“NECESSITY KNOWS NO LAW”: VESTED RIGHTS AND THE STYLES OF REASONING IN THE CONFEDERATE CONSCRIPTION CASES

Alfred L. Brophy

How different may be the judgments of different minds equally astute when exercised upon precisely the same state of facts.

Fredrick Grimke, The Nature and Tendency of Free Institutions

On December 7, 1863, Jefferson Davis sent his annual message to the Confederate Congress. Davis lamented the reversals of fortune of the Confederate military the previous summer. He believed that in light of “the large conscription recently ordered by the enemy and their subsequent call for volunteers, to be followed if ineffectual by a still further draft... no effort must be spared to add largely to our effective force as promptly as possible.” One effort he proposed was an expansion of the draft of 1862.

Under the 1862 draft, men subject to service could pay another to serve for them. Davis suggested that the principals—the men who provided substitutes—be liable for service

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themselves. In early 1864, the Confederate Congress passed such a law. Principals immediately challenged the law in the state courts of the Confederacy as a violation of their vested rights. The principals argued that they had a contract with the government to permanently exempt them from service, which the Confederate Congress could not constitutionally abrogate. Supreme courts of five Confederate states issued opinions on the act; all rejected the challenges.

The published opinions, from Virginia, North Carolina, Georgia, Alabama, and Texas provide a unique opportunity to assess the almost simultaneous approaches of different state courts towards vested rights. This essay is the story of those five opinions and how the judges came to write the opinions that they did. It examines the relationship between the political affiliation of the judges who wrote the opinions and their reasoning and thus responds to the debate among legal historians over the degree to which the styles of reasoning employed by judges correlated with their political and social background.

The arguments used by the five former Democrats and three moderate Whigs who filed opinions involved the radical doctrine that the state had reserved the right to do whatever necessary in time of emergency. It was largely the Democratic judges who adopted extreme positions to protect the states against the federal government, as well as states against cor-

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3 The Act provided:

Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms:

The Congress of the Confederate States of America do enact, That no person shall be exempted from military service by reason of his having furnished a substitute; but this shall not be so construed as to affect persons who, though not liable to render military service, nevertheless furnished substitutes.

Act of Confederate Congress, January 5, 1864. 6 JOURNALS OF THE CONFEDERATE STATES OF AMERICA CONGRESS 499 (House vote); 3 id. 561 (Senate Vote); 3 WARS OF THE REBELLION, OFFICIAL RECORDS, ser. 4, 12 (hereafter OR).

4 See Burroughs v. Peyton, 57 Va. 470 (1864); Daly v. Fitzgerald, 34 Ga. Supp. 85 (1864); Ex Parte Tate, 39 Ala. 254 (1864); Gatin v. Walton, 60 N.C. 310 (1864); Ex Parte Mayer, 27 Tex. 715 (1864).
porations. The two former Whigs who wrote opinions analyzed the problems differently. One, who filed a dissent, explicitly denied the power of the state to do whatever necessary; another analyzed the issues in terms of the common law of contract, not the grand constitutional power of a state to act in an emergency.

This essay identifies the strands that came together in the opinions, such as constitutional doctrines related to power of the state and to contracts. Part I frames the debate over legal historians' interpretations of how judges in the first half of the nineteenth century decided cases—and how the judges articulated what they were doing. The remainder of the essay tells the story of how the Confederate state court judges came to write their opinions. The first part of the story involves the development of the belief that protection of society from social upheaval is a paramount goal of government. Part II suggests ways in which the argument that there were certain rights that no state could ever give up—such as the right to protect itself against danger—related to legal arguments in the South in the antebellum era. Part III suggests ways that values of the Whig and Democratic parties influenced the approach of courts towards government interference with contracts. It further suggests a connection between arguments that certain state powers were inalienable and the approach of certain radical Southern justices towards cases involving contracts between states and corporations.

Part IV examines the confluence of the strands of inalienable power and contracts jurisprudence in the Confederacy. It discusses the political background to the call to arms of principals who had provided substitutes. Then, after describing the political conflict, it turns to an examination of the five opinions and attempts to link the types of arguments used to the ideological orientation of the judges. Finally, it draws some conclusions about the nature of political ideology on constitutional law in the Confederacy.
I. REASONING STYLES IN THE ANTEBELLUM JUDICIARY

Thomas R. R. Cobb wrote on the first page of his treatise *The Law of Slavery* that “[p]hilosophy is the handmaid, and frequently the most successful expounder of the law. History is the groundwork and only sure basis of philosophy. To understand aright, therefore, the law of Slavery, we must not be ignorant of its history.” Legal historians perennially debate the factors that influence the ways that judges decide and, perhaps even more importantly, how judges explain their decisions to the public. Following the path-breaking work of Karl Llewellyn, whose 1960 book *The Common Law Tradition* labeled the predominant style of judges in the antebellum era the “grand style,” legal historians have shown that judges in that era routinely rejected precedent in favor of reasoned re-examination of legal rules. More recently, such constructs as “republicanism,” “liberalism,” and “ideology” have been proffered to explain constitutional and private law decisions. Writers with such diverse views as Morton J. Horwitz, Duncan Kennedy, Stephen Siegel, G. Edward White, and William

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8 Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 RES. IN L. & SOC. (1980).

9 Stephen Siegel, Understanding the Nineteenth-Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence, 60 S. CAL. L. REV. 1 (1986). See also Mortimer Sellers, Liberalism, Republicanism,
E. Nelson have expended their considerable analytic talent to map out the connection between judges’ ideology and background and the arguments those judges brought to bear on legal issues.

Brooding above all of the recent debate on reasoning style are the writings of Professors Morton J. Horwitz and Duncan Kennedy. Professor Horwitz in particular shows that an “instrumental conception” emerged in judicial thinking, particularly in the 1830s and 1840s. Judges self-consciously altered legal rules to promote economic development. Professor Horwitz’s thesis has been subject to some of the most searching criticism of any recent American historiography; many question his primary thesis—that judges conceived of law instrumentally to conform to their own economic beliefs. The instrumental style, which Professor Kennedy calls pre-classical legal thought, was composed of a vibrant investigation by judges of the rational for a legal rule, an investigation of the history and policy underlying particular choices, and a desire by judges to effect particular pro-business results. Judges, thus, rejected mere reliance on precedent in favor of a search for rules that comport with their current political and economic beliefs.

Stephen Siegel’s nuanced monograph on the Contracts


13 See HORWITZ, supra note 7, chap. 1; Kennedy, supra note 8, at 5-6.
Clause in the nineteenth century suggested that the various interpretations of the clause resulted from shifting interpretations of the scope of protection that the Constitution conferred on private property, as well as differing jurisprudential attitudes of judges deciding appeals.\textsuperscript{14} Harnessing the concept of ideology, William Fisher has recently explored the connection between religion and vested rights. He suggests that much of the connection may be attributable to the political affiliations of the judges as Whigs—and from the religious beliefs of those Whigs. Even those judges who were Democrats, rather than Whigs, may have adopted the reasoning styles first popularized by Whigs. Whig ideology is, therefore, central to Professor Fisher’s explanation of reasoning style in the antebellum courts.\textsuperscript{15}

William Nelson, on the other hand, posits that antebellum judges adopted the grand style of reasoning as a way of “effectuat[ing] socially desirable policies.”\textsuperscript{16} After the Civil War, according to Nelson, the grand style, which had been associated in the public mind with proslavery law, was rejected in favor of a formalistic approach. Nelson’s analysis has been challenged by Harry Scheiber. Professor Scheiber, who considered reasoning style in vested rights cases, demonstrated that an instrumental conception appeared in opinions throughout the nineteenth century. According to Scheiber,

\textsuperscript{14} Professor Siegel wrote, for example, that “the pattern of inalienable power adjudication did not follow from a continual elaboration of a single, consensus viewpoint . . . Rather, it was the result of controversy and of shifts and compromises in dominant opinion.” Siegel, supra note 9, at 47. He further explains that the “pattern was shaped . . . by the aspects of nineteenth-century social and legal thought.” Id. at 55.


\textsuperscript{16} Nelson, supra note 11, at 514. For a response to Nelson, see Alfred L. Brophy, “over and above . . . there broods a portentous shadow,—the shadow of law”: Harriet Beecher Stone’s Critique of Slave Law in Uncle Tom’s Cabin, 12 J. L. & RELIGION 457, 499-504 (1997) (arguing that proslavery legal thought was more frequently formalist than instrumentalist). Post-war formalism might have owed more to the country’s retreat to conservatism—to its rejection of reasoning based on grand moral absolutes—than to its rejection of proslavery instrumentalism.
judges ruled that “vested property rights could be abridged, often dramatically, if economic-growth goals established by the commonwealth dictated that they should yield.”

Even more recently, a series of scholars are proposing a counter-hypothesis to Horwitz’s hypothesis that judges altered the law to promote economic growth. The loosely associated newer group argue that judges were motivated by sentimental concern for plaintiffs and therefore altered the law to promote the welfare of those who had been injured. At the core, they argue that judges often respected precedent, but that on the occasions when judges departed from it, they often acted to limit the power of the wealthy. Judges followed, so the argument goes, a jurisprudence of the heart. While adherents of Horwitz’ position as well as his opponents disagree on the direction jurists moved in, most seem to agree that judges were influenced by the principles being “debated all around them.” A consensus seems to be emerging that judges rerafted the law to comport with their ideas about economy, society and religion.


The treatise writers told their readers—and therefore us as well—what the grand style meant to them. It required an understanding of the principles underlying the decision. Thomas R.R. Cobb believed one could not understand slave law until one understood its context. South Carolina lawyer James Walker wrote in his 1850 treatise *An Inquiry into the Use and Authority of Roman Jurisprudence in the Law Concerning Real Estate* that "the best preparation by the bench and the bar, for the correct application of a rule, is an accurate knowledge of its true ground; 'for then are we said to know the law, when we apprehend the reason of the law.'" 20 "Jurisprudence is the knowledge of laws, their reasons, and their sources. Knowledge of laws and their sources constitutes the history of the law," wrote Walker in his 1852 book, *A Theory of the Common Law*. One must understand the history of the rule, "'for though a man can tell the law, yet, if he know not the reason thereof, he shall soon forget his superficial knowledge.'" 21

Chancellor Kent provided one of the most explicit statements of the role of the judge in the grand style. He thought that

a very large proportion of the matter contained in the old reporters . . . has been superseded, and is now cast into the shade by the improvements of modern times; by the disuse of real actions, and of the subtleties of special pleadings . . . by the growing value and variety of personal contracts; by the spirit of commerce, and the enlargement of equity jurisdiction; by the introduction of more liberal and enlightened views of justice and public police; and, in short, by the study of the civil law." 22

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22 Kent's Commentaries *453-54. See also id. at 443-44 (attack on reliance on precedent).
Everywhere one looks in antebellum legal writings, there were expressions of the importance of reason, history, and precedent in formulating legal rules. When the Philadelphia lawyer Charles Jared Ingersoll delivered a speech on the *Influence of America on the Mind* he reserved a special place for law. Hugh S. Legaré's review of Kent's *Commentaries* affirmed the sacred place of law in America; drawing on Ingersoll's ideas, Legaré celebrated the law as the place where Americans had made their contribution to learning. That search for new monuments to guide them in formulating rules was part of the search for principles that took place throughout American society. Ralph Waldo Emerson expressed the sentiments of the nation asked in his essay *Nature*, "Why should we not also have an original relationship with the Universe?" Americans, expressing the optative mood, energetically reexamined the doctrines, laws, and literature of their ancestors. They came to believe, with Emerson, that "There are new lands, new men, new thoughts." It was natural, then, for them to "demand our own works and laws and worship."

Judges, too, explained their mode of reasoning. Often they wrote about reason and experience as their guides. One Kentucky jurist explained his adoption of a rule in terms of both precedent and reason. "These decisions, we still approve, and suppose they are founded on principles which cannot be subverted, and to be sustained by reasons which cannot be refuted." Or they sometimes wrote merely of the rule as "supported by reason and confirmed by authority." A logical approach dominated their thought—reasoning from analogy. Experience was what they sought. In some cases, they explained in detail their analysis. One Kentucky jurist, for example, drew upon

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the language of the Constitution, the circumstances surrounding its adoption, and experience since the framing, to understand the Contracts Clause. His extensive opinion illustrates the paths of understanding, the sources of law, that converged in his mind.\textsuperscript{27}

The grand style, which entailed a discussion of the underlying reasons for legal rules, was a mode of argument, a way of convincing others, a way of operating that was common to the jurists of the early nineteenth century. Through that mode of operating, judges brought their own ideas into the formal law. This paper now turns to what those ideas were and then examines the reasoning style of judges during the Confederacy.

II. CONSTITUTIONAL THEORY: POLICE POWER AND SOCIAL STABILITY

The most important weapon in support of conscription was the belief that a state can do whatever is necessary in time of crisis to protect itself against danger. That “necessity” argument has a firm grounding in antebellum society. This section recovers the context in which the judges decided the conscription cases by examining the concern over a state’s powers to protect itself against danger and to protect a state against exploitation by corporations.

A. Social Stability and Constitutional Theory

Liberty, indeed, though among the greatest of blessings, is not so great as that of protection; inasmuch, as the end of the former is the progress and improvement of the race,—while that of the latter is its preservation and perpetuation. And hence, when the two come into conflict, liberty must, and ever ought, to yield to protection; as the existence of the race is of greater moment than its improvement.\textsuperscript{28}

\textsuperscript{27} Lapsley v. Brashear, 14 Ky. 46, 64-67 (1823) (Mills, concurring).
\textsuperscript{28} JOHN C. CALHOUN, DISQUISITION ON GOVERNMENT 55, in 1 THE WORKS OF JOHN C. CALHOUN (Richard K. Cralle ed., 1851-1856) (hereafter DISQUISITION).
A vital strand in the response to the exigencies of civil war was the belief that the state could do whatever it needed to protect itself in time of danger. This belief correlated closely with the Southern experience in the antebellum era. Beginning in the 1820s Southerners lived in a world of fear of social upheaval. They were surrounded by blacks, a source of potential rebellion, as well as Northerners who, when they were not threatening to end slavery, seemed to be increasing control over the states through the federal government. Southerners developed a philosophy based on the inequality that surrounded them, which argued that social stability was the highest goal of the state.

William and Mary professor George Frederick Holmes provides a window into the Southern belief that society can function only when there is stability. In his vicious essay review of Uncle Tom’s Cabin, Holmes attacked what he identified as the thesis of Stowe’s novel: that slavery “ought to be universally condemned, and consequently abolished immediately” because it has produced the evil that Stowe documents and is, therefore, “a violation of all the laws of Nature and of God.”

Such a philosophy, Holmes raved,

strikes at the very essence and existence of all community among men, it lays bare and roots up all the foundations of law, order, and government . . . . Pandemonium itself would be a paradise compared with what all society would become, if this apparently simple and plausible position were tenable, and action accordingly regulated by it.

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31 Id. at 104-05. See also WILLIAM HARPER, MEMOIR ON SLAVERY (Charleston, S.C. 1838), reprinted in THE PROSLAVERY ARGUMENT (Charleston, S.C., 1860) and in THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860 78, 87 (Drew Gilpin Faust ed., 1981).
Arguments of this ilk appeared in formal constitutional theorizing about slavery as well as in popular literature. The constitutional theory of John C. Calhoun, the radical South Carolina theorist, for example, promoted social stability. Slavery served as a way of maintaining stability among the whites of all economic strata. Calhoun developed his theory as a way of acquiring a universal white upperclass. "With us," Calhoun said on the Senate floor in 1848, "the two great divisions of society are not the rich and the poor, but white and black; and all the former, the poor as well as the rich, belong to the upper class."

In his *Disquisition on Government*, his final statement of political philosophy published posthumously in 1851, Calhoun built his theory of government upon three related principles: the inherent desire of individuals to place their own well-being above that of society, "the great law of self-preservation," and inequality of people. Calhoun thought that the goal of government was to channel those selfish desires; government had to restrain individuals in order to "protect and to perfect society." Such protection and perfection required an appropriate balance of liberty with restraint. "For to extend liberty beyond the limits assigned, would be to weaken the government and to render it incompetent to fulfill its primary end—the protection of society against dangers, internal and external."

For the state to prosper, it had to harness the inherent inequality of people. One way to harness the inequality was to give government the power to protect itself by compelling obedience from its citizens, as well as service in the military. Chancellor William Harper of South Carolina developed the inequality theory in a pamphlet published in 1837. Harper based much of his proslavery argument on the proposition that humans do—and are morally justified in doing—whatever nec-

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12 *Calhoun's Works*, supra note 28, at 505-06.
13 *Calhoun, Disquisition*, supra note 28, at 3-4.
14 Id. at 52. See also Abel Upshaw, *Domestic Slavery as It Exists in Our Southern States, with Regard to Its Influence upon Free Government*, 5 So. Lit. Messenger 677-87 (1839) (discussing influence of slavery on democracy).
essay in self-defense. Harper infused a pessimism about society into his political theory, based on his beliefs about human behavior. "Man is born to subjection" and people remain in a form of subjection throughout their lives. This maxim of social hierarchy and the need to restrain people in their "pursuit of happiness" were immutable, he thought: "So it has been since the days of Nimrod."35

Albert Bledsoe's philosophical essay Liberty and Slavery, written while he was teaching at the University of Virginia, further illustrates the Southern concern for protection of stability of the state and its religious basis.36 God, Bledsoe believed, dictated natural law and the state should use law to require individuals to follow natural law. He argued that law facilitates human society by restraining individuals from violating natural law.

Bledsoe began his 150 page essay by arguing that—contrary to the beliefs of such philosophers as Locke and Hobbes—law does not limit natural rights. According to Bledsoe, both Locke and Hobbes had erred when they stated that the state restrained natural liberty. Locke's error was his belief that people had to give up natural liberty to the state; Hobbes' was his belief that the state was necessary to restrain individuals' passions and thus preserve liberty. Instead, Bledsoe believed "the law which forbids the perpetuation of mischief, or any other wrong, is a restriction not upon the liberty, but upon the tyranny, of the human will."37 His "correct" view of human society held that God established the natural right to freedom from anarchy. How well liberty was preserved depended, then, upon the state's preservation of natural rights through law:

The truth is that in a state of nature, we would possess

36 Albert Taylor Bledsoe, Liberty and Slavery, or Slavery in the Light of Moral and Political Philosophy, in Cotton is King and Proslavery Arguments 271 (E.N. Elliot ed., Augusta, Ga., 1860).
37 Id. at 278.
rights, but we could not enjoy them. That is to say, notwithstanding all our rights, we should be destitute of freedom or liberty. Society interposes the strong arm of the law to protect our rights, to secure us in the enjoyment of them. She delivers us from the alarms, dangers, and the violence of the natural state...

Good government it is that restrains the elements of tyranny and oppression, and introduces liberty into the world. Good government it is that shuts out the reign of anarchy, and secures dominion of equity and goodness. He who would spurn the restraints of law, then, by which pride, and envy, and hatred, and malice, ambition, and revenge are kept within the sacred bounds of eternal justice—he, we say, is not the friend of human liberty. 36

All of his groundwork went to show that the abolitionists were destroying the well-ordered American society. Slavery, rather than restraining the natural liberties of the slaves, Bledsoe thought, "really shuts out the most frightful license and disorder from society." That disorder would be the downfall of American liberty.

Bledsoe's defense of slavery fit well within the Southern beliefs about slavery and the constitutional defense of slavery. Bledsoe echoed and provided a justification for the popular belief that government should promote stability. He mixed that belief with an argument that society benefitted from slavery and that without slavery there would be anarchy.

This Southern ideology reached its apex during the Confederacy. Confederates carefully distinguished their revolution from prior radical uprisings, such as the French Revolution and made frequent calls for reliance upon traditional hierarchy and deference were common. 37 It is not surprising, therefore, to

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36 Id. at 234-35.
find the argument used frequently in the South during the war. The South was not, of course, homogeneous in its political values; but the republican principle of the subversion of individual interests to the public good was broad enough to encompass the vision of both Democrats and Whigs. Indeed, the organicist social philosophy of the South's defenders of slavery was driven by more than just slavery. As historian Drew Faust points out, the social ideas of proslavery writers were related to larger movements in nineteenth-century philosophy. Thus, proslavery ideas were closely allied to conservative British philosophers Matthew Arnold and Thomas Carlyle as well as the conservative Boston ministers who "were among slavery's harshest critics."  

Nevertheless, the Whigs and Democrats divided on their approach to constitutional law. While Democrats might be willing—as their President Andrew Jackson was—to brush aside constitutional issues in favor of expediency, Whigs were not. On issues from protection for vested rights to free speech, Whigs appeared more receptive than Democrats to refined constitutional arguments. The Whig tradition appears to have derived from lingering concerns over the effect of democracy on the Republic. A careful balancing of interests—state and federal and property against the landless—supported by the appropriate constitutional scruples was necessary to preserve liberty.  

B. Constitutional Theory into Practice

In the years leading up to the Civil War, lawyers and judg-

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es translated the popular beliefs that slavery served as a groundwork for society into formal constitutional law. In the opinions of the United States Supreme Court and, more often, in arguments before the Court, as well as in the state courts and in debates in Congress one can see legal principles emerging around the argument that a state could not give up the right to protect itself against danger. That principle was commonly called the police power.

The way in which the abstract theory that lay at the basis of Southern political theory—the belief that the first goal of government was the protection of stability—was translated into constitutional law is illustrated by two crises.

The 1836 Congressional debate over the distribution of abolitionist literature through the United States mails provides another illustration of the application of such ideas. In the spring of 1835, the New York-based American Abolitionist Society, began using the United States mails for a massive mailing campaign to distribute unsolicited copies of its tracts to prominent southerners. When the first such mailing arrived in Charleston, South Carolina in May 1835, the literature was burned in the post office. Soon, however, South Carolinians proffered a legal defense of suppression. 42

John C. Calhoun, the foremost Southern proponent in Congress, established a Southern-dominated committee in the Senate to study the problem. The Committee studied various solutions, including President Jackson's drastic proposal of a federal law prohibiting literature that Congress found offensive. 43 The Committee report (written largely by Calhoun) argued that no state had surrendered its most basic right—the ability to protect itself against external danger. Therefore, each state could exclude any literature it wished. 44

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42 For extended discussion of the abolitionist literature crisis, see Alfred L. Brophy, "Like the Serpent into the Garden of Eden": Abolitionist Literature and Southern Constitutional Theory (unpublished paper); Freehling, supra note 29, chap. 8.
43 2 Messages and Papers of the President, 175-76 (James Richardson ed., 1897); 5 Correspondence of Andrew Jackson 360-61 (Aug 9, 1835) (John Spencer Bassett ed., 1926).
44 Report of the Select Committee on Abolitionist Literature, 13 Papers of
Another example of the application of abstract philosophical ideas comes from the interstate slave trade. In the 1830s Mississippi adopted a new constitution, which prohibited anyone from bringing slaves into the state for sale. The prohibition was challenged as an interference with the interstate commerce clause. The majority opinion in *Groves v. Slaughter* decided the case on technical grounds, but Justice Thomas McLean’s concurrence strongly indicated that police power supported Mississippi’s exclusion. He wrote:

Each state has a right to protect itself against the inconveniences and dangers of a slave population. The right to exercise this power, by a state, is higher and deeper than the constitution. The evil involves the prosperity, and may endanger the existence of a state. Its power to guard against, or to remedy the evil rests upon the law of self-preservation; a law vital to every community, and especially a sovereign state.45

Thus, the right of a state to protect itself against danger had deep roots in antebellum law. Cases such as *Groves* provide a concrete connection between abstract arguments and the response of Confederate judges who faced the question of how to deal with the conscription cases.

### III. CONTRACTS CLAUSE JURISPRUDENCE

A second strain of thinking leading to the conscription cases involved the Contracts Clause of the United States Constitution. That clause provides that no state shall impair the obligation of contracts. In the antebellum era, the contracts clause was a crucial way of protecting private property against encroachment by the government. The clause, therefore, occupied a central position in debates over competing visions of the

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role of corporations and established wealth in American society.\textsuperscript{46}

In cases involving attempts by states to infringe on contracts they had made with corporations, courts developed a body of doctrine around the belief that states should be protected against corporations. Democratic jurists construed legislative grants narrowly, construed the scope of the contracts clause narrowly, and, in extreme cases, held that there were certain powers that the state could not grant away. Thus, two elements—the right of a state to protect itself and opposition to established wealth—combined to produce a new approach to vested rights in contracts clause cases by the middle of the nineteenth century.

\textit{A. Democratic Suspicions of Corporations}

From 1836 until the Civil War the United States Supreme Court was dominated by Democratic justices and chief among them was Roger B. Taney. President Andrew Jackson appointed Taney chief justice in 1836 to fill the vacancy left by John Marshall's death in 1835. Taney's contemporaries believed that he represented a shift towards increased control by the Democrats—and increased application of Democratic principles—on the Court.\textsuperscript{47}

Taney's contemporaries predicted that he would guide the Court toward increased suspicion of corporations. There was substantial evidence from other Democrats of the suspicion of established wealth. President Andrew Jackson's Farewell message succinctly canvassed the spectrum of Democratic beliefs, including fear of corporations. In writing about banks, Jackson warned that "unless you become watchful . . . and check this spirit of monopoly . . . you will in the end find that the most important powers of Government have been given or bartered away, and the control over your dearest interests has passed

\textsuperscript{46} See Siegel, supra note 9.
into the hands of these corporations. Under Taney’s care, the Supreme Court translated the views of the Democratic party into formal constitutional law, especially in the area of the Contracts Clause.

B. Methods of Limiting the Contracts Clause

The Supreme Court restricted the Contracts Clause in several ways. The most common way was the narrow construction of grants, followed by the narrow application of the Contracts Clause. The most controversial doctrine, subscribed to by only a minority of justices, held that states could not part with the most important of their sovereign powers, such as the right to eminent domain.

1. Narrow Construction of Grants

The primary mode of limiting the Contracts Clause was the narrow construction of government grants. Chief Justice Taney introduced the narrow construction principle in his opinion in Charles River Bridge v. Warren Bridge. In that case, the proprietors of a bridge spanning the Charles River, who had received a charter from the state of Massachusetts, sued to

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48 Messages and Papers of the Presidents, supra note 1, 16, at 306. On the differences between Whigs and Democrats on vested rights, contrast [James Kent], Supreme Court of the United States, 2 New York Rev. 372 (1838) and [Charles Ingersoll], The Supreme Court of the United States, United States Mag. & Dem. Rev. 497, 503 (1840). On a more literary level, one might also contrast Heman Humphrey, Discourse Delivered Before the Connecticut Alpha of Φ. B. K. at New Haven, August 14, 1838 (New Haven, Hitchcock & Stafford, 1839) with Joseph Ingersoll, An Address Delivered Before the Phi Beta Kappa Society, Alpha of Maine in Bowden College 13 (Brunswick, 1837) and George Bancroft, An Oration Delivered Before the Democracy of Springfield... July 4, 1836 5 (Springfield, 1836).

49 There is no biography of the Taney Court that places it within its historical context in the way that G. Edward White’s stunning volume places the Marshall Court in its. Nevertheless, there much recent scholarship points out ways in which the Taney Court was influenced by—and adopted the perspective—of its predominantly Democratic justices. See generally Swisher, supra note 47, at 128-45; Alfred L. Brophy, Note, Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford, 50 Colum. L. Rev. 192 (1990) (locating Court’s federalism decisions in the context of antebellum political thought).
prevent the chartering of a nearby bridge. The proprietors of the first bridge argued that the chartering of the new bridge violated an implied condition that they would have a monopoly. Justice Taney’s approach advocated deference to legislative wishes and emphasized that a sovereign legislature did not contract away its rights lightly. 50

Justice Joseph Story’s dissent, on the other hand, illustrates an alternative vision of Contracts Clause jurisprudence. Story, a prominent Massachusetts Whig, one of the most respected jurists of his time, and author of influential treatises on various aspects of law from contracts to the Constitution, proposed a broad reading of the charter, which would have fulfilled the expectations of the proprietors of the first bridge. Chancellor Kent voiced concern over the implications of the decision in a letter to Story. If the “legislature can quibble away contracts . . . can the People be far behind?” 51 At base was a difference in political visions. Story’s conservative Whig tradition impelled his opposition to the legislature interfering with individuals’ property rights, which were necessary, in his view, to maintain a democratic government. 52 The difference between the Story and Taney opinions is in the mode of constitutional interpretation. Taney wanted to construe strictly and he does so because of the nature of the legislature in relationship to the people. Story construes broadly because the people have spoken and fairness dictates treating government grants like any other contract. 53

51 Newmyer, supra note 47, at 233.
53 Eventually, the narrow construction of grants became a principle that all agreed upon. As Whig jurist Henry Lumpkin wrote in 1851, “if one principle is settled in this country beyond all hazard of a change, it is, that in grants by the public, nothing passes by implication.” Shorter v. Smith, 9 Ga. 517, 524 (1851).
2. Narrow Application of Contracts Clause

The Contracts Clause was further limited by the Justices’ application of the clause to only a narrow range of relationships. Thus, laws granting rights were construed as public laws, rather than contracts. In *Butler v. Pennsylvania*, for example, Justice Peter V. Daniel of Virginia held that a statute appointing canal commissioners for one year did not create a vested right for those commissioners. The state could replace the commissioners and lower their salaries whenever it wanted. Justice Daniel thought that the appointments created mere hopes, but did not create an enforceable contract.54

3. Inalienable Powers

Finally, some opinions held that a state could not alienate fundamental aspects of sovereignty, such as the right to eminent domain. A minority held that the state could not alienate other powers, such as the right to tax. This radical approach, which relied upon the belief that the states had certain sovereign elements that they would never part with, was advocated strenuously by Democratic Justices Peter V. Daniel of Virginia, John A. Campbell of Georgia, and John Catron of Kentucky.

The doctrine held that certain powers of a state were so fundamental that the state could not part with those rights. This was closely related to the Southern argument that states did not alienate the right to protect themselves in forming the United States Constitution.

The 1851 case *Debolt v. Ohio* illustrates the diversity of approaches of the Taney Court justices on the Commerce Clause. *Debolt* upheld the Ohio legislature's imposition of an increased tax on banks chartered after 1838. Chief Justice Taney narrowly interpreted the Ohio grant. He based much of the decision on the Ohio court’s previous interpretations that the legislature could increase a tax on a bank. “The grant of

privileges and exemptions to a corporation are strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms." He furnished another reason to narrowly interpret the legislature's grant:

It is founded in principles of justice, and necessary for the safety and well-being of every State in the Union. For it is a matter of public history, which this court cannot refuse to notice that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of the session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner. . . . 55

For Taney, fairness to the state compelled the narrow construction. In their concurrence, Justices Daniel, Catron, and Campbell took an approach explicitly disavowed by Taney, which led to the same result. Justice Catron wrote that Ohio could not part with its right to tax.56

In one case a majority of the Justices did subscribe to a view that a sovereign power was inalienable and that a charter restricting that sovereign power was invalid. In West River Bridge v. Dix, Justice Daniel had a rare opportunity to write for the majority; he held that all contracts have implied conditions, including the right of a state to eminent domain. Justice Daniel wrote:

[It] is undeniable that the investment of property in the citizen by the government . . . is a contract between the State . . . and the grantee; . . . But into all contracts . . . there enter conditions which arise not out of the literal terms of the contract itself; they are superintended by the pre-existing and

55 Debold, 57 U.S. at 435.
56 Id. at 443 (incorporating his dissent in Piqua Bank v. Knoop, 57 U.S. 392, 414-15 (1854), which argued that exemption of taxation was not irrevocable).
higher authority of the laws of nature, of nations, or of the community to which the parties belong. . . . Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.\(^{57}\)

Such a conclusion is not surprising; the federal government's right of eminent domain is guaranteed by the Fifth Amendment. And as long as the state paid adequate compensation, there would ordinarily be no violation of contracts problem.\(^{58}\) But \textit{West River Bridge} came to stand for a much more radical proposition; it was cited to show that certain sovereign powers could not be contracted away. The doctrine of implicit conditions became the doctrine that sovereignty could not be alienated.\(^{59}\)

\textit{Dodge v. Woolsey}, decided in 1856, was one of the, last expressions of the tension between vested rights and state sovereignty before the Civil War. The dissent shows the radical approach to states' rights and the power that radicals attributed to a state constitutional convention. For those radicals, the public good—as opposed to the good of the avaricious corporations—dictated the reservation of the right of sovereignty. The

\footnotesize\textsuperscript{57} \textit{West River Bridge}, 47 U.S. (6 How.) 507, 532 (1848).

\footnotesize\textsuperscript{58} Some Southerners disagreed with my characterization. They thought that slaves could not be taken away even if the government paid just compensation. Their theory was related to Justice Daniel's argument: that slavery was the basis of Southern society and that the government could do nothing to destroy society. See Thomas Roderick Dew, \textit{Abolition of Negro Slavery, reprinted in IDEOLOGY OF SLAVERY}, supra note 31, at 39-42. A particular version of this doctrine held that the federal government could do nothing to hinder slavery because that would discriminate against the slave states in favor of the non-slave states. See Calhoun, \textit{Resolutions on the Territories}, 4 CALHOUN'S WORKS, supra note 28, at 437.

\footnotesize\textsuperscript{59} Professor Fisher suggests that the inalienable power argument derives from Whig thinking. He traces the development of the doctrine to the Whig ideology that courts—and political bodies in general—should select "common-law doctrines that simultaneously promote the common good and do justice in particular cases." See Fisher, supra note 15, at 112-13, 120. He sees the inalienable power doctrine, in turn, as promoting that general precept. While recognizing the importance of Whig ideology in general in shaping judicial doctrine, this paper suggests that Democrats were the most frequent wielders of the inalienable power doctrine in the middle of the century.
general public’s good was the highest goal and when that good conflicted with individual interests, the public good triumphed. This was the dominant philosophy of the Confederacy exemption cases. Thus, it appears that the Democratic ethos accounted for certain developments in jurisprudence at the federal level. The limited evidence available also suggests that political affiliations of judges correlated closely with their approach towards vested rights.

IV. CLASH OF CONSTITUTIONAL VIEWS: 
THE EXEMPTION CONTROVERSY

Against this backdrop, the Confederate Congress formulated—and the courts almost unanimously approved—the act to subject those who had provided substitutes for conscription.

A. The Act and Public Reaction

Two motives combined in the fall of 1863 to impel Jefferson Davis to propose the revamping of the Confederacy’s conscription law. The first was a pressing need to expand the army. The Confederate military fortunes took a decided turn for the worse in 1863. Following defeats at Gettysburg, Vicksburg, and Port Hudson in July came the retreat from Tennessee in September, and the defeat at Chattanooga in November. The annual report of Secretary of War James Seddon issued in November 1863 accurately labeled the Mississippi campaign “disastrous.” The Confederacy was inundated with reports of the Northern draft and unfavorable comparisons of the size of the Confederate and Union armies. Secretary Seddon charged that the substitution law depleted the army of perhaps 50,000 soldiers. He, therefore, proposed its immediate repeal.60

Davis’ proposal was also the result of several years’ dissatisfaction with the Confederacy’s conscription program. When, in April 1862, the Confederacy enacted the first nationwide draft of the war, it granted broad exemptions and allowed anyone

60 See James Seddon to Jefferson Davis, November 26, 1863, 2 OR, Ser. IV, supra note 3, at 990, 995 (Northern draft will result in 300,000 men).
subject to the draft to provide a substitute. As the war took its
toll, morale suffered as soldiers in the field served while their
wealthy counterparts remained at home. The bill repealing the
exemptions for those who provided substitutes was designed,
the Richmond Whig reported, to quiet discontent among the
soldiers because the wealthy had been allowed to avoid service.
"A privilege such as the substitute law afforded was well calcu-
lated to excite jealously and discontent in the minds of the
gallant men who bore the brunt of this conflict." Mary
Boykin Chestnut, the well-known barometer of Confederate
opinion, recorded anger that some Floridians who had exemp-
tions were profiting during the war. The image of the principal
as a skulker pervaded Chestnut's thought. When she neglected
to visit soldiers at the Richmond hospital, she thought that she
knew "how men feel who hire a substitute and shirk the fight."
In debates on the bill, Senator Louis Wigfall of South Carolina
reminded Senators that "those who had fought under the suns
of July and August and under the frosts of October and Novem-
ber, and were not yet buried, were discontented that their rich
neighbors were not in the army to share their lot with them."
Privately, Wigfall and Secretary of War Seddon charged that
the opponents of the bill were "aiding the Yankees." 

The Yankees who were being aided did not have the same
problems surrounding conscription. Until July 1863, men sub-
ject to service in the North could purchase exemptions for three
years for $300. Because the United States Congress spelled out
exactly what the $300 purchased, the terms of the contract
were clear. From July 1863 until the end of the war, men sub-
ject to service in the North could provide a substitute in their
place. Many of the same concerns about fairness of conscrip-
tion, however, emerged in the North. In July, 1863, just after
Gettysburg, antidraft sentiment drove Irish immigrants in New

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81 Richmond Whig, Feb. 10, 1864; Charleston Mercury, Dec. 30, 1863 (bill
passes House, influenced by Army sentiment).
82 See Mary Chestnut's Civil War 464-65, 641 (C. Vann Woodward ed.,
Society Papers, 46-46; Confederate Union, Jan. 12, 1864; Chestnut's Civil
War, at 517.
York city to riot. In excess of 120 people died in what remains some of the worst rioting in American history. Nevertheless, there was not the same stigma attached to purchase of a substitute in the North as in the South. Even the office of the Presidency was open to one who purchased a substitute, as Grover Cleveland demonstrated when he was elected in 1884.53

Judging by the amount of money spent on purchasing substitutes, the popular fears that the exemptions aided the wealthy had some basis in reality. Some anecdotal reports show that the principals spent as much as $5,000 to $6,000 on substitutes.64 Debate over conscription was tinged by class conflict from the beginning. One Virginia resident warned Secretary of War James Seddon

> It is impossible to make poor people comprehend the policy of putting able-bodied, healthy, Mr. A. in such light service as collecting tithes and money at home, when the well known feeble & delicate Mr. B. — who is a poor man with a large family of children depending on him for bread — is sent to the front . . . . [T]he people will not always submit to this unequal, unjust and partial distribution of favor and wholesale conscription of the poor while the able-bodied & healthy men of property are all occupying soft places.65

The immediate public reaction to Jefferson Davis' proposal to eliminate the exemption was largely positive. The Charleston Mercury, writing while Charleston was in its 170th day of siege, rejoiced that the wealthy men who had bought their way out of service would at last be pulling their weight. The Mobile Advertiser was more emphatic. In the face of reports that the law was "creating a stampede among that class of Confederate

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55 Escott, supra note 64, at 119 (emphasis omitted).
patriots who have determined from the beginning to take no part in the great struggle for freedom which belongs to every individual who can fight or labor in the holy cause," the Advertiser offered a lesson to the men who "never learned... the obligations of allegiance and what they owe to society in return for the privileges which society has accorded to them." The Advertiser quoted the "books of International law to learn what these duties and obligations are." One of those books was Chancellor Kent's Commentaries. The paper noted that those who do not act to protect the government forfeit all "rights to the protection of the state, to life, liberty and property." It concluded by suggesting that the government should confiscate the property of those who did not serve.66

There were fears that the principals would try to undermine the Confederate government by selling their securities and emigrating from the Confederacy. "An abquestration from the Confederate limits of numbers of gentlemen... may be looked for," thought one newspaper.67 Despite those fears, there was little evidence of the "general exodus... to Yankeedom" that Virginia radical Edmund Ruffin thought that he detected. Instead, men were looking for favorable positions in the army.68

An important, vocal minority opposed the Act. Some cited practical reasons. One paper raised the specter that expanded conscription would leave few people to tend the farms and might lead to slave insurrection. South Carolina Senator John L. Orr, one of only two Senators to vote against the Act, whose speech opposing the act was widely discussed in Richmond, wrote to former South Carolina governor John Henry Hammond, asking if Congress expected "special interposition of Providence" to provide food for the Army as "God Almighty fed

68 See 3 Diary of Edmund Ruffin 326 (William Kauffman Scarborough ed., 1989) (reporting "exodus" and bitterly claiming that the exodus would raise the morale level of the remaining Southerners). [Mobile] Advertiser, Jan 12, 1864; Chestnut, supra note 62, at 540.
the Israelites.  

The most important opposition to revocation of the exemption came on constitutional grounds. Conscription itself was attacked as an unconstitutional interference with states’ rights. In an editorial in March 1864 entitled “The Sovereign States vs. Their Servants,” the Richmond Whig warned about the centralizing tendencies of the Confederate Congress. The editorial used conscription as an example of the unconstitutional infringement on the states’ rights. “The centralizing influences of war are apt to lead us astray. Nothing should make us forget that the five or six citizens composing the Agency at Richmond are simply and subtly the servants of their sovereignties.” Nevertheless, the Whig recommended that the constitutional problems be resolved at a constitutional convention after the war.  

Others urged vigilance now, rather than waiting for the end of the war. Veritas, writing in the Milledgeville, Georgia, Confederate Union, thought that

passing events clearly portray the aim and object of a certain class of our public men; and with the lullabies of “conflict,” “war upon the Administration,” “whip the Yankees then fight for the Constitution and States Rights,” “a strong government is necessary to our success,” and a hundred other cajoling opiates, they hope to put vigilance to sleep, and accomplish by indirect, what they dare not attempt by open and direct means.

Veritas feared those people sought to establish a dictatorship. The Charleston Mercury warned about the potential for loss of liberty from the proposals for consolidation of power, which were based on calls of military necessity:

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70 March 11, 1864. See also Richmond Enquirer, March 12, 1864 (editorial urges resolution of constitutional questions after the war) (reprinted from Charleston Mercury).

71 See [Milledgeville, Ga.] Confederate Union, May 16, 1864. See also Charleston Mercury, Jan. 5, 1864.
It is a bad sign when, in place of the steady self-possession and calm exercise of wisdom displayed by the Roman Senate after the battle of Cannae, the recklessness of alarm and the desperation of demagogism show their presence to the Congress of the Confederate States. . . . Instead of going into wild revolutionary talk, like some that has been uttered, . . . Congress may bend its efforts to infusing competency and vigor into the bureaus and departments of the Administration . . . . Anything else is madness.72

There were quite specific constitutional objections to the revocation of exemption, as illustrated by a comprehensive editorial in the Petersburg Express, which was reprinted in the North Carolina Hillsboro Recorder, edited by a former Whig Unionist. The editorial suggested that the bill violated two contracts: that the principal had with the government and the one he had with the substitute. It was destined to "create in a very large portion of the people the greatest discontent." If the government can "repudiate one kind of contract it can repudiate another, and as necessity is the argument in the present case, necessity may . . . repudiat[e] any and every other engagement by which it may be bound."73

Despite those objections, the overwhelming weight of public opinion was behind the act. When the Confederate Congress took up debate on the Act in December 1863, it proved extremely popular. Secretary of War Seddon tried to head off any constitutional claims when he initially proposed revocation of exemption in November 1863. He argued that the exemption was merely a privilege for which the substitute should have been grateful. Moreover, he thought that the privilege of exemption only extended to a single call to duty; one could never be permanently exempted from "the paramount duty, ever incumbent upon every citizen, as a patriot soldier, to defend his country." Jefferson Davis echoed Seddon's position in his annual message. When a substitute becomes liable, the principal

72 CHARLESTON MERCURY, Jan. 5, 1864.
73 HILLSBORO [NORTH CAROLINA] RECORDER, Jan. 6, 1864.
“should respond,” because the government had received no compensation to exempt the substitute.74

Following Davis and Seddon, most newspapers portrayed as trivial any constitutional concerns. The exemption was made at the whim of the legislature; if you could eliminate or change the age exemption, why not an exemption for the rich, the Charleston Mercury asked? On the floor of the House and Senate, the constitutional issues were once again brushed aside.75

The bill passed easily on January 5, 1864, in the Richmond Virginia Capitol building designed by Thomas Jefferson in the 1790s, used by the Confederate Congress. Only 17 members of the House and two members of the Senate opposed it. That night it was the “talk of the town.”76 In February 1864, another Act repealed all remaining exemptions. According to the best estimate currently available, the Acts brought 30,000 men to arms.77 But before some men reported they challenged the Act. The constitutional issues were destined for further exploration in the courts.

B. Judicial Resolution

In at least five states the principals—or those who provided substitutes for them— instituted habeas corpus actions. The cases worked their way through the state courts and were decided by the supreme courts of five states: Georgia, Alabama, Virginia, North Carolina, and Texas, in that order. They were decided between late February and late June, a span of about four months. These opinions represent, at the extreme, the triumph of radical Southern constitutional theory. And at their most moderate, they represent the attempt to maintain constitutional government.

How did Democratic values, such as narrow construction of grants, fit with preservation of social hierarchy and the desire of a minority of Southerners to maintain constitutional restric-

74 Seddon to Davis, Nov. 23, 1863, 2 OR, ser. 3, supra note 3, at 996-97.
75 CHARLESTON MERCURY, Dec. 30, 1863.
76 See [MOBILE] ADVERTISER, Jan 10, 1864, at 3.
tions on the central government? The remainder of this essay seeks to show how the opinions came to be written in the particular way that they were. The goal is to achieve a greater understanding of the role of the various ideologies on constitutional law and on the operation of the courts in the nineteenth century. Because they deal with the same issue and were issued almost simultaneously, they allow for a rare examination into the factors that contribute to a particular outcome—and a particular explanation of that outcome. By holding the issue and time constant, as the opinions do, one can see the factors that led to the result in the conscription cases.

In looking to origins of the judges’ decisions, this essay focuses closely on their political affiliation, because political affiliation offers a proxy for a judge’s position on the contracts clause. Because of the Act’s extreme popularity, it is sometimes difficult to make distinctions on approach to the Act based on political affiliation, but the authoritative study of the Confederate Congress has shown that representatives who had been Democrats (there were no political parties in the Confederacy) were more likely than former Whigs to vote for conscription.78 And by the “disheartening winter months of 1864-65,” there appears to have been “substantially greater zeal among former Democrats than among former Whigs” for conscription.79 This essay now takes up the opinions in the order in which they were delivered to show the panoply of views expressed in them and to demonstrate the mixing of the Democratic and Whig values that made up the courts’ responses to the conscription act.


It was in Georgia that a state’s highest court first heard the claim that the revocation of exemption was unconstitutional. Justice Charles F. Jenkins, a Whig who opposed secession, wrote the well-crafted opinion in *Daly & Fitzgerald v. Harris*,

79 *Id.* at 114.
which focuses heavily upon the intent of the Confederate Congress in making its exemptions. Jenkins, who was born in South Carolina in 1805, attended Franklin College (later the University of Georgia) and graduated from Union College in Schenectady, New York, in 1824. He then read law with John Berrian, who later served as United States Senator from Georgia. From 1836 to 1850 he served in the Georgia legislature, including four terms as speaker of the House. In 1850 he wrote and promoted the “Georgia Platform” of 1850, in support of the Compromise of 1850.

Then, in 1852, an “Independent Whig” meeting in Milledgeville, Georgia nominated Daniel Webster for President and Jenkins as Vice President. Webster died before the 1852 election, and the ticket received no votes outside of Georgia, but Jenkins continued his political career. He ran unsuccessfully for governor in 1853. He was unsuccessful in his run for the Supreme Court in 1859, when he was defeated by Richard Lyon, which caused a prominent attorney to lament that the Georgia Supreme Court had become the domain of “political intrigue.” Jenkins finally reached the bench in 1860 when Governor Joseph E. Brown appointed him to fill a vacancy. Brown became known, along with North Carolina governor Zebulon Vance, for his jealous guarding of state’s rights against the Confederate central government during the war, largely by opposing conscription. Jenkins’ career as a jurist was relatively short-lived, however; he served until 1865. After the Civil War he was elected governor without opposition.90

Much more than other opinions, the Georgia opinion relies on the common law. It begins by examining the 1862 Act, which provided for draft and for exemption, then explains the facts of the cases before it. The first substantive legal discussion is the examination of whether there was a contract. The problem is analyzed upon common law contract theory, which

90 See 10 DICTIONARY OF AMERICAN BIOGRAPHY 44; Baxter, supra note 52, at 495-96; ROBERT M. MYERS, CHILDREN OF PRIDE: A TRUE STORY OF GEORGIA AND THE CIVIL WAR 1533 (1972); C.C. Jones, Jr. to C.C. Jones, Nov. 11, 1859, id. 533-34. On Brown and Vance, see ESCOTT, supra note 64, at 89-93.
required mutuality of agreement. 51 “Did the Congress so intend?” Jenkins asked. “For beyond their real intent and meaning they cannot be bound.” 52

An examination of the circumstances of the Act satisfied Jenkins that Congress did not intend the Act to create a binding contract. Jenkins dispassionately portrayed the vast power of the Congress over raising an army. Starting from the premise that Congress had complete power over individuals, Jenkins inferred that it is doubtful that Congress had diminished its rights by allowing a binding exemption. But Jenkins did not think that it was necessary to draw inferences on exemption from an ambiguous statute. The statute had “no specified terms of a substitution exemption, no declaration of legal consequences to ensue,” in short, “nothing which savors of abdication or suspension of the power confessedly possessed by the Legislature over him who is permitted to furnish a substitute.” 53

From the war power he concluded, “[t]his view of the danger of the loss to the public service is too palpable to admit the supposition that it could have escaped the attention of Congress.” 54

Further, there was no protected contract right because there was no clear intent by Congress to make an irrevocable exemption. The statutory language established that the legislature asserted an absolute right to compel service, but was permissive in granting an exemption. Finally, the same legislature that granted the exemption took it away. “This is equivalent to a declaration that in authorizing substitution they had not intended to bind their constituents irrevocably, but to grant a

51 Daly & Fitzgerald v. Harris, 34 Ga. Supp. at 43. The utility of the subjective theory of assent is useful to jurists who want to narrowly construe government contracts. Nineteenth century contracts law applied the subjective theory outside government grants. But already there was a movement towards objective assent, which did not look to the parties’ true intentions but only to the apparent meaning of the contract. Compare 2 JAMES KENT, COMMENTARIES * 556 (2nd ed. 1832); 2 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 3-4 (1855).
52 Here, as in many Jenkins opinions, a treatise, the popular Chitty’s Contracts, published in England, is cited for a basic legal proposition, that “mutuality or assent is the essence of a contract.” Daly & Fitzgerald, 34 Ga. Supp. at 43.
54 Id.
privilege revocable at the will of themselves. The court next refuted the argument that the exempted men had acquired a right to exemption because they expended money, which it characterized as based on "false hopes and expectations upon the statute." The court refuted this argument by analogy to exemptions based on occupation, such as a manufacturer of necessary supplies. The manufacturer acquired no vested right to exemption when he purchased equipment to begin manufacturing.

The next paragraph is unique among the courts' opinions. The Georgia court notes that "the character of our free institutions authorizes, nay invites severe criticism upon the acts of public servants and if within reasonable limits, its effects are decidedly conservative." Presumably the court thinks that the criticism and hence conservatism are appropriate. The conservatism is the protection of individuals' vested rights against revocation by subsequent legislatures. But "there is a manifest proneness to excess, tending to impute wrong designs and thereby weakening public confidence and enervating legitimate power." When the legislature has rightful authority, the courts cannot impute an intent to oppress citizens. The court closed this portion of its opinion by urging support for the men who challenged the revocation of exemption:

Here we turn aside from the argument to enter a voluntary protest against the prevalent denunciation of exempts by substitution. Whilst it would be excessive tenderness to give them relief at the cost of detriment to the public service, we can readily imagine that many of them honestly mistook their rights. Neither in availing themselves of the privilege allowed by law, nor in appealing to the Courts to define the extent of that privilege, have they exhibited any lack of patriotism or courageous manhood. . . . Let good and true men of this class neither leave home laden with unmerited reproach not encounter it on the field to which they repair."

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48 Id. at 47.
49 Id. at 48.
50 Id.
51 Id. at 49.
52 Id. at 49-50. For discussion of the conflict over wealthy people obtaining
The remainder of the Georgia opinion turns to the second issue that concerned Jenkins. Even if there had been mutual assent, "had the legislature and executive departments . . . power to make such a contract?" Jenkins began his discussion by invoking "writers upon the social compact and political law": Burlamaqui, Emmrich Vattel, Secretary of War (later President) James Monroe, and John C. Calhoun. Those writers established "the proposition inwrought with the foundation of all society, that each member owed to all other members . . . the duty of defending the State, as far as he is capable." No government could "release him from this obligation." Cases from the United States Supreme Court and state courts demonstrated that a state could not "divest itself or its successors of any power necessary to the well-being of the state." A practical argument followed to show why the Confederate Congress could not have the power to grant irrevocable exemptions: the Congress could grant exemption to a half-million soldiers and "thus, with a powerful enemy on the borders, alien by contract the entire defensive force of the country, placed at their disposal solely for its defense." This reference to the powerful enemy is the first and only reference to the Northern army. Where other states' opinions drip with fear of the enemy, Georgia's does not.

The opinion then notes that neither practical reasoning nor references to the social compact and other original principles are necessary; the Confederate Constitution provides the an-
The Confederate Congress has only powers expressly delegated to it. The people delegated the war power and—Jenkins assumed without citation—the power necessary and proper for carrying out the delegated war power. "Far from being necessary and proper for that purpose [to fulfill war powers] it may be well stated that when contracts of exemption are made they hinder and obstruct all subsequent efforts to raise armies, and, within the range of possibility, they might be so multiplied as to render impracticable the raising of an efficient army, or, in other words, to defeat the exercise of the power altogether." The opinion concludes by discussing the need to have discretion to exempt "men who can be more useful at home than others, and more useful there than in the field." Congress needs to have discretion to exempt men, but cannot be bound by an exemption. That would hinder the exercise of "another power expressly granted for a purpose vital to the Confederate States." The opinion, thus, uses common law contract principles to deny the principals their claim. It goes on to discuss in balanced terms, Congress' inalienable right to request service from its citizens. Such an opinion leads one to conclude that Jenkins, like better-known Whig judges, tried hard to resolve complicated constitutional issues in dispassionate common law terms.

Jenkins' balanced approach is not surprising given his other opinions. During his five years on the bench he wrote several other opinions dealing with conscription. In an exhaustive opinion delivered at the November 1862 term, Jeffers v. Fair, Jenkins upheld the constitutionality of the first conscription act. Drawing upon the experience of the framers of the United States Constitution and upon more recent American history, Jenkins established the necessity of granting the Con-

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96 Id. at 51.
97 Id. at 54. Jenkins' reading of the scope of the war powers' implied necessary and proper clause was extremely narrow.
98 Id. at 55.
federate government power to conduct war for the means specified in the Constitution. The opinion carefully threaded the path between granting absolute power to a central government to conduct war for any purpose, which leads to a "consolidated republic," and the reservation of too much power to the states, which leads to the opposite and equally fatal result: "the shadow of a government" and ultimately the failure of "the experiment of Confederate Republics."

Jenkins' language and citations are to republican thought. Besides the Federalist he cited continental scholars to demonstrate that civil, natural law itself limited the power of a government. Much like the framers of the Confederate Constitution, Jenkins sought to create a world that gave states and individuals the power to balance the power given to the Confederate government.

According to Jenkins, even in time of war the government had to follow the Constitution. When he upheld the Confederacy's first conscription act, Jenkins concluded his opinion with gratification that "when flagitious war is engulfing our country" the court is able "in perfect consistency with the obligations of our official duty" to uphold the Confederacy's power to act. Perhaps Jenkins' clearest divergence from the Democratic radicals came in an opinion upholding the Confederate impressment act, which allowed the army to impress civilian merchandise into military service. The court must give deference to the Confederate Congress' interpretation of the Constitution, but he warned that "not even war, with its attendant horrors, may rightfully impel the judiciary. Positive conviction

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102 Id. at 365-67 (citing Burlamaqui, Rutherford, Blackstone, Vattel). In another opinion Jenkins listed the Constitution's checks and safeguards against abuse of the war power: short tenure of officials, multiple members of Congress, division of Congress into two houses, President has veto power, and judiciary may arrest unconstitutional laws. Barber v. Irwin, 34 Ga. 28, 38 (Nov. Term 1864) (reaffirming Jeffers by upholding the constitutionality of conscription). On intention of the framers of the Confederate Constitution and the American Constitutional Tradition, see Donald Nieman, Republicanism, the Confederate Constitution and the American Constitutional Tradition, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 201 (Kermit L. Hall & James W. Ely, Jr., eds., 1989).
of constitutional obligation may not be yielded under any circumstance." Even to the end Jenkins stuck by his convictions. At the March 1865 term, he explicitly avoided extreme opinions, promising to bridle usurpation, even when done for public good. 103

Jenkins’ position, protective as it was of the constitutional rights of Georgia’s citizens, ultimately upheld the Confederate government’s actions. Justice Richard Lyon acted even more firmly to protect the rights of Georgians. Lyon, a Whig who attended Franklin College (later the University of Georgia) and read law with Georgia Justice Joseph Lumpkin, was elected by the legislature in 1859 to the Supreme Court and served until 1866. 104 He filed a brief, ambiguous concurrence to Jenkins’ opinion in Daly, in which he said that he did not subscribe to Jenkins’ reasoning, but thought it unproductive to supply his own analysis.

One can gauge Lyon’s sentiments from his dissent in an earlier case involving substitutes, Weems v. Williams. The majority opinion in Weems, written by Jenkins, upheld an 1863 law revoking a principal’s exemption when the substitute he had provided became liable for service. Weems, thus, involved substantially similar issues to Daly. (Daly differed from Weems only in that it required a principal to serve even if the substitute was not independently liable for service.) In an opinion strangely bereft of citations to authority—its only citation in the seven page opinion was to an obscure treatise on statutory interpretation—Jenkins brushed aside the constitutional issues, arguing that the legislature merely granted a privilege, not a binding contract. Moreover, he pointed out, the substi-

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103 Jeffers, 33 Ga. at 371; Cunningham v. Campbell, 33 Ga. 625, 634 (Dec. Term 1863); Parker v. Kaughman, 34 Ga. 140 (March Term 1865). In Parker, Jenkins considered the Confederate Congress’ act compelling military service reasonable in light of the danger. Because republican principles contained no “necromancy to spirit away the invader” the Republic needed to “match strength with strength.” Id. at 142-43. Likewise, in a case involving construction of a grant of right of way to a railroad he wrote that courts must never act according to the unsound ethical maxim, “the end sanctified the means.” Savannah, Albany & Gulf R.R. Co. v. Shields, 33 Ga. 601, 616 (Nov. Term 1863).
104 See MYERS, supra note 80, at 1536.
tutes were accepted pursuant to a military regulation that explicitly stated that the principals would become liable to service if the substitutes were conscripted, thus simplifying the Contracts Clause issue.\textsuperscript{105}

Lyon's dissent in \textit{Weems} disposed of the contract issue by arguing that the military regulations could not limit the rights granted by statute; it rested on the Confederate government's moral obligation to uphold exemptions that it had granted. The first conscription act was harsh and to mitigate its rigor, the government allowed exemptions. "This privilege \ldots was a right in the citizen, as absolute and indubitable as the liability was imperious and necessary." To revoke the exemption left the principals with the "feeling] that they have been cruelly oppressed by the Government in breaking up and defeating a contract made by them upon its most deliberate consent. They must feel that the Government \ldots has violated its blighted faith—a thing much more injurious than the loss of a few soldiers from the army."\textsuperscript{106}

2. Alabama: "Self-preservation is the supreme law"

Alabama's opinion, \textit{Ex Parte Tate}, was written by John Phelan, a Democrat who actively promoted secession. Born in New Jersey in 1810, Justice Phelan graduated from the University of Tennessee. He was appointed in 1864 to fill a vacancy on the Alabama Supreme Court. Justice Phelan opens with a general discussion of the nature of government: "Government is ordained by God and the powers confided to governors are held in trust for the benefit of the governed."\textsuperscript{107}

Justice Phelan immediately established the power over "war and peace" as he called it, a power that ranks first in importance.\textsuperscript{108} He "fortified his position with references to

\textsuperscript{106} \textit{Id.} at 434.
\textsuperscript{108} \textit{Tate}, 39 Ala. at 256. "This war-and-peace power, conferred on the Congress
Vattel and Burlamaqui, that the state has the right to compel service from its citizens, and to Wheaton, that each state has the right of self-preservation, which includes all incidental rights necessary to preserve the government, including compelling military service. Calhoun, the court wrote, showed with particular reference to the American government that "exigencies will arise in which the entire power and resources of the community will be needed to defend its existence .... Self preservation is the supreme law, as well with communities as individuals." \(^{109}\)

Having established the political principles under which the court operated, Justice Phelan framed the question as whether the Confederate Congress has the power to grant "permanent and irrepealable exemptions ... upon any terms ... whatsoever?" \(^{110}\) He held that Congress could not make irrepeaable exemptions. Justice Phelan established that sovereignty encompassed certain powers that no legislature could grant away. "Certain high functions ... can neither be surrendered nor sold. They cannot be vested in private persons ...." \(^{111}\) He focused particular attention on the power of taxation and eminent domain, drawing upon *West River Bridge*.

Phelan surveyed the shifting opinions in the United States Supreme Court on the taxing power to show that "In view of this divided state of legal opinion, ... it may be fairly claimed, that the question, whether the *taxing power* is not one of those great attributes of sovereignty, which cannot be finally surrendered or impaired by an ordinary act of legislation, still remains *in dubio."\(^{112}\) But if there was doubt about whether the legislature could grant away its taxing power, "there are un-

\(^{109}\) Id. at 257, 259 (quoting Disquisition).


\(^{111}\) *Tate*, 39 Ala. at 259.

\(^{112}\) Id. at 263.
questionably certain high attributes of sovereignty, which do not allow of any such limitations." That higher power was the right of eminent domain, which Phelan described as "the right which belongs to the society, or the sovereign, of disposing in case of necessity, and for the public safety, of all the wealth contained in the State." The right of eminent domain could not be surrendered because the right was an attribute of sovereignty itself.

No matter who may be the holder of property, nor how solemnly any legislature may have declared their intention that its grantees shall have an exclusive right to the enjoyment of that property, whether it be a tract of land, or the franchise of a railroad company, such legislature cannot make them more or less than private property at last, and this great attribute of sovereign power holds all property subject to be taken for public uses when the common welfare of the community requires it. What sort of government would that be, which did not hold under its constant direction and control the great public interests which stand connected with our roads, bridges, ferries, turnpikes, railroads, and canals; our jails, penitentiaries, court-houses, and capitolis; our market-places, streets, wharves, in towns and cities; our asylums, hospitals and cemeteries, and public seminaries of learning; and, as more immediately connected with the public defense, our forts, arsenals, armories, and navy-yards?

Having firmly established that eminent domain powers could not be alienated, Phelan analogized the war power to eminent domain. If the eminent domain power could not be alienated, what principle would allow a legislature to grant irrevocable exemptions from "that more vital and essential sovereign attribute, the right to call into the field every citizen of the state should public safety require it?"

"All contracts are made subject to those rights, and nothing

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113 Id. at 264.
114 Id.
115 Id. at 265.
116 Id. at 268.
can be done to interfere with them."\textsuperscript{117} Phelan concluded that "no respectable authority can be found which conflicts with the idea that contracts incorporate the principle of eminent domain."\textsuperscript{118} He then clinched the case with reference to the greater importance of the war power. To further show that the exemption was not binding, because military exemptions are a mere privilege, the opinion invoked \textit{Commonwealth v. Bird}, a Massachusetts case from 1810.\textsuperscript{119}

The court's exhaustive treatment of eminent domain and taxation cases showed that every state has the right to eminent domain and that its right cannot be given up by contract:

It would exhibit a strange adjustment of the principles and powers of government ... that all the money in the world could not suffice to purchase, even through the solemn formalities of a legislative contract, the exemption of a piece of land from being taken by the state for a road, or a bridge, or the site for a fort, if the public good required it; and yet that an able-bodied citizen could be allowed by law to buy, for a few dollars, an absolute exemption from the military service of his country, although that country might at the time be engaged in a death-struggle to maintain his liberties and its own existence.\textsuperscript{120}

Phelan's other opinions point in the direction he was headed. He consistently interpreted the Constitution and legislation in ways favorable to the government. In a technical opinion turning on statutory interpretation, he held that males became liable for active military service on their eighteenth birthday. Another opinion turning on an intricate statutory interpretation and analysis of federal-state relations upheld Alabama's

\textsuperscript{117} \textit{Id.} at 268-69.

\textsuperscript{118} He cited fifteen cases, including \textit{Charles River Bridge}, to support his inalienable power argument. Phelan's citations were to cases upholding the traditionally Democratic argument. Elsewhere in the opinion, he referred to Chief Justice Bartley's opinion in \textit{Toledo Bank v. Bond}, 1 Ohio St. 623, which refuted \textit{Dartmouth College}'s protective stance towards the Contracts Clause. \textit{See id.} at 263.

\textsuperscript{119} \textit{See id.} at 270.

\textsuperscript{120} \textit{Id.} at 272.
right to require plantation overseers who had been exempted from service in the Confederate Army to serve in the state militia.121

Phelan rested on the bulwark of inalienable war power; the nuances of contract law and of statutory interpretation were not important to the decision. The court explicitly "waive[d] the discussion of" whether the original exemption act should be construed to allow Congress to revoke the exemption at will. Instead, Phelan found "higher and firmer grounds on which to base a decision."122 One should probably admire the decision for its forthright grappling with the central issue and certainly for the insight it provides into Alabama in relation to the other Confederate courts. Justice Phelan in no way wanted his decision on this political issue to be confused with technical issues of contract law. That may not be surprising, because his three sons were serving in the Confederate Army and his brother, James, was one of the staunch defenders of the Act's necessity in the Confederate Senate.123

Justice George Washington Stone delivered a mysterious one paragraph opinion, which defies classification as either a concurrence or dissent. Stone wrote that he did not want to file a dissent, but observed that he did not agree with Phelan's opinion. Stone, identified by his biographer on somewhat dubious grounds as a lifelong Jacksonian Democrat, was born in 1811 in Virginia and read law in Fayetteville, Tennessee, then

121 See Ex Parte Starke, 39 Ala. 475, 488 (June Term 1864); State ex rel Dawson, 39 Ala. 367 (June Term 1864). The intricate Dawson opinion turns upon whether the exemption provided to overseers was tantamount to a delegation from the Confederate Army to a farm. Phelan concluded that it was a mere exemption, so that the overseer was not enrolled in the Confederate Army and was thus available for state service. The militia was critical for the protection of the state against slaves. See CLARENCE L. MOHR, ON THE THRESHOLD OF FREEDOM: MASTERS AND SLAVES IN CIVIL WAR GEORGIA 214-16 (1986).

122 See Tate, 39 Ala. at 272.

123 Id. One son had already been killed at Fredericksburg; another died at Petersburg. See 4 DICTIONARY OF ALABAMA BIOGRAPHY 1356. On his brother, see CONFEDERATE UNION, Jan. 12, 1864. Phelan's poetry, like his judicial philosophy, was heavily influenced by his wartime experience. See "Ye Men of Alabama," and "The Good Old Cause," in WAR POETRY OF THE SOUTH (William Gilmore Simms ed. 1866).
migrated to Alabama in 1840, where he served in the legislature. He served on the court from 1856 until 1865 and then again, after the war, from 1874 to 1894. Stone's position is somewhat puzzling, because he had previously upheld portions of the conscription act and seemed ready to give the Confederate government ample power pursuant to the war power. Perhaps his dissenting opinion in *Dawson*, which argued that the state militia could not conscript farm overseers who were exempted from service in the Confederate Army, offers a key to understanding Stone. *Dawson*, and some of Stone's pre-war cases, promised to protect individuals from the government, a position at odds with Phelan's radical opinion.\(^\text{124}\)

3. Virginia: "the army... would be the most efficient instrument... for the defeat of the object in view"

The Virginia opinion in *Burroughs v. Peyton* was the longest of the five. It relied upon careful parsing of the constitutional issues, followed by a finding that there was no enforceable contract. Forty-seven year old Justice William Robertson, graduate of the University of Virginia law school at age twenty-five and a secessionist Democrat, wrote the majority opinion.

Robertson's opinion began by settling the fundamental question of whether the Confederate Congress had the power to pass any conscription at all. He was sensitive to the "transcendent" power of "coercing the citizen to render military service." He relied upon a detailed parsing of the language of the Con-

\(^{124}\) 4 BIOGRAPHICAL DICTIONARY OF ALABAMA 1628-29; WILLIAM H. BRANTLEY,
CHIEF JUSTICE STONE OF ALABAMA 95 (1964); HUEBNER, supra note 18, at 160-85;
J. MILLS THORNTON, POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA, 1800-
1860, 239 (1978); Ex Parte Hill, 38 Ala. 429, 447 (Jan. Term 1863). In *Hill*, after
discussing the need to balance state and federal powers, Stone wrote that "the
magnitude of the war that is being waged against us renders it necessary that
the government put forth its greatest strength for the protection of our liberty... [This] could not be accomplished by any means short of compulsory
enrollment; and hence I hold that the conscription acts are constitutional." *Hill*
emphasized the importance of respect for the sovereignty of the state and federal
government, a hint that he wanted to balance state, federal and individual inter-
esta. Id. at 446; *Dawson*, 39 Ala. 367, 393; Stately v. Langley, 34 Ala. 311 (1859)
(invalidating law that took land for private corporation's purposes).
stitution, as illuminated in light of the *Federalist*, English practices before the Revolution, and John Marshall’s biography of George Washington. The Virginia court also emphasized the war power, with reference to the American situation. Instead of the bare question of power, the right of the state to compel the ultimate sacrifice from its citizens, Virginia rested on a refined analysis of the *Federalist*, as well as from examples of conscription from the Revolutionary War and the War of 1812. That illustrated that the framers of the Confederate Constitution included conscription as one of the war powers. He relied on a careful balancing of power in interpreting the Constitution: there was no serious reason to fear military dictatorship from conscription because “the army, when raised, would be the most efficient instrument that could be devised, for the defeat of the object in view.”

Having established the right to conscript, Robertson then argued that the Congress did not have the constitutional power to make a contract that would exempt a person from future service in the military: “No government can have the right to endanger the life of the nation it represents, by contracting that it will not exercise the powers confided to it.” Robertson supported his assertion with prominent Taney Court precedents.

He went a step further and said that Congress never tried to make a binding contract. He again used Taney Court cases, including *Butler* and Justice Campbell’s famous phrase that a “plain distinction exists between statutes which create hopes and expectations, and those which form contracts.” Then the narrow construction of grants came in. There was no evidence that the government believed that it was entering a contract and he refused to recognize equitable grounds for relief.

The elegant opinion, which is attentive to the potential for

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126 *Burroughs*, 57 Va. at 487, 489 (citing *East Hartford*, which held that the state cannot make irrepealable contracts on matters of public interest).

127 *Id.*

128 *Id.*
abuse by the central government may result from Robertson's training at the University of Virginia, where Henry St. George Tucker was teaching. Tucker's Lectures on Natural Law, which Robertson would have attended, advocated a similar balancing of power with liberty.\textsuperscript{129} The opinion differs from the others in its abstraction, its self-conscious application of the rule that the Constitution should be construed to protect liberty, its questioning of where power exists in the government, and its reasoning based on general principles of government, which have been revealed in the American experience.

The press seized upon the unanimous opinion of the Virginia Court of Appeals to support conscription. The Richmond Whig reprinted a paragraph, including Robertson's carefully balanced statement that "A nation cannot foresee the extent of the dangers to which it may be exposed; it must, therefore, grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength." Robertson recognized the inherent danger in conferring the power on a central government, but reassured that denying the central government national power was not the solution. Rather, the quotation continued, "The hazard of abuse should be guarded against, by so framing the government as to render it unlikely that it will use the power oppressively."\textsuperscript{130} The Richmond Enquirer used the opinion to respond to a Charleston Mercury editorial charging the Confederate Congress with violations of the Constitution. Jefferson Davis relied upon the Virginia opinion to support conscription.\textsuperscript{131}

\textsuperscript{129} Henry St. George Tucker, A Few Lectures on Natural Law (J. Alexander, Charlottesville, 1844).
\textsuperscript{130} Richmond Whig, March 11, 1864. The paragraph printed in the Whig included extra phrases that do not appear in the published opinion.
\textsuperscript{131} See Richmond Enquirer, March 12, 1864 ("The Supreme Court of Virginia has unanimously decided that the Conscription act is constitutional. There is no need of a Convention on that point."). The Charleston Mercury editorial, "The Course of the States," was reprinted in the Richmond Whig, March 11, 1864; Jefferson Davis to Zebulon Vance, OR III, supra note 3, at 200-01.

The seriatim opinions of the three North Carolina Supreme Court Justices in *Gatlin v. Walton* make North Carolina the most illuminating of all the courts because of their exhaustive treatment and because the Chief Justice dissented.

Justice William Battle, a professor of law at the University of North Carolina at the beginning of the war, wrote one of the two majority opinions for the North Carolina court. Battle, who had served in the North Carolina legislature as a Whig before the war and opposed secession, began his analysis by observing that the powers of the legislature were closely modeled on those of the British Parliament. He then went on to examine the powers of Parliament and the early American states, before the ratification of the Constitution, to "aid us...in our investigations." He thereby developed the position that states—before the adoption of the United States Constitution—had the right to violate contracts.152

Having established the awesome power of the states underlying the Constitution, he then turned to the United States Constitution and demonstrated, by reference to James Madison’s *Federalist* 23, that the war powers “ought to exist without limitation.” The Constitution’s war power, which “is given in the most unlimited terms,” was based on the recognition that “[t]he first duty of a nation is that of self-preservation, and to that end, it has a right to do everything necessary for its preservation.”153

Battle then built on the war power to argue that the Con-

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152 2 *DICTIONARY OF AMERICAN BIOGRAPHY* 58 (1929). Justice Battle’s opinion recognizes that the American states followed Great Britain and the exceptionalism of the British model: “The source from which legislative power was supposed to be derived in the nationalities of the Western continent was very different from what it was in the Eastern; but the extent of power, except in the cases of a restriction by a written constitution, varied very little in the legislatures of the free states of America from that of the Parliament of Great Britain.” *Gatlin v. Walton*, 60 N.C. 310, 327-30 (1864). Perhaps his interest in British precedent derives from his work as editor of *NORTH CAROLINA REPORTS*, 1789 to 1798.

153 *Gatlin*, 60 N.C. at 332, 331, 332 (quoting Vattel and citing *Ex Parte Tate*, 39 Ala. 254).
federate government has the power of eminent domain and from that, presumably, can ‘whenver the necessities of the country should require . . . annul and disregard it.’\textsuperscript{134} This was a variance of the inalienable power doctrine.

But Battle did not need that argument, because he argued that exemption was neither a tangible piece of property nor a contract, but was a mere ‘privilege.’ He went on to argue that the contract incorporated the government’s right to require service under the war power. Thus, the justice who had already lost two sons in the fighting was able to say ‘The necessities of a nation as of an individual, have laws of their own, and that is the true meaning of the celebrated maxim, ‘necessity has no law.’’\textsuperscript{135}

The other justice in the majority was Mathias Manly. Manly, a Whig who may have switched allegiance to the Democratic party in the late antebellum period and who favored secession, was also educated at the University of North Carolina. He was elected by the legislature to the court in 1859 to replace Thomas Ruffin.\textsuperscript{136} Manly began with a key tenet of Democratic jurisprudence, that all contracts are subject to conditions. He recognized that much of the discussion was theoretical and rarely discussed, because the principle has rarely ‘supposed to have any bearing upon the practical affairs of mankind.’\textsuperscript{137} Nevertheless, Manly explained the emergency:

> If any evidence were proper or needful to confirm the truth of the view taken by Congress, a survey of the situation at that time would convince any unprejudiced mind. A large portion of the States was occupied by a foreign foe. The invasion was established by a power, stronger in all military appointments than ours, having an overwhelming population more numer-

\textsuperscript{134} Id. at 336.

\textsuperscript{135} Id. at 336-38.

\textsuperscript{136} 6 BIOPGRAPHICAL DICTIONARY OF NORTH CAROLINA 357-68; James Hamilton, North Carolina and the Confederate Courts, 4 J. S. HIST. 366 (1937); Reuel E. Schiller, Conflicting Obligations: Slave Law and The Late Antebellum North Carolina Supreme Court, 78 VA. L. REV. 1207, 1220-21 n. 61 (1992); 3 THE PAPERS OF THOMAS RUFFIN 104 (J.R. Hamilton ed., 1920).

\textsuperscript{137} Gattlin, 60 N.C. at 342.
ous in the proportion of five to one, and large armies were mustered and marched into the country by every open avenue to pillage and waste the land. . . . Surely the time had come, if such a time can come, when the government has a right to call upon every man to aid in its defense. Authorities are abundant, as to the rights and duties of the war power in such an emergency. . . . Every other consideration yields to self-preservation—the supreme law. 138

Manly supported his arguments with reference to Vattel, Burlamaqui, Wheaton and Calhoun to show that in such emergencies the state's war power supports calling men and money into service. Manly's citation to Calhoun provides a direct link between the antebellum philosophy and the conscription cases.

Manly then shifts into a straight contracts analysis, asking whether there ever was a contract. He relied upon a Justice Campbell opinion to distinguish between statutes that create contracts and those that merely gave rise to hopes. How could the government have intended to make a contract, he asked, when the government merely gave up its right to service and received nothing in return? The government never received consideration for the contract. And the government never recorded any specific intention to grant a permanent exemption; relying again upon the pillar of Democratic jurisprudence of Charles River Bridge, as well as Parsons on Contracts and a North Carolina case, he concluded that there was no contract. 139

Chief Justice Pearson, the 59 year old former Whig unionist from western North Carolina, who became a Republican in 1868 and then served in North Carolina government, filed the only written dissent of the seventeen judges involved in the five cases under study. His opinion is particularly important because it demonstrates that another outcome besides support of the Confederate central government was possible. 140

138 Id. at 340-41.
139 Id. at 344, 345, 346 (citing McCree, 47 N.C. (2 Jones) 186).
140 Lower courts in Georgia also invalidated various conscription acts. See, e.g., Daly v. Harris, 33 Ga. Supp. 38, 40 (1864) (Judge Bingham held 1864 Conscript-
Pearson had previously foiled attempts by the Confederate Army to suspend *habeas corpus*. His opinions, which jealously guarded individual rights at the expense of the central government and the war effort, attracted the attention of President Davis. North Carolina Governor Zebulon Vance, notorious for his states' rights stance, referred to Pearson's opinions in correspondence with Davis.\(^{141}\)

Pearson had also previously dealt, in an opinion written in chambers, with a case involving the conscription of a principal arising from the Confederate Congress' Conscription Act of 1863, which expanded conscription by increasing the maximum age for service from 35 to 45. When that happened, many substitutes were then liable for service themselves. The War Department maintained that when his substitute became liable for service, the principal became liable. Pearson's opinion in *Ex Parte Bryan*, written in June 1863 exempted the principal.\(^{142}\)

Pearson had also issued the first decision in North Carolina on the 1864 Conscription Act when he decided *Gatlin* while sitting as a single justice in his chambers in February 1864. It was an open secret in North Carolina that when the entire court met in June, Manly and Battle intended to reverse Pearson and uphold the act. Nevertheless, Pearson's decision led Attorney General Thomas Bragg to propose halting conscription in North Carolina and to propose the suspension of *habeas corpus*.\(^{143}\)

Pearson was, therefore, well-familiar with the issues. He began by noting the well-established right of courts to review the constitutionality of legislation and then distinguished between legal questions and political questions. Probably the attempt to distinguish political from legal questions is an attempt to remove the debate from the highly suspect arena of

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\(^{141}\) See ESCOTT, *supra* note 64, at 79-86.

\(^{142}\) See *In re Bryan*, 60 N.C. 1 (1863); *In re Ritter*, 60 N.C. 76 (1863); Mann v. Parke, 16 Va. 443, 33 Ga. 413. OR III, 231.

politics. It is here that he boldly stated that "my brothers Battle and Manly have put the decision on the only ground which is unanswerable, 'necessity knows no law;' for if the Courts assume that the government may act on that principle, there is no longer room for argument."\footnote{Gatlin, 60 N.C. at 350.}

Justice Pearson noted that in this case the law, the domain of the courts, related solely to "the dry question of the common law," whether there was a contract between the individual and the Confederate government. Pearson went through the basic requirements of a contract: parties capable of contracting, "a thing to be the subject of contract," and then the keystone of consideration. For Pearson, the question turned upon whether the government and the individual had agreed to "an exchange or a 'swap,' as it is commonly called." Did the government give up something in exchange for the exemption of the soldier? Pearson thought so: "The Government agrees to discharge a man in consideration of his putting a sound, able-bodied man in his place, and it is done; this is a valid contract."\footnote{Id. at 352.}

Having established to his satisfaction the existence of a contract, he then argued that the Confederate Congress' power is limited. "The other governments referred to, have no written Constitution, and may act on the broad and arbitrary rule, 'the safety of the state is the supreme law,' but the Confederate States has a written Constitution."\footnote{Id. at 355.}

5. Texas: Moral Philosophy and Virginia Revisited

Last, and in many ways least, the Texas Supreme Court followed with \textit{Ex parte Mayer}, delivered in June 1864. Justice Ruben A. Reeves, elected to the court in 1864, is obscure. Born in 1810 in Tennessee, Reeves read law in Kentucky and practiced in Dallas before his election. Like the Chief Justice of the Texas Supreme Court, Owen M. Roberts, Reeves supported secession. After the war he served on the Texas Supreme Court in the 1870s and later served as a Justice on the New Mexico
Supreme Court.\textsuperscript{147} Reeves began his opinion, which resembled an exegesis on abstract constitutional issues more than it did an opinion deciding a concrete case, by marking out the express and implied powers of the Confederate and state constitutions. The expressed power of Congress to raise armies was intended, "no doubt, to confer a real and substantial power." The opinion recognized the multi-faceted balancing necessary among the rights of the state government and the need to respect the rights of the Confederate states as a whole. Disrespect for those concerns would "pervert the power which was intended for the protection and common defense of all the states into an engine of self-destruction; and its work would be accomplished with as much certainty as though the territory of a state should be invaded by physical force, under authority of the Confederate states."\textsuperscript{148}

The court then made the revealing observation that the legislature is to decide on the appropriateness and constitutionality of laws. Courts, then, do not so much invalidate laws because they are unconstitutional, but simply withhold their consent, thus making the laws unenforceable. That enigmatic observation led the \textit{Mayer} court to the conclusion that great deference should be given to the legislature's actions.\textsuperscript{149}

The court next moved to the observation that nothing prevented Congress from violating the obligations of contract and cited an opinion issued by a justice riding circuit. But the court took seriously the Contracts Clause argument; it did not "intend to rest the decision... on the doctrine that congress can violate the obligation of a contract."\textsuperscript{150} Reeves, therefore, discussed Contracts Clause jurisprudence generally to deduce several principles. Reeves thought that there was no contract because the type of contract protected by the Contracts' Clause


\textsuperscript{148} Ex Parte Mayer, 17 Tex. 715, 718, 718-19 (1864).

\textsuperscript{149} \textit{Id.} at 719.

\textsuperscript{150} \textit{Id.} at 720.
are ones by which private property vests, not rights “growing out of governmental regulation.”\textsuperscript{161}

The analysis is also substantially less complete than the other courts'. Rather than canvassing the whole scope of opinions, it discusses Justice Daniel's opinion in Butler in one summary paragraph. In the next paragraph it discusses the Massachusetts case of Bird. Then the court concludes that only contracts related to private property are protected. The opinion’s reliance upon Butler and Bird, rather than resorting to the government’s power to compel service, is interesting because it suggests that the Texas court was moderate.

That completes the main work of the opinion. In the remaining paragraphs Reeves disposes of the just compensation argument with the same reasoning he used to dispose of the contract clause argument—the just compensation principle only applies to tangible property. Next comes a comparison of the right of a sovereign to compel military service and the right to just compensation, concluding that taking property is analogous to compelling military service. “The right of eminent domain, as applied to property, is the same right, by whatever name it may be called, applied to persons when the exigencies of the country demand its exercise and require the services of persons for the common defense.” Thus, the war power is introduced as part of the power of eminent domain.\textsuperscript{162}

In the concluding two paragraphs, Justice Reeves infers from the Congress' other actions that it did not intend to make a contract. He closed the opinion by observing that, although some cases might lead to a moral obligation, a mere moral obligation was insufficient to serve as the basis of a legal right.

The Texas opinion is strange because of its philosophical approach and the construction of the final paragraphs. The later part of the opinion maps closely the structure of the Virginia opinion, but it treats in a much more summary fashion the arguments. One is left with the impression that Reeves had a particularly abstract approach to law and that he copied the

\textsuperscript{161} Id. at 723.

\textsuperscript{162} Id.
Virginia opinion.

V. COMPARISONS

Important differences appear between the courts of the Confederacy. Georgia and Virginia emerge as deliberative courts, as does the dissent in North Carolina. Alabama and the North Carolina majority are less deliberative and more apt to rest upon extreme theories. Texas appears the most philosophical and most likely to try to reconcile the decision based on universal principles of constitutional and contract law. Those differences highlight a wide spectrum of opinions that existed during the Confederacy and appear to relate to ideological differences in the judges deciding the cases, ranging from the radical pro-war stance of Alabama’s John Phelan to the more moderate stance of Virginia’s Robertson and Georgia’s Jenkins, through to the dissent of North Carolina’s Pearson, who supported the war but protected individual rights even more.

In attempting to explain the opinions in the conscription cases, an initial question is why they were so willing to compel sacrifices among members of their community. Drew Faust argued in The Creation of Confederate Nationalism that the conservative doctrines emerged as the dominant mode of political theory in the Confederacy. There remained dissenters, of course, but the “forceful assertion of conservative doctrines as at once southern and sacred and the hegemonic effort to equate Yankeeism simultaneously with democracy and the Devil shaped the character of Confederate nationalism as it was promulgated by the pulpit, the stump, and the press.”

In the case of the conscription cases, the war exerted enough force to bend the traditional modes of interpretation. But besides the dire necessity, there were well-established doctrines that the judges were able to draw upon. Democratic thought significantly influenced the style of argument of the courts. The inalienable power doctrine, which Democratic justices on the United States Supreme Court popularized in the

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153 See FAUST, CONFEDERATE NATIONALISM, supra note 39, at 39.
antebellum era, played a prominent role in several of the opinions, notably Virginia and North Carolina, and, to a lesser extent, Georgia. The doctrine that the state may do whatever is necessary to protect itself emerged as a very powerful doctrine in North Carolina and Alabama. But there remained a desire to protect individual rights. The Georgia opinion and the North Carolina dissent—and, to a lesser extent, Virginia and Texas—fit well into the constitutional tradition, subscribed to largely, though by no means exclusively, by Whig justices.

The judges did not decide the conscription cases entirely in a vacuum. Their opinions occasionally indicate that they had some information—and in rare instances the entire text—of other courts. When the North Carolina justices decided *Gatlin v. Walton*, they were familiar with the opinions of the Virginia, Georgia, and Alabama courts. The Virginia opinion seems to be familiar with Georgia's opinions because it quotes a statement made by Monroe in 1841, when he was Secretary of War, which appeared first in the Georgia reports. In dealing with other issues of conscription, Chief Justice A. J. Walker of Alabama concurred in one case based on reports of North Carolina and Virginia that had already decided the issue, because he wanted uniformity of decisions.154

The various responses of the courts illuminate the differences in approaches of the judges. A check of their political affiliations shows the connection between the types of political beliefs and their modes of argument. The Democratic judges—Robertson of Virginia, Phelan of Alabama, and Reeves of Texas—used the doctrines of narrow construction of grants and inalienable power, as well as the necessity argument, which was popular across the political spectrum. Democrat Stone of Alabama illustrates a different variant of Democratic values, which was protective of individual rights, and which one might

expect to see used more frequently by Whig judges.

The Whig judges also exhibited a variety of approaches. Moderate Whig Justices Jenkins and Pearson were less sanguine about relying upon necessity, but rather took more technical approaches to the issue. The two radical North Carolina justices who upheld the Act, however, were also Whigs (one was a radical pro-secessionist). They may represent a radical strain among the Whigs, which sought public order at the expense of public rights.\textsuperscript{155}

In the realm of constitutional law there is a general consensus among historians that ideology plays a role in shaping decisions. Stephen Siegel, whose book length article provides a detailed taxonomy of judicial positions on vested rights, has attributed differences in doctrine to differences in judges' philosophical approach, rather than to their political differences. Recently William Fisher, taking an approach that implicitly recognized the influence of politics on constitutional law, has argued that much of nineteenth-century vested rights jurisprudence originated in the political thought of the Whigs. One implication of Fisher's work, however, is that styles of reasoning among Democratic and Whig judges were similar.\textsuperscript{156}

But there remains no comprehensive study of reasoning styles among nineteenth century judges that will answer the question of whether judges affiliated with the Democratic and Whig parties differed in the way that they approached questions of vested rights, or any other issue.\textsuperscript{157} The conscription

\textsuperscript{155} See KOHL, supra note 41, at 77 (explaining Whigs as desiring public order over individual freedom).

\textsuperscript{156} See Fisher, supra note 15; Siegel, supra note 9. See also NOVAK, supra note 17 (considering Whig and Democrat jurists as similar in the nineteenth century). Fisher focused upon one style of reasoning, the balancing of public good with private good, a doctrine particularly well-suited to Whigs' respect for private property rights. Democrats more easily adopted the constitutional arguments that states parted with no rights by implication, as a way of guarding states against corporations and other established wealth.

\textsuperscript{157} See Herbert Ershkowitz & William G. Shade, Consensus or Conflict? Political Behavior in the State Legislatures During the Jacksonian Era, 58 J. OF AM. HIST. 591 (1971); Alfred L. Brophy, "Vested Rights in the Antebellum Southern State Courts: The Intersection of Ideology and Reasoning Styles," in "The Intersection of Property and Slavery in Southern Legal Thought from Missouri Com-
cases under study here suggest that ideology—as measure by political affiliation and judicial statements—correlated with style of reasoning. It remains for further research to establish more clearly the relationship between political affiliation and the ways that judges write their opinions to justify their conclusions. The conscription cases under study here raised uncommon questions. It is, therefore, difficult to draw conclusions on the extent to which judges differed in their approach to common issues, such as torts, contracts, real property, and statutory interpretation. The answer to that question will serve to show much more clearly than is now available how political beliefs affected law; but based on the small sample of cases presented in this study, it appears that a broad variety of reasoning appeared in cases deciding the same issue, almost simultaneously.

VI. CONCLUSION

The Confederate courts aggressively protected the right of the Congress to compel military service from its citizens. In particular, in order to defeat claims by men who had provided substitutes for service in the army that they were not liable to conscription, the Confederate courts relied upon a combination of arguments, ranging from the right of a state to protect itself against destruction and the doctrine that states part with their powers only by express grant to the more moderate doctrines of narrow construction of legislative grants and a narrow construction of the contracts clause. The courts applied a law that promoted the common good by restricting the rights of wealthy citizens.

The historian Don E. Fehrenbacher attributed the disastrous decline in morale in the final years of the Civil War to promise through Civil War” (Ph.D. dissertation in progress, Harvard University) (portraying differences between Democrat and Whig jurists in Southern states); GREGORY ALEXANDER, COMMODITY AND PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 204 (1997) (discussing differences between Democrats and Whigs and employing phrase “entrepreneurial republicanism”).
the extreme sacrifices made necessary by the war. Fehrenbacher pointed to the Confederacy's ultimate concession to free slaves and to require service from all its able-bodied male citizens.\textsuperscript{158} The radical opinions of North Carolina and Alabama, which rested their decisions on the emergency created by war, may have served to boost morale by sharing sacrifices. And the careful opinions of Georgia and Virginia emphasizing republicanism consistent with constitutionalism may have tried to allay fears of "military despotism." The opinions represent the different visions of their authors. Certain rebels may have felt that what they were fighting for was no longer worth the cost. While they might have lost what they were fighting for, Southerner obtained what their pre-Civil War doctrine had molded for them.

\textsuperscript{158} DON E. FEHRENBACKER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH chap. 3 (1989).