln exhorted Americans to embrace the nation's foundational legal texts, the Declaration of Independence and the Constitution, as their "political religion."[1] American government relied upon "the attachment of the People," and the project of the Union therefore required that the "best citizens" not undergo an "alienation of their affections from the Government."[2] Twenty-three years later, in his first inaugural address, President Lincoln would invoke the authority of "universal law and . . . the Constitution" to argue that "the Union of these States is perpetual."[3]

By the outbreak of the Civil War in 1861, the national obsession with identifying a single true meaning for the federal union constructed by the Constitution had spread to observers elite and ordinary; northern, southern, eastern, and western; wealthy and poor; male and female; black and white. Historian Arthur Bestor has argued that the Constitution was the "channel" through which the many political, economic, social, and moral controversies of the period flowed, and that the war was therefore a largely inevitable constitutional crisis.[4] This essay argues, however, that constitutional text and modes of thought were more than a channel that configured other, more foundational debates. The words of the Constitution, its ways of framing questions, and indeed its very structure dominated the American consciousness to such a degree that even secessionists could not escape it. On the contrary, they sought to embrace it.

The best evidence of this Constitution-dominated mindset comes, paradoxically, from the same individuals who felt they had no choice but to break apart the Union: the leaders of the Confederate States of America. In March 1861, the first seven states to secede from the Union adopted a constitution that looked remarkably similar to the U.S. Constitution, the founding document of the republic from which they had just departed. Four states (Virginia, Tennessee, North Carolina, and Arkansas) had not yet seceded but would soon join the Confederacy, over the protests of the Constitutional Union and Whig parties within each state. So strong was the force of what I have termed the "interbellum

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[1] Abraham Lincoln, "Address Before the Young Men's Lyceum of Springfield" (Jan. 27, 1838), in Richard N. Current, ed., *The Political Thought of Abraham Lincoln*, (New York: Macmillan), 16-17.

[2] Id. at 11, 15-16.

[3] Abraham Lincoln, First Inaugural Address (1861), in James D. Richardson, 7 A Compilation of Messages and Papers of the Presidents 3206 (1897).

[4] Arthur Bestor, "The American Civil War as a Constitutional Crisis," 69 *American Historical Review* 327-52 (1964).

Constitution,"[5] then, that it transcended the would-be national boundary created by the departure of some of its members. Moreover, the authority of the text and structures set forth in the U.S. Constitution was viewed by many Confederate leaders as controlling, even as they attempted to launch their new polity.

This essay examines two related topics: the structures of constitutional federalism in the Confederacy, and the interpretive theories that Confederate leaders applied to the question of the relationship between their own constitution and the one that had preceded it. In both structure and theory, I argue, the Confederacy displayed what to modern observers is a surprising aspiration toward continuity with the U.S. constitutional regime. The continuity is evident in the specific textual provisions of the document itself, which duplicated some of the most contested language of the pre-war period, including several clauses that suggested a relatively powerful central (or, as contemporaries would have termed it, "general") level of government with a robustly powered Congress. The Confederate Congress had the authority to regulate commerce among the Confederate states and to make all laws that were necessary and proper for carrying its constitution into execution.[6] The states were prohibited from entering into any "treaty, alliance, or confederation" or levying import or export duties.[7] The constitution and the laws and treaties of the Confederate States made in pursuance of the constitution were deemed "the supreme law of the land," with binding effect on judges in the state, "any thing in the Constitution or laws of any State to the contrary notwithstanding" – a duplication of the Supremacy Clause of Article V of the U.S. Constitution.[8]

Moreover, the substantive scope of Confederate legislative power was greater than that of the United States, insofar as Article I of the Confederate Constitution required the Confederate Congress to pass laws preventing "the importation of negroes of the African race, from any foreign country, other than the slaveholding States or Territories of the United States of America," and authorized it to "prohibit the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy."[9] The reach of confederal power over slavery was clearly larger than the analogous scope of the U.S. Constitution, and consequently less tolerant of states' rights. The drafters of Confederate Constitution vested their Congress with explicit and expansive powers over the institution of slavery, which the drafters of the U.S. Constitution had declined to give Congress in 1789.[10]

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[5] Alison L. LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," 67 Stanford L. Rev. __ (forthcoming 2015) (describing the period between 1815 and 1861 as a distinct period of constitutional thought).

[6] Confederate Constitution, Art. I, sec. 8, cl. 18, in The Statutes at Large of the Provisional Government of the Confederate States of America, ed. James M. Matthews (Richmond: R.M. Smith, 1864) (William S. Hein repr. 1988).

[7] Confederate Constitution, Art. I, sec. 10.

[8] Confederate Constitution, Article VI, sec. 3.

[9] Article I, sec. 9, cl. 1 and 2.

[10] See Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 (New York: Simon and Schuster, 2010); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (New York: Vintage Books, 1996). But see David Waldstreicher, Slavery's

In addition to this replication of some of the most nationalistic aspects of the U.S. Constitution, Confederate officials explicitly referred to themselves as the inheritors of the Revolution. This identification with "our revolutionary fathers," as Jefferson Davis termed the founders in his Second Inaugural Address, was clearly a rhetorical strategy to establish the legitimacy of the entire Confederate project.[11] Southern statesmen routinely argued that the Confederacy represented the true principles of the American Revolution, in contrast to the debased and commercial northern states.

But Confederate leaders' persistent invocation of the eighteenth-century founders contained a more profound claim about the constitutional regime those founders had established. For Confederate statesmen maintained not only that their government was the legitimate legal and political successor to the principles of 1776, but also that their new-modeled constitution of 1861 was a seamless continuation of the Constitution of 1789. And this claim of continuity extended all the way from the text itself to the modes used to give meaning to that text. It was a claim about the mechanics of constitutional interpretation, in its most challenging form: interpretation over time, and across what southerners insisted was a break in regimes.[12] The Confederate mode of constitutionalism was thus consciously intertemporal and inter-regime.[13] Moreover, with no supreme court ever constituted, Confederate constitutional interpretation was largely carried out by other branches of government – principally the Confederate Congress, the president, and the attorney general.[14]

The constitutional law of the United States was, for all practical purposes, the law of the Confederacy, except where the Confederate Constitution specifically provided otherwise.[15] The explicit recognition of slavery in the Confederate Constitution was the most important substantive difference between the original text and the inheritor. From a structural perspective, however, the relationship between center and periphery set forth in the two documents was remarkably similar.

Constitution: From Revolution to Ratification (New York: Hill and Wang, 2010). Unlike the U.S. Constitution, the Confederate Constitution used the terms "slave" and "slavery."

[11] Jefferson Davis, Second Inaugural Address, Feb. 22, 1862.

[12] The Lincoln Administration, however, maintained the official position throughout the war that secession was illegal and that the conflict was an insurrection by the states in rebellion not a civil war. See The Prize Cases, 67 U.S. 635 (1863).

[13] I have discussed intertemporal constitutional interpretation in the early-nineteenth-century United States in other work. See Alison L. LaCroix, "The Constitution of the Second Generation," 2013 U. Ill. L. Rev. 1775, 1777-78 (2013) (describing early-nineteenth-century lawyers and politicians as believing themselves to be "charged with a project of implementation: translating the words of the document into practice, even as the landscape of that practice shifted around them").

[14] See David P. Currie, "Through the Looking-Glass: The Confederate Constitution in Congress,' 1861-1865," 90 Va. L. Rev. 1257 (2004).

[15] On the common law approach to constitutional interpretation, see David A. Strauss, "Common Law Constitutional Interpretation," 63 U. Chi. L. Rev. 877 (1996).

My argument thus differs from many other accounts of the Confederate Constitution. An influential strand of scholarship dating from the early twentieth century contended that the Confederacy perished in part due to its thoroughgoing legal and political commitment to the principle of states' rights, which ultimately undercut its efforts to prosecute the war.[16] More recent scholars have argued that the Confederate government became increasingly centralized not because of an affirmative commitment to strong national power but rather in response to the exigencies of war.[17] David Currie termed the Confederate States of America "a looking-glass variant of the United States without the North and without Northern ideas."[18] A more recent study describes the Confederate Constitution as "premised upon principles dating back to the American Antifederalists of the constitutional convention."[19] The conventional view of the Confederate Constitution thus emphasizes its role as the legal basis for the rupture of the Union and depicts it as a poorly executed epigone that was doomed to fail not only by its commitment to slavery, but by its flawed structure. Such a view places the Confederate Constitution alongside the Articles of Confederation: bookends to the U.S. Constitution, one a very rough first draft and the other a failed experiment in variation.

I argue instead that the origins of Confederate constitutionalism lay in deep devotion to the U.S. Constitution and to the modes of interpretation that Confederate lawyers and politicians had inherited along with that original document. Their desire to adhere to a stable and continuous set of arguments about the constitution – especially with respect to the structure of government – was rooted in their belief that they, too, were bound by the text and institutions that the American founders had established. This point is not that Confederate constitutionalism was in any sense "correct" about the true meaning of the Constitution's text in 1861. Nor is my aim to highlight ironies or hypocrisies in the Confederacy's embrace of the U.S. Constitution. Rather, I am interested in Confederate constitutional interpretation as a case study in how mid-nineteenth-century Americans – both North and South – understood the project of constitutionalism itself, and how that understanding was changing in the period of the Civil War.

This essay begins with a brief discussion of the procedural background to the Confederate Constitution, which began as a provisional document drafted by a handful of states. I will then examine the structural continuities between the regime established by

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[16] See, e.g., Frank L. Owsley, State Rights in the Confederacy 1 (1925) ("If a monument is ever erected as a symbolical gravestone over the 'lost cause' it should have engraved upon it these words: 'Died of State Rights.'").

[17] See Curtis Arthur Amlund, Federalism in the Southern Confederacy (1966).

[18] See Currie, "Through the Looking-Glass," at 1258.

[19] Marshall L. DeRosa, The Confederate Constitution of 1861: An Inquiry Into American Constitutionalism 5 (Columbia: University of Missouri Press, 1991) ("The primary concern of the Confederate framers was the centralization of political power at the national level to the detriment of the states; it was this centralization inherent in the political principles of the Federalists which they rejected."); see also Charles Robert Lee, Jr., The Confederate Constitutions (Chapel Hill: University of North Carolina Press, 1963) (emphasizing the significance of the differences between the U.S. and Confederate constitutions).

the U.S. Constitution and that set up by the Confederate Constitution, with special focus on relations between the central and peripheral levels of government within each system. Finally, I will discuss the similar modes of constitutional interpretation that obtained between the two systems.

I. The Background of the Confederate Constitution.

Like the U.S. Constitution, the Confederate Constitution originated in a convention. Unlike the U.S. Constitution, however, the final version of the Confederate Constitution was a product of the legislature. The Constitution for the Provisional Government of the Confederate States of America was drafted by delegates from the six states that had seceded since Lincoln's election in November 1860. Those delegates, in turn, had been selected by the secession conventions in their respective states. The delegates met in Montgomery, Alabama – which they quickly denominated the capital of the new polity – for four days in early February 1861.[20] On February 8, they unanimously approved the provisional constitution, and the Provisional Convention became the Provisional Congress.[21] At the same time, the Provisional Congress selected Jefferson Davis and Alexander H. Stephens to become, respectively, provisional president and vice-president.

The drafting of the final version of the constitution proceeded quickly. Seven weeks after the Provisional Convention had approved the provisional constitution and resolved itself into the Provisional Congress (during which it divided its time between passing legislation and debating the proposed constitution[22]), the final draft of the constitution was approved. The Constitution of the Confederate States of America in its final version was approved by the Provisional Congress on March 11, 1861, and ratified by Missisippi – the fifth and final required state – eighteen days later, on March 29. One year following Davis's inauguration, pursuant to the governing language of the provisional constitution, the permanent Constitution took effect, and the First Confederate Congress convened.

In their ordinances of secession, the state conventions had emphasized their connection to the Revolution and the founding. The South Carolina ordinance of secession, for example, stated that "We, the People of the State of South Carolina, in Convention assembled do declare and ordain" that "the Union heretofore existing between this State and the other States of North America is dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate

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[20] The six states were South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana. Constitution for the Provisional Government of the Confederate States of America, preamble, in Statutes at Large of the Provisional Government of the Confederate States of America, 1.

[21] See Currie, "Through the Looking-Glass," at 1259.

[22] Currie, "Through the Looking-Glass," 1259. The debates of both the provisional and the permanent congresses were not officially reported, although journals of motions, votes, some bills, and some committee reports were published by both. See id. at 1263.

and independent State."[23] Even more striking was the posture of South Carolinians: by using an ordinance to secede, they employed procedures in line with their decades-old substantive claim that the nature of the Union was a compact – a voluntary association in which the states retained their sovereignty.[24] The secession ordinance declared that

> the ordinance adopted by us in Convention, on the twenty-third day of May in the year of our Lord One Thousand Seven hundred and eighty eight, whereby the Constitution of the United State of America was ratified, and also all Acts and parts of Acts of the General Assembly of this State, ratifying amendment of the said Constitution, are here by repealed; and that the union now subsisting between South Carolina and other States, under the name of "The United States of America," is hereby dissolved.[25]

In other words, the drafters of the secession ordinance claimed that it represented lawmaking at the same level as South Carolina's original ratification of the Constitution in 1788. A juridical and political entity called South Carolina passed an ordinance in 1788 to join the Constitution, and now, in 1860, that entity had decided to repeal that ordinance, by means of another ordinance. The actual document of secession thus made two claims: it downplayed the significance of secession itself by using the fairly mundane tool of an ordinance, but it also elevated the act of secession to the level of the founding. In terms of the political and legal rhetoric of secession, the mechanism of secession was thus an example of what I have elsewhere termed the "long founding moment": a particular early-nineteenth-century worldview according to which contemporaries believed themselves to be in conversation with the founding generation.[26] Moreover, they believed that they still had the authority to generate norms governing the meaning of the founding.[27]

As this chronology demonstrates, the process by which the Confederate Constitution was drafted and ratified differed significantly from the analogous processes during the founding period. With no change in personnel, the Confederacy's founding convention became its ordinary legislature. Higher lawmaking by the "people out of doors" was quickly cabined into the day-to-day course of running the government.[28] Both the provisional and permanent Confederate constitutions were drafted by the legislature, not by a special convention called into existence for that sole purpose. This procedural difference is striking, especially when one considers the important role the

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[23] See An Ordinance to Dissolve the Union Between the State of South Carolina and Other States, Dec. 20, 1860.

[24] On compact theory, see Forrest McDonald, States' Rights and the Union: Imperium in Imperio, 1776-1876, at 7-11 (Lawrence: University Press of Kansas, 2000).

[25] Id.

[26] See LaCroix, "The Interbellum Constitution and the Long Founding Moment," at __.

[27] On the concept of norm generation in a different context, see Markus D. Dubber, The Sense of Justice: Empathy in Law and Punishment 111 (2006).

[28] On the ideology of the convention in Revolutionary and founding-era political theory, see Gordon S. Wood, The Creation of the American Republic (1969); see also Bruce Ackerman, We the People, Volume 1: Foundations (1993).

convention played in the early American political theory and practice.[29] But the lack of a constitutional convention also suggests the degree to which southerners continued to identify with the U.S. Constitution and to regard it as the best model for the Confederacy's new government.[30]

Yet the text of the permanent constitution included some notable changes from that of the provisional constitution. Some of the edits served to harmonize the text more closely with that of the U.S. Constitution. For example, consider the preamble: the provisional version had begun "We, the deputies of the sovereign and independent States,"[31] while the permanent preamble spoke of "We, the people of the Confederate States, each State acting in its sovereign and independent character."[32] By removing the "deputies of the states" language, the revised version echoed the preamble of the U.S. Constitution ("We the People of the United States"), with its broad invocation of popular sovereignty,[33] rather than leading with a claim about state sovereignty.[34] But state sovereignty was nevertheless vital to the revised preamble, and thus to the Confederate constitutional project. Indeed, the final version of the preamble contained something of a non sequitur: just what type of entity was "the people of the Confederate States" as a whole, if the most important source of sovereignty was in fact the states, each "acting in its sovereign and independent character"? By leaving the relationship between "we the people" and the states in their sovereign character ambiguous, the Confederate Constitution attempted to meld the longstanding Anglo-American ideology of popular sovereignty[35] with compact theory's view on the states as sovereigns that had joined in a league only for limited purposes.[36] The nationalistic tones of the former sat uneasily in the preamble with the fissiparous tendencies of the latter. But the rhetorical appeal, and the ideological resonance, of "We the people" formed another node of connection between the federal and the Confederate constitutions.

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[29] See, e.g., the many early colonial founding documents the legitimacy of which stemmed in part from the fact that they had been drafted by conventions or similarly constituted bodies: Mayflower Compact (1620); Fundamental Orders of Connecticut (1639). See also earlier precedents in English republicanism – e.g., Putney Debates.

[30] See G. Edward White, "Recovering the Legal History of the Confederacy," 68 Wash. & Lee L. Rev. 467, 497 (2011) ("The use of the Constitution as a template for the formal organization of the Confederacy is revealing in itself, demonstrating how deeply residents of the American South had internalized most of the substantive and structural principles set forth in the 1789 Constitution and its first twelve Amendments.").

[31] Provisional Constitution of the Confederate States of America, preamble.

[32] Confederate Constitution, preamble.

[33] See Ackerman, We the People, Volume 1; see also Sanford Levinson, Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program, 123 Yale L.J. 2574 (2014).

[34] On ideas of popular sovereignty in the founding period, see Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (New York: W.W. Norton& Co., 1988).

[35] See Morgan, Inventing the People; Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Wood, Creation of the American Republic.

[36] See Alison L. LaCroix, The Ideological Origins of American Federalism (2010) (discussing the role of compacts and agreements, or *foedera*, in seventeenth- and eighteenth-century federal thought).

II. Confederal and Federal Structure.

The Confederate Constitution was manifestly a proslavery document. Slavery was explicitly mentioned in the text, and support of the institution was woven into many provisions.[37] This embrace of slavery marked a dramatic difference from the U.S. Constitution, which did not use the terms "slave" or "slavery,"[38] although it did provide federal support for slavery in the form of the fugitive slave clause.[39]

At the structural level, however, the Confederate Constitution copied much of the language of the U.S. Constitution. The relationship between state and confederal power in the Confederacy bore a striking resemblance to the analogous relationship between state and federal power in the Union. Especially in the congressional domain, the documents set forth similar visions of the respective powers of the center and the periphery.

Article I of the Confederate Constitution largely tracked Article I of the U.S. Constitution. To be sure, the vote of two-thirds of the Confederate Congress was required to approve appropriations,[40] rather than the simple majority required by the U.S. Constitution, and the president possessed a line-item veto over appropriations bills.[41] But the Confederate Congress was still vested with the power to regulate commerce "among the several States,"[42] as well as the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, or in any department or officer thereof."[43] Indeed, the final draft of the constitution returned to the language of the Necessary and Proper Clause of the U.S. Constitution, rejecting the provisional constitution's narrower version of that language, which limited the power to "laws that shall be necessary and proper for carrying into execution the foregoing powers and all other powers *expressly delegated* by this Constitution to this Provisional Government."[44]

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[37] One of the most foundational statements of the Confederate commitment to slavery was this: "No bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed." Confederate Constitution, Art. I, sec. 9, cl. 4.

[38] See, e.g., U.S. Const., Art. I, sec. 9. ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

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

[40] Confederate Constitution, Art. I, sec. 9, cl. 9.

[41] Confederate Constitution, Art. I, sec. 7, cl. 2.

[42] Art. I, sec. 8

[43] Confederate Constitution, Art. I, sec. 8, cl. 18.

[44] Provisional Constitution, Art. I, sec. 6, cl. 17; see also Martin v. Hunter's Lessee (1816) (relying in part on the founders' decision not to include in the Tenth Amendment the phrase

Moreover, Article I of the Confederate Constitution retained most of its predecessor's prohibitions on the states, including prohibiting the states from making treaties or alliances, coining money, or levying import or export duties.[45] Finally, the language of the Tenth Amendment to the U.S. Constitution was incorporated into the body of the Confederate Constitution, identical but for the addition at the end of the word "thereof": "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."[46]

For the most part, the Confederate Constitution appeared to rely heavily on a vigorous enumeration principle as a constraint on Congress's powers. The major exception, besides the prohibition on legislation impairing the property rights of slaveholders, was the commerce power. The Confederate Congress's power to regulate commerce among the states explicitly excluded the power to fund a program of internal improvements:

> [N]either 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.[47]

Notably, however, the ban on a confederal program of internal improvements was not included in the provisional constitution.

The rejection of congressional power over transportation and navigation was consistent with the southern self-image. In his first inaugural address as president of the provisional government, Davis contrasted the Confederacy – "an agricultural people whose chief interest is export of commodities" and the "freest trade" – with "any manufacturing or navigating community, such as the Northeastern States of the American Union."[48] In addition, the view that Congress lacked constitutional authority to appropriate funds for internal improvements projects had been endorsed by Presidents

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"expressly delegated," which had been included in the analogous provision in the Articles of Confederation).

[45] Confederate Constitution, Art. I, sec. 10.

[46] Confederate Constitution, Art. I, VI, sec. 6; cf. U.S. Const., am. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[47] Confederate Constitution, Art. I, sec. 8, cl. 3. On the importance of the debates over internal improvements to early-nineteenth-century constitutionalism, see LaCroix, "The Interbellum Constitution," __.

[48] Jefferson Davis, Inaugural Address of the President of the Provisional Government, Feb. 18, 1861, in A Compilation of the Messages and Papers of the Confederacy, ed. James D. Richardson (Nashville: United States Publishing Co., 1905).

Madison and Monroe in previous decades.[49] Similarly, the Confederate Constitution confined another concurrent power, the taxing power, to only those levies that were necessary to raise revenue – and, presumably, not those intended as a form of regulation.[50] Although both the commerce and the taxing powers were cabined to reflect one side of the debate over the Constitution that had raged since its ratification, the description of the powers replicated the text of the predecessor. The powers remained concurrent, shared between the states and the confederal government, but the document specified substantive limits on their exercise by Congress. At the levels of both the structure of the text and the structure that the text created, there was continuity between the Constitution of 1789 and that of 1861.

III. Modes of Confederate Constitutional Interpretation.

Despite the Confederacy's origins in secession and rupture, the guiding principle of constitutional interpretation was one of continuity with the preceding constitutional regime. In public speeches, official records, and private correspondence, Confederate statesmen proclaimed their fidelity to what they argued was the original Constitution of 1789, and to a mode of interpretation that reached back to their conception of the founding text. They were acutely aware that the legitimacy of their venture relied on a claim that it was preserving foundational constitutional values. As was the case with other Americans of the early- to mid-nineteenth century, however, southerners' persistent invocations of their Revolutionary and founding-era heritage signaled anxiety about their own place in American constitutional time.[51] And it was *American* constitutional time that most concerned Confederate commentators, even as they proclaimed their right to secede from the United States of America.

At the level of interpretation – what Philip Bobbitt has termed "modalities of constitutional argument"[52] – Confederate constitutionalism emphasized text, history, and precedent. The textual commitment was complicated by the fact that there were two key texts: the document of the predecessor polity, and the framing document of the Confederacy. Indeed, in a further irony, Confederate officials insisted both that they had legally broken away from the United States, and that their constitution was continuous with that of the supposedly broken-away-from regime. They argued that the secession was perfect and complete, but that the structural fundaments of the U.S. Constitution – compact theory, states' rights, and the enumeration principle – had nevertheless been

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[49] See Madison, Monroe vetoes and commentary, in LaCroix, "Interbellum Constitution," __.

[50] Confederate Constitution, Art. I, sec. 8, cl. 1 (granting Congress the power "[t]o lay and collect taxes, duties, imposts, and excises for revenue, necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States.).

[51] See LaCroix, "The Constitution of the Second Generation," at 1779 (describing early- to mid-nineteenth-century Americans' "intertemporal project of fixing ground rules that honored the eighteenth-century republic of Generation 1, even though the veil of ignorance had already been lifted").

[52] See Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982) (setting forth six modalities of constitutional argument).

transmitted across that fissure to the new Confederate state. Confederate textualism required fidelity to two texts – the Confederate and U.S. constitutions. It therefore also necessitated an overarching interpretive theory about how the two texts were to be harmonized, and when they were to be read as conflicting.

The techniques of Confederate constitutional interpretation emerged from a variety of sources. But the supreme court was not among them, even though the Confederate Constitution appeared to require the court's establishment.[53] The Confederate Congress debated the composition and organization of the supreme court throughout its existence, but the court was never established, in part because of concerns about whether the court would have the power to review the decisions of the state courts.[54] Confederate district courts as well as state courts engaged in constitutional interpretation.[55] So also did political and legal actors within the Confederate government, notably the president and the attorneys general.[56]

The speeches of Confederate president Jefferson Davis repeatedly sounded the theme of constitutional continuity. In his two inaugural addresses, Davis suggested that the Confederacy represented the endpoint of the long founding moment, the redemption of the founders' Constitution after decades of decline and misuse by a wayward federal government. Indeed, Davis exhibited little of the anxiety about the possible squandering of the founders' patrimony that had so troubled statesmen of the early nineteenth century such as Lincoln, Joseph Story, and even the elderly James Madison.[57] Rather, Davis presented himself and the Confederacy as in direct privity with the founders – and, in particular, with their view of the Constitution's meaning. In his inaugural address as president of the provisional government, Davis went so far as to suggest that even the variations between the Confederate and U.S. constitutions should be understood as

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[53] Confederate Constitution, art. III, sec. 1 ("The judicial power of the Confederate States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.").

[54] See Currie, "Through the Looking-Glass," at 1366 (discussing "the missing Supreme Court"); White, "Recovering the Legal History of the Confederacy," at 528 (noting that the debate over the Confederate Supreme Court "helps capture an endemic feature of the Confederacy itself. It was constantly struggling to establish its identity as a government that was separate from, as well as the agent of, the states that formed it.").

[55] On the Confederate judicial system, see William M. Robinson, Jr., Justice in Grey: A History of the Judicial System of the Confederate States of America (Cambridge: Harvard University Press, 1941). On state courts, see J.G. de Roulhac Hamilton, "The State Courts and the Confederate Constitution," 4 J. S. Hist. 425 (1938); Jennifer Van Zant, Confederate Conscription and the North Carolina Supreme Court, 72 North Carolina Historical Review 54 (1995). Of the district courts, however, Currie notes that "virtually none of their opinions appear to have survived." Currie, "Through the Looking-Glass," at 1262.

[56] See Currie, "Through the Looking-Glass," at 1264 (noting that the opinions of the attorneys general "acquired special significance in the Confederate States because they served to some degree as a substitute for decisions of the missing Supreme Court").

[57] See LaCroix, "The Lawyer's Library in the Early American Republic," in Subversion and Sympathy: Gender, Law, and the British Novel in the Eighteenth and Nineteenth Centuries, Martha C. Nussbaum and Alison L. LaCroix eds. (New York: Oxford University Press, 2013).

authoritative glosses on what the founders had really meant. The Confederate Constitution "differ[ed] only from that of our fathers in so far as it is explanatory of their well-known intent," Davis maintained.[58] Davis thus presented the Confederate Constitution as restating and refining what the founders had really meant to say.

Related to these assertions of a deeply conservative constitutional ideology was the rejection by Davis and others of the term "revolution." Only "by abuse of language" had the actions of the sovereign states that constituted the Confederacy "been denominated a revolution," Davis insisted in his first inaugural address.[59] On this view, the secession movement's continuity with the Revolution was so thoroughgoing that breaking away from the Union could not possibly be conceived as a revolution. The desire to identify with the founders evidently did not extent to embracing their revolutionary fervor. Yet Davis's point went deeper than categories alone. His key evidence against the "revolution" label was that the internal law of the seceded states had not changed as a result of their departure from the Union. "They formed a new alliance, but within each State its government has remained; so that the rights of person and property have not been disturbed," Davis stated.[60] Given the Confederate position that each state had been a sovereign entity before joining the Union, and that some vital quantum of that sovereignty had been retained throughout the intervening decades, the argument that the states' internal legal and political status had not changed as a result of secession was a powerful one. State sovereignty was the crucial component of a confederation built on a compact among its members. Therefore, establishing the continuity of the states as independent juridical entities was essential to legitimizing the structure of the Confederacy as the true inheritor of the Constitution.

As long as the states' internal structure remained stable, Davis argued, the overarching government that acted on their behalf was of secondary importance. The integrity of the state as a unitary sovereign was what mattered; the external league that the states created to deal with a small set of international issues was merely a thin canopy of narrowly cabined powers. "The agent through which they communicated with foreign nations is changed, but this does not necessarily interrupt their international relations," Davis maintained.[61] The Confederacy had "assumed" a position "among the nations of the earth"[62] – an unmistakable echo of the language of the Declaration of Independence.[63]

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[58] Davis, First Inaugural Address. For related discussion of the rhetoric and ideology of southern nationalism, see John McCardell, The Idea of a Southern Nation; Drew Gilipin Faust, The Creation of Confederate Nationalism: Ideology and Identity in the Civil War South; Michael T. Bernath, Confederate Minds: The Struggle for Intellectual Independence in the Civil War South; Robert E. Bonner, Mastering America: Southern Slaveholders and the Crisis of American Nationhood.

[59] Davis, First Inaugural Address.

[60] Id.

[61] Id.

[62] Id. ("[W]e must prepare to meet the emergency and maintain, by the final arbitrament of the sword, the position which we have assumed among the nations of the earth.").

[63] "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them,

But Davis declined to apply the revolutionary, nation-announcing elements of the Declaration to his own project of establishing the Confederacy.[64]

Even if one accepted the argument that the southern states were continuous political entities from the founding period through their secession, the relationship between their old and new agents required a theory of constitutional interpretation. The question of how, if at all, the U.S. Constitution applied to the new Confederate regime drew commentary from Davis, a series of Confederate attorneys general, and even the Confederacy's founding convention at Montgomery.

The predominant mode of constitutional interpretation in the Confederacy was to incorporate U.S. law into the new regime, except where it had been specifically rejected. This absorption of what secession advocates insisted was the prior legal regime into the new regime extended even to statutes. The Montgomery Convention provided that all laws of the United States carried over to become laws of the Confederacy unless superseded by the Confederate Congress.[65] Davis made an even stronger claim of continuity in his inaugural address: "We have changed the constituent parts, but not the system of government. *The Constitution framed by our fathers is that of these Confederate States*. In their exposition of it, and in the judicial construction it has received, we have a light which reveals its true meaning."[66]

Here we see the deep claim of continuity that lay at the core of Confederate constitutional interpretation. Confederate commentators were determined to attach themselves to the text of the U.S. Constitution, but they went even further by adopting the constructions that the U.S. Supreme Court had put on that text over the past seven decades. Indeed, as Davis's comments suggest, Confederate constitutionalism proceeded from three premises: first, that the U.S. Constitution had a true meaning; second, that the founders' intentions should govern that meaning; and third and most important, that "[t]he Constitution framed by our fathers is that of these Confederate States." Both the Constitution and the constitutional law (to paraphrase Justice Felix Frankfurter[67]) of the United States were thus binding on the Confederacy, despite southerners' insistence that secession had formally split the two regimes. The judicial constructions of John Marshall and Joseph Story, as well as Roger Taney, "instructed" Confederate statesmen "as to the true meaning and just interpretation of that instrument," the U.S. Constitution. And the Constitution of 1789 was that of the Confederate States, and vice versa.

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a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." Declaration of Independence, para. 1 (1776).

[64] On the international context of the Declaration of Independence, see David A. Armitage, "The Declaration of Independence and International Law," 59 William & Mary Quarterly 39 (3d ser. 2002).

[65] Coulter, 25, 27.

[66] Davis, First Inaugural Address (emphasis added).

[67] See Graves v. New York ex rel. O'Keefe, 306 U.S. 446 (1939) (Frankfurter, J., concurring) ("The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Confederate commentators, especially the attorneys general,[68] embraced the idea that Confederate constitutional law essentially picked up where U.S. doctrine had left off. They viewed themselves as engaging in intertemporal constitutional interpretation, but their constitutional landscape included two texts. Moreover, the second text – the Confederate Constitution – was seen as both the perfection of the first, and as largely derivative of it. Most striking was the wholesale adoption of the decisions of the U.S. Supreme Court at least as useful guides, and at most as binding precedent, for Confederate constitutional interpreters. The decision to absorb rather than reject U.S. case might appear sensible after the fact, given our knowledge that the Confederate Supreme Court was never established. But in 1861, it was not at all clear that the new polity would never have a confederal-level constitutional arbiter. On the contrary, given the similarity between the relevant provisions of the Confederate and U.S. Constitutions, and the growth of judicial supremacy during the early nineteenth century, contemporaries might well have assumed that the Confederate Supreme Court would be a robust body producing the very type of distinctly southern, state-sovereignty-respecting species of decisions that critics of the U.S. Supreme Court had always faulted it for rejecting.[69]

As a case study, consider the controversy over the postmastership of Montgomery, Alabama, in 1863. The incumbent of that office died while the Confederate Senate was in session; during the same session, Davis nominated one E.M. Burton, Esq., to the office. The Senate then resolved to continue Burton's nomination until its next session.[70] On May 8, 1863, the Confederate postmaster general requested the opinion of Attorney General Thomas Hill Watts on the following question: "Can the President, notwithstanding the failure of the Senate to confirm or reject the nomination of Mr. burton, appoint him or another to hold the Office, under the conditions, and as if the vacancy had occurred during the recess of the Senate?"[71] The relevant clause of the Confederate Constitution was identical to that of the U.S. Constitution, save for one preposition and one comma.[72] But should that similarity matter for purposes of a dispute within the Confederate government itself?

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[68] See Currie, "Through the Looking-Glass," at 1264 (referring to the opinions of the attorneys general as "to some degree a substitute for decisions of the missing Supreme Court"). The opinions were published by Congress in 1906. See id.; see also Opinions of the Confederate Attorneys General, 1861-1865 (Rembert W. Patrick ed., 1950).

[69] See, e.g., Martin; McCulloch; Osborn; see White, Marshall Court and Cultural Change.

[70] See Appointment During Recess of Senate, 1 Opinions of the Confederate Attorneys General 261, ed. Rembert W. Patrick (1950).

[71] Id. at 261-62. For a recent, U.S. version of the same controversy, see NLRB v. Noel Canning, 573 U.S. __ (2014) (holding that the president's recess appointment power may be used only when the Senate is in recess and is unable to transact Senate business).

[72] There were also small differences in orthography, owing to disparate conventions of capitalization between 1789 and 1861. The Confederate Constitution read: "The President shall have power to fill all vacancies that may happen, during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Confederate Constitution, Act. II, sec. 2, cl. 4. The U.S. Constitution reads, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const., Art. II, sec. 2, cl. 3.

Watts began his opinion by noting that the text was clear. But the text he looked to was that of the U.S. Constitution, not that of the polity which he was bound by oath to support. Indeed, Watts introduced the U.S. Constitution in his opinion without any remark as to the propriety of using it as an interpretive guide. The scope of the recess appointments power "was much discussed in the United States," he stated, and the provision of the Confederate Constitution was "the exact language of the Constitution of the United States," with some minor changes.[73] Having thus brushed any choice-of-constitutional-law issues aside, Watts then moved to the text itself. Because the Montgomery postmaster's office fell vacant while the Senate was in session, it did not "happen" during the recess of the Senate; therefore, the recess appointments clause did not apply, and the president lacked the power to appoint Burton. Therefore, Watts maintained, "If the question, now presented to me, were *res nova*, and I were left to the plain language of the Constitution of the United States, I should be strongly inclined to decide, that the President has no power to fill the vacancy."[74] The vacancy had "happened" during the Senate's session, and the fact that it had continued to exist into the recess was insufficient to trigger the recess appointments power.[75]

But then Watts turned from text (of the predecessor Constitution) to practice and interpretation (both also of the prior Constitution). U.S. attorneys general William Wirt and Roger Taney had written opinions giving "a more enlarged sense to the word 'happen,'" Watts noted.[76] Based on the views of these "distinguished Attorneys-General," Watts concluded that "the practice, from the beginning of the Government of the United States, under the Constitution of 1787, had been, for the President, to fill all vacancies which 'happened to exist', during the recess of the Senate." This view was the "uniform construction placed on that clause of the Constitution of the United States."[77] Watts acknowledged that to adopt the Wirt/Taney construction might arguably amount to permitting precedent to control text. But he nevertheless concluded that not only precedent, but *U.S. precedent* – i.e., the precedent of the nation from which his own had separated – ought to outweigh what he regarded as a clear textual provision.

But what was the argument for privileging the precedents of another polity over the text of the Confederacy's own founding document? Watts's analysis traced a line from the Confederate Constitution, to the U.S. Constitution circa 1861, to the precedents that had accreted around the U.S. Constitution between 1789 and 1861, to the American founders' intended meaning. "[W]e must suppose," Watts maintained, that the framers of the Confederate Constitution "were well informed by the settled and uniform construction placed on every part of it (whenever such settled and uniform construction prevailed)."[78] Those clauses of the U.S. Constitution that were "incorporated, without alteration or change, into the Confederate Constitution, must have been adopted with full

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[73] Opinions of the Confederate Attorneys General at 262.
[74] Id.
[75] Cf. the Court's and the parties' competing analyses of the meaning and significance of the word "happen" in *NLRB v. Noel Canning*.
[76] Opinions of the Confederate Attorneys General at 263.
[77] Id.
[78] Id. at 264.

knowledge of the established and uniform construction given them in the United States."[79] In other words, the drafters of the Confederate Constitution were charged with having imported into their text not only the language, but also the penumbra of interpretation surrounding that language, of the U.S. Constitution. "[S]uch construction thus became a part of our Constitution," Watts wrote, "and may well guide us in ascertaining the true meaning of its framers."[80]

Watts then concluded with a stark statement of the Confederate Constitution's relationship to the U.S. Constitution: "If we will note the fact, that the Confederate Constitution is almost a transcript of the United States Constitution, and that most of the changes made serve but to exclude doubtful and dangerous constructions, great force is added to the strength of this argument."[81] For Watts, the practice and precedent of broad construction of "happen" was crucial to interpreting the U.S. Constitution, despite the apparent clarity of the text. This was a strong expression of a precedent-driven interpretive modality, above a textually focused one. But the more important analytical leap came with Watts's shift from the U.S. Constitution to the Confederate Constitution. On matters of structure, Confederate constitutional law was for the most part U.S. constitutional law – and that arrangement was the preference of Confederate leaders.

IV. Conclusion.

Examining the Confederate Constitution demonstrates the degree to which nineteenth-century Americans were constitution worshipers – not only the U.S. Constitution, but constitutions in general. The Confederate Constitution was similar to the U.S. Constitution because the Confederate Constitution stood for the assertion that its text was the correct reading of the previous document. Potential textual loci of nationalism such as the Supremacy Clause and the Necessary and Proper Clause endured as reflections of the view that President Andrew Jackson's insistence on the supremacy of federal law in the face of South Carolina's nullification, or Chief Justice John Marshall's endorsement of Congress's power to establish a bank, were mistaken interpretations, not problems with the text itself. The constitution drafted by Americans who broke away from the United States is, paradoxically, the best possible evidence of nineteenth-century Americans' conviction that the U.S. Constitution offered the essential tools to structure a compound federal, or indeed confederal, republic.

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[79] Id.
[80] Id. at 264-65.
[81] Id. at 265.

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