Drawing Lines of Sovereignty:
State Habeas Doctrine and the Substance of States' Rights in Confederate Conscription Cases

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"I have heard some express the opinion that it would have been better not to have made a Constitution for the Confederate States until after the war was over!" North Carolina Supreme Court Chief Justice Richmond M. Pearson, *ex parte Walton,* 60 N.C. 350 (1864)

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Introduction

In 1863, the North Carolina, Alabama, and Georgia supreme courts each issued opinions addressing whether state judges could issue habeas writs to Confederate conscription officers on behalf of those claiming exemption from military service. Across all of these courts, only one justice dissented from the holdings that permitted state judges to exercise habeas jurisdiction over prisoners held by federal officers, a position known as state habeas doctrine. Today state habeas would constitute a gross violation of jurisdictional lines as only federal courts have habeas jurisdiction over federal prisoners. Even at the time of the Civil War the doctrine was unsettled after *Ableman v. Booth*, 62 U.S. 506 (1859), where the United States Supreme Court ruled the Wisconsin Supreme Court's use of state habeas to free a prisoner indicted by a United States district court unconstitutional. Yet, the judges in the majority of *in re Bryan* (NC), *Mims v. Wimberly* (GA), and *ex parte Hill* (AL) defended state habeas, justifying the jurisdiction as an inherent part of state sovereignty.[1] State judges across the Confederacy exercised the jurisdiction in what can be understood as a collective assertion of state sovereignty. But, while doing so, they uniformly sanctioned centralized military policies that were seemingly incompatible with the states' rights principles upon which the Confederacy was founded. State judges did not find fault with conscription or even release many of those claiming unlawful detention as conscripts in state habeas cases. This contradiction raises an important question: why go through the hassle of

[1] 60 N.C. 1 (1863); 33 Ga. 587 (1863); 38 Ala. 458 (1863).

defending state habeas jurisdiction as integral to state sovereignty if only to defer to the Confederate government's unprecedented centralization of federal power?

The embrace of state habeas shows that state judges sought to hold on to states' rights procedurally while allowing for centralization in practice. The state habeas cases' outcomes supporting military centralization suggest a form of judicial nationalism ran amongst state judges, but that characterization would be incomplete without considering the implications of state habeas. Whether the state judges felt a sincere attachment to states' rights or turned to state habeas in order to ease their conscience about complicity in centralization cannot be known from the sources available. What is clear is that state habeas allowed judges to carve out jurisdictional autonomy for state courts, thereby giving legitimacy and lasing power to states' rights in the Confederacy. State habeas thus illustrates how judges reconciled tension between commitment to winning the war and preserving the Confederacy's founding principles by enabling judges to protect states' rights procedurally without hindering the war effort. This paper focuses primarily on judges, but it would be imprudent to ignore the wider impact of state habeas beyond the state bench.

The administration of Jefferson F. Davis, President of the Confederacy, did not agree with the legal basis for state habeas, but tolerated its use because it was understood that the jurisdiction represented states' rights and most judges did not materially interfere with conscription. This tolerance weakened as the war grew in intensity until the discharge of too many conscripts by a few judges led Congress to follow Davis's recommendation and suspend habeas corpus across the Confederacy in 1864. How the Davis administration responded to state judges' embrace of state habeas is thus emblematic of the Confederate constitutional identity

crisis about the role of states' rights in the Confederacy, and, consequently, uncertainty about what exactly the South was fighting for.

Part I explains how this study of state habeas contributes to existing Civil War historiography, Confederate legal history, and federal courts scholarship by examining how judges employed a states' rights procedure to produce nationalistic outcomes. Part II details the origins of state habeas doctrine and why state habeas was attractive to Confederate state judges. Part III explores the tension between states' rights and military centralization in the Confederacy, and how the absence of a Confederate Supreme Court signaled an opportunity for the empowerment of state courts. Part IV then addresses the three flagship cases on state habeas jurisdiction, *in re Bryan, ex parte Hill,* and *Mims v. Wimberly*, and how the judges defended state habeas as integral to state sovereignty. Their arguments framed state habeas as a crucial judicial check on executive power and a substantive right to liberty enjoyed by state citizens pursuant to the states' sovereign duty to protect individuals from unlawful imprisonment. Finally, Part V explores the Davis administration's relationship with state habeas doctrine. Specifically, how that relationship demarcated the boundary of the administration's respect for states' rights.

Part I – State Habeas and Civil War Scholarship

That judges framed state habeas jurisdiction as an expression of states' rights problematizes accounts concluding that southern constitutionalism was purely instrumental for defending slave interests.[2] Historian Don E. Fehrenbacher and others have argued that there was no true Confederate or southern constitutionalism because states' rights arguments were

[2] This position is held by: DON E. FEHRENBACHER, CONSTITUTION AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH (1989); MARK E. NEELY, JR., SOUTHERN RIGHTS: POLITICAL PRISONERS AND THE MYTH OF CONFEDERATE CONSTITUTIONALISM (1999); EMORY M. THOMAS, THE CONFEDERATE NATION 58 (1979); CURTIS A. AMLUND, FEDERALISM IN THE SOUTHERN CONFEDERACY (1966); W. BUCK YEARNS, THE CONFEDERATE CONGRESS (1960), *available at* http://catalog.hathitrust.org/Record/000407904.

employed instrumentally to defend slavery.[3] Whether southerners turned to majoritarian politics or states' rights depended on what position proved a more effective defense for slavery; in example, southerners had no compunctions about strong federal power when the Supreme Court struck down northern states' personal liberty laws protecting fugitive slaves. Likewise, historian Mark E. Neely argues that during the Civil War many state judges, like southerners themselves, preferred order to grander libertarian principles; and thus, acted as ready accomplices to Richmond's centralizing policies.[4] In his seminal study of Confederate conscription, Albert Burton Moore concluded that state courts neglected to "maintain the dignity and prerogatives of the states against encroachments of the Confederate Government," because state sovereignty as a political philosophy had never taken root on the bench, and that the judges "were completely indoctrinated" to follow Marshall Court precedent favoring federal over state power.[5] If those arguments are true, then why did southern state judges take the time to craft complex states' rights arguments in the middle of a war when slavery was no longer threatened from within the Confederacy? Why would judges exercise their habeas jurisdiction if slavery would be better defended by rejecting conscripts' habeas petitions altogether so as to not to obstruct the process of conscription?

Historians on the other side of the spectrum – holding the position that sincere attachment to states' rights crippled the Confederacy – do not fully answer these questions either.[6] Frank

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[3] FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM; *see also*, James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998)(Arguing there is no distinctive southern judicial character, and that southern state judges decided outcomes based on their antebellum political affiliations in the Confederate conscription cases).

[4] NEELY, 79.

[5] ALBERT B. MOORE, CONSCRIPTION AND CONFLICT IN THE CONFEDERACY 162-63 (1924).

[6] The following are older examples of this position: FRANK L. OWSLEY, STATES RIGHTS IN THE CONFEDERACY (1925); FRANK E. VANDIVER, REBEL BRASS: THE CONFEDERATE COMMAND SYSTEM (1956); MAY SPENCER RINGOLD, THE ROLE OF THE STATE LEGISLATURES IN THE CONFEDERACY (1966). Examples of more recent scholarship examining internal fissures within the Confederacy are: WILLIAM W. FREEHLING, THE SOUTH VS. THE SOUTH: HOW ANTI-CONFEDERATE SOUTHERNERS SHAPED THE COURSE OF THE CIVIL WAR (2001); RICHARD E.

Owsley notably offered the thesis that the Confederacy died of states' rights in 1925.[7] Strains of this argument survive in recent scholarship, suggesting that the Confederacy failed due to internal divisions: and that states' rightists, along with dispossessed lower class whites, slaves, etc. hamstrung the Confederate war effort and prevented nationalism from forming.[8] As officers of the state one would assume, pursuant to this argument, that state judges had a vested interest in protecting states' rights, so would oppose a draft conscripting state citizens into the national army. But, state judges routinely rejected substantive states' rights arguments against the Confederacy's centralizing military policies.

State courts dismissed such arguments during the war to rule conscription constitutional, undermining the view states' rights crippled the Confederate war effort. In 1862, the Texas supreme court in *ex parte Coupland* turned down a conscript's challenge that he had been detained without "any order or process whatever" by holding that conscription was an inherent and necessary power in light of United States military history, constitutional theory, and the constitutional debates - particularly the Federalist Papers.[9] In response to the charge that

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BERINGER, ET AL, WHY THE SOUTH LOST THE CIVIL WAR (1986); DAVID WILLIAMS, BITTERLY DIVIDED: THE SOUTH'S INNER CIVIL WAR (2008); STEPHANIE MCCURRY, CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH (2010).

[7] Owsley first offered this thesis in his dissertation in 1925. Note, this is a much debated position, and is significant in that many historians have framed their work as a continuation or refutation of Owsley, *see e.g.,* BERRINGER, ET AL.

[8] MCCURRY, BERINGER, FREEHLING, WILLIAMS. Professor Gary W. Gallagher characterizes this as the "internal weakness" school of interpretation, spotlighting Appalachia, unionism, slavery, desertion, and other topics that had gained supremacy in the field of Confederate home-front studies prior to the 1990s. The opposing school focuses on nationalism within the Confederacy: Readily acknowledging internal tensions and war weariness, a number of historians, and I count myself among them, detect substantial evidence of national sentiment, willingness to sacrifice amid war weariness, steadfastness among soldiers, agreement about questions relating to slavery and race, awareness of class inequities that prompted measures to address them, cohesion around cultural symbols, and preference for the Confederacy, whatever its flaws, over return to a United States governed by Abraham Lincoln and emancipationist Republicans." Gary W. Gallagher, *Disaffection, Persistence, and Nation: Some Directions in Recent Civil War Scholarship* 55 CIVIL WAR HIST. 329, 332-32, 338-39 (2009). *See also*, SHEARER DAVIS BOWMAN, AT THE PRECIPICE: AMERICANS NORTH AND SOUTH DURING THE SECESSION CRISIS 50 (2010)("Yet they could also believe sincerely in the principle of state sovereignty (the extreme version of state's rights thinking) as the political justification of immediate separate state secession from what they claimed was a potentially despotic federal government, headed for the first time by an unabashedly antislavery chief executive.").

[9] 26 Tex. 386, 395 (1862). "Though this is the first occasion, in this country, that an army has been raised by conscription, it does not come before the country with out the sanction of high authority. The principle upon which it

conscription robbed the states' of their constitutional right to a militia, the court replied that conscription took men as citizens, not state militiamen.[10] Faced with a similar challenge, the Georgia supreme court responded that the grant of "power to raise armies" in the Confederate and United States Constitutions made no requirement that soldiers be raised voluntarily.[11] Although voluntary enlistments were preferable, whatever "scheme which promises greatest attainable promptness and efficiency is necessary and proper," so conscription did not violate the spirit of the Constitution.[12] In 1864, the Virginia supreme court dismissed the contention that the Confederate Conscription Acts posed a threat to constitutionally protected freedoms. Curiously, the court reasoned that voluntary enlistment posed the greater threat to freedom because "an improper exercise of conscription could not fail to excite at once the indignant opposition of the people; while an army might be improperly increased by voluntary enlistment without attracting much popular attention."[13] These and other cases signal the state courts' approval of the Davis administration's expansive military policies and reflect further that the judges viewed winning the war as the utmost priority – made all the more dire by the growing realization Union victory meant the death of slave society.[14] State judges' support of military centralization represents a

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is based was sanctioned and approved by General Washington in 1790; and it was maintained in 1812 by Mr. Monroe, then secretary of war, in an argument of convincing clearness and cogency and Mr. Troupe and other distinguished strict constructionists of that day gave it their sanction." *Id.*, 405.

[10] *Id.*, 397.

[11] *Jeffers v. Fair*, 33 Ga. 347, 351 (1862).

[12] *Id.*, 351-52.

[13] *Burroughs v. Peyton* 16 Gratt. 470, 481 (1864). For more on state courts review of conscription's constitutionality *see* Alfred L. Brophy, *"Necessity Knows No Law": Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 69 Miss. L.J. 1123 (2000); Sidney D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, *in* 8 THE LAWYER & BANKER AND SOUTHERN BENCH & BAR REVIEW 387 (Charles E. George, ed., 1915).

[14] By the time of these cases, widespread apprehension about what would happen if South lost the war as hostilities destroyed what sentimentality there was between erstwhile countrymen and emancipation threated slave society itself. "Though life under the Confederate government had not developed as planned, the war confirmed white suspicions of the Yankees. Confederate identity was uncertain and troubled, but hostility to the North was deepening into the dominant theme in Southern culture." PAUL D. ESCOTT, THE CONFEDERACY: THE SLAVEHOLDERS' FAILED VENTURE, 57 (2010). Historian James M. McPherson described the transition to total war: "When Grant said that Shiloh convinced him that the rebellion could be crushed only by complete conquest, he added that this included the

form of judicial nationalism amongst state judges, which was sometimes readily apparent in their opinions.

Some judges exhibited clear nationalist tendencies in state habeas cases.[15] The Alabama supreme court adopted a decidedly nationalist tone in *ex parte Tate*, strongly preferring federal over state service: "To fulfill this high trust [win the struggle for national independence], we hold it to be the manifest right, and the imperative duty of the government of the Confederate States, to exhaust, if it becomes necessary, the entire military force of the country, in men, money, and every other available material of war."[16] The Mississippi Court of Errors struck down a state statute expanding the militia so as to exempt from Confederate service those liable for conscription, stating "it is held that such concurrent powers in the States are not independent and absolute, but subordinate powers, subject to be defeated or postponed whenever the Federal Government shall exercise the power granted to it in a manner incompatible with the legislation of the State upon the same subject."[17] In *ex parte Coupland,* Texas Supreme Court Justice George F. Moore explained that conscription was a necessity in order to defeat the Union, which was "baffled in an unholy lust of gain and maddened by revenge, [having] buried at home the once cherished principles of republican liberty in a concentrated military despotism."[18] Beating the vilified North justified any means. Admittedly such overt nationalism was relatively rare in state habeas cases. It would be wrong to say state judges completely subordinate the states'

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destruction of any property or other resources used to sustain Confederate armies as well as of those armies themselves." JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 79 (1991).

[15] That state judges sought to preserve states' rights in the Confederacy suggests their own construct of nationalism within state habeas. In that nationalism, respect for states' rights tenuously coexisted with the ultimate priority of winning the war – so judges sought to preserve states' rights where possible without interfering with the centralization deemed necessary to win the war.

[16] 39 Ala. 254, 257 (1864). The case arose from a habeas petition by a conscript who had provided a substitute but was subsequently arrested as liable for conscription.

[17] *Simmon v. Miller* 40 Miss. 19, 25 (1864).

[18] *Coupland*, *supra* note 9, at 405.

interests to the Confederacy's military needs,[19] but support for conscription demonstrates states' rights played second fiddle to winning the war.[20]

The nationalist position staked out by state judges has led scholars to ignore how the exercise of state habeas to adjudicate these cases represented an assertion of states' rights. If on little else, state judges were consistent states' rights advocates with regards to their habeas jurisdiction. The outcomes of state habeas cases must be analyzed alongside an evolving procedural discourse on state sovereignty.[21] Only then does the paradoxical use of state habeas becomes clear: that judges employed state habeas to project attachment to states' rights, and even to establish the autonomy of their courts, but also to facilitate military centralization. The history of state habeas cases consequently introduces an integrated picture of the roles played by states' rights and military centralization in the existing historiography.

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[19] For example, the Supreme Court of Georgia held in *Andrews v. Strong,* 33 Ga. Sup. 166 (1864), that a man mustered in as a conscript who had subsequently been elected as a justice of the peace was discharged because, even if Congress had imposed a constitutionally valid duty on an individual, when that duty conflicted with the proper administration of the state government, the rights of Congress must yield to the paramount right of the state.

[20] The extent to which nationalism took hold beyond the southern state bar is beyond this study, and the depth of Confederate nationalism is an ongoing debate in Civil War historiography. *See e.g.*, GARY W. GALLAGHER, THE CONFEDERATE WAR (1997); GARY W. GALLAGHER, BECOMING CONFEDERATES: PATHS TO A NEW NATIONAL LOYALTY (2013).

[21] That judges were engaged in a dynamic discussion of state sovereignty is evident by the differing opinions on the scope of state habeas review. In Alabama, with the most explicit anti-state habeas precedent from *ex parte Hill*, 38 Ala. 429 (1863), the Supreme Court continued to hear habeas cases as late as January 1865, *see ex parte Bolling* 39 Ala. 609 (1865); State courts deciding the particulars of conscription's application proved frustrating to confederate officials but the administration accepted the situation "The practice of honoring the decree of a civil court in a particular case but rejecting it as a general rule of action…" MOORE, *supra* note 5, at 181-82. Regarding differing scopes of review *see e.g., Mann v. Parke* 16 Gratt. 443 (1864)(*I*n February 1864 the Supreme Court of Appeals of Virginia held there would be a *prima facie* denial of habeas if between petitioner was between18-45, but an writ would be entertained for men over 45). The North Carolina justices disagreed over the extent of state habeas, Justice Charles Manley, in *Walton v. Gatlin*, 1 Win. 318, 326-332 (1864)(dissenting), maintained that neither the common law nor statute granted the Supreme Court appellate power over habeas corpus decisions of other courts took the opportunity to disagree with *In re Bryan*'s holding regarding the Supreme Court's habeas jurisdiction. Even Chief Justice Richmond M. Pearson (state habeas' most adamant supporter) regularly denied habeas writs, *see* Jennifer Van Zant, *Confederate Conscription and the North Carolina Supreme Court,*72 N.C. Hist. Rev. 54, 70-71(1995)(anecdote joking about his reputation for freeing everyone who came his way), and did not always defer to strong state prerogative, *see e.g., Wood v. Bradshaw,* 2 Win. 22 (1864)(man exempt from Confederate service was not liable to state home guard); *In re Kirk*, 60 N.C. 186 (1863) (Pearson repudiated North Carolina Governor Zebulon Vance for abusing exemption categories).

This paper gives greater depth to Confederate legal history by exploring state habeas jurisdiction. Law professors David P. Currie and G. Edward White have focused in on the Confederacy's constitutional identity crisis about the role of states' rights as a coherent doctrine. White addresses the Confederacy's judicial architecture and the central legal issues created by the war to conclude that the Confederacy was plagued by an internal struggle: how to live up to states' rights ideals while also expanding military power to fight the war?[22] Currie argues that the Confederate Constitution represented a measured half step in the direction of states' rights and that the Confederate Congress readily abrogated states' rights principles for the war effort.[23] White and Currie's conclusions should be pushed further and applied to the jurisdictional realm of state courts, where judges wrestled with the identity crisis in an evolving legal context. Both miss the analytical opportunity presented by the jurisdictional wrinkle of state habeas – that state judges defended state habeas as an extension of state sovereignty in order to resolve the tension White and Currie identified. J.G. De Roulhac Hamilton likewise addresses this tension between states' rights and centralization in his study of Confederate state courts.[24] Hamilton presents a trend wherein judges raised states' rights argument in their opinions before inevitably accepting the general government's strong wartime prerogative.[25] How judges could possibly give credence to states' rights while holding for centralization on the merits makes sense when it is understood that state habeas jurisdiction was itself an assertion of state sovereignty. White,

[22] G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 528-31 (2011).
[23] David P. Currie, *Through the Looking Glass: The Confederate Constitution in Congress, 1861-1865,* 90 VA. L. REV. 1257 (2004).
[24] J.G. de Roulhac Hamilton, *The State Courts and the Confederate Constitution,* 4 J. S. L. HIST. 425 (1938).
[25] Hamilton characterizes the state habeas conscription cases as a missed opportunity for making a stronger stand on state habeas, acquiescing to Richmond's centralizing policies. "It is clear that by the middle of 1864 the state courts had all fully accepted the military power of the Confederacy. Even Chief Justice Pear- son, its most consistent and logical opponent among all the judges-as well as the most interesting and colorful judicial figure in the Confederacy- however great his disagreement with his colleagues, yielded in good faith to their decisions. Possibly it was too late; the time for unanimity of judgment was earlier. And, yet, it should be said that most of those who have discussed Judge Pearson and other judges who failed to agree with the majority have never given due credit to them for the courage they displayed, amidst all the clamor and passion of war, in interpreting the law as they saw it-a biased view, perhaps, as are most judicial opinions where the law is doubtful." Id. at 447-48.

Currie, and Hamilton's works raise the question of what happened to all the states' rights rhetoric from the secession period once the war began. State habeas provides the answer: by treating state habeas as a proxy for state sovereignty state judges could honor states' rights without materially interfering with military centralization. White, Currie, and Hamilton are not alone in this oversight.[26]

Those who have studied the state habeas cases at length missed the significance of state habeas jurisdiction as an assertion of states' rights. All ignore the significance of jurisdiction in because the outcomes of state habeas cases do not fit the normative states' rights mold. Law professors Alfred Brophy and James Gardner do not remark on state habeas as a distinct legal issue in their studies of state conscription cases. The former adopts contextualizes the decisions with the judges' antebellum political affiliations. The latter analyzes whether the judges employed regionally distinct constitutional analyses. Neither perceived anything substantively out of the ordinary in state judges' reasoning beyond the doctrine of necessity's prominence.[27] The historian Sidney Brummer gives greater attention to state habeas, but do not incorporate the doctrine into a larger argument. Brummer takes note of how state habeas "vitally" affected relations between the Confederate and state governments, but gives no additional commentary other than outlining the three habeas cases discussed below.[28] Besides from offering fuller

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[26] Hamilton gives little analysis beyond detailing the arguments for and against state habeas in *In re Bryan*. Hamilton, *State Courts* at 18; Hamilton mentions *ex parte Hill*, 38 Ala. 458 (1863), in passing at 13. Currie gives the state habeas aspect only a cursory mention in a footnote. Currie, at 1331. Currie opines that Confederate Attorney General "might have been on firmer ground had he said simply that state jurisdiction to release Confederate prisoners, like state power to tax the Bank of the United States, was the power to interfere with legitimate operations of the central government. Compare Tarble's Case, 80 U.S. (13 Wall.) 397, 408–09 (1871) (holding no state habeas corpus jurisdiction), with McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (holding states do not have the power to tax the federal government)."

[27] Brophy, *supra* note 13; Gardner, *supra* note 3. Brophy provides clarification on the doctrine of necessity, ""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." Brophy at 1132.

[28] Brummer, *supra* note 13, at 397-400. In a similar way, James G. Randall identified the complex federalism issues implicated by Union state habeas cases, but failed to capitalize on the opportunity of expanding his analysis beyond

context for these cases, the jurisdictional aspect should be revisited because the judges framed state habeas as more than just procedure; the jurisdiction strengthened the integrity of the Confederacy's founding principles.[29]

Furthermore, a study of state habeas explicates the Confederacy's struggle for identity. Both Currie and White portray Congress's failure to establish a Supreme Court as central to the Confederacy's identity crisis.[30] For White, the debate over whether to establish the Supreme Court, as was constitutionally mandated, captures the Confederacy's essential spirit: "it was constantly struggling to establish its identity as a government separate from, as well as the agent of, the states that formed it."[31] This observation is enshrined within the administration's relationship with state habeas. Because the administration did not agree with the legal basis for state habeas, but still participated in state habeas litigation instead of circumventing the state courts, the administration displayed respect for the judges' decision to honor states' rights through state habeas. How the administration grappled with whether to suspend habeas illustrates a clear boundary of the administration's respect for states' rights, expanding on Currie and White's work and our understanding of the constitutional crisis for identity.[32] Because state judges attached state habeas to states' rights, the administration evidently felt constrained from contesting that jurisdiction out of respect for states' rights. The Confederate government was

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a cursory treatment, or recognizing the doctrine's role in the Confederacy. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 432 (1951), *available at* HeinOnline. Noting "The decisions on the subject read like commentaries on the fundamental doctrine of our constitutional law and are replete with citations drawn from *the Federalist*, Marshall, Story, Kent and other sources that rank among our legal classics." *Id.*

[29] Historian of the Confederate courts, William Robinson Jr., claimed the southerners by nature were lovers of constitutional forms. State habeas is a manifestation of Robinson's claim in a way, because state judges sought legal substance out of form so there would be constitutional order. WILLIAM M. ROBINSON, JR., JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA 383 (1941).

[30] White at 516-29; Currie at 1366-77. *See also,* ROBINSON at 437-57; AMLUND, *supra* note 2, at 83-84; Yearns, *supra* note 2, at37-38. In an on and off debate, Congress decided it would only establish a Supreme Court without appellate jurisdiction over state courts due to persistent fears born from the antebellum experience with the Marshall Court that a Court would trample on states' rights. Congress never got around to actually establishing that Court, but proceeded to implement the very centralized war policies congressman had that feared the Court would sanction.

[31] White, *supra* note 22, at 528.

[32] See discussion of historiography of the Davis Administration *infra*, note 168.

concerned with preserving states' rights, but, like the states judges, winning the war was the priority. Once the war became a more desperate struggle, the government's respect for state habeas as a proxy for states' weakened. State habeas has been an under utilized locus of study for states' rights in the Confederacy as a whole.

Lastly, this study expands on recent interest in state habeas as a constitutional doctrine by federal courts scholars.[33] These scholars have not looked critically at Confederate state judges' defense of state habeas. Consequently, there is a gap in the scholarship between *Ableman v. Booth* (1858) and *Tarble's Case* (1871),[34] in which the Supreme Court conclusively ruled state habeas doctrine unconstitutional. This paper fills that gap by presenting the ways in which state habeas jurisdiction was defended in practice as an offshoot of state sovereignty, characterized as a bastion for individual liberty, and conceived of as an integral component in the separation of powers.

Part II – Antebellum State Habeas and Confederate Constitutionalism

In the early Republic, the writ of habeas corpus evolved beyond a procedure to a substantive right to liberty. American colonists had copied the English Habeas Corpus Act of 1679 verbatim in colonial charters and incorporated habeas into American courts' common law

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[33] Ann Woolhandler & Michael G. Collins, *The Story of Tarble's Case*, *in* FEDERAL COURTS STORIES (Vicki C. Jackson & Judith Resnik, eds., 2009); WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); JUSTIN J. WERT, HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS (2011); Earl Maltz, *Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle for Fugitive Slaves*, 56 CLEV. ST. L. REV. 83 (2008); Akhil R. Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425 (1987); Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995).

[34] *Tarble's Case* reiterated the points made by Taney in *Ableman,* discussed *infra*, and can be understood as a clarification that *Ableman*'s holding had ruled state habeas jurisdiction unconstitutional writ large: "Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman v. Booth, and The United States v. Booth, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further." Tarble's *Case*, 80 U.S. 397,410-11 (1871)

jurisdiction.[35] By the Revolution, people in all thirteen colonies' had access to the writ, which Americans had begun to conceive of as a distinct right, rather than merely a procedural device, that all courts held at common law.[36] Inheriting this view, many American jurists conceived of a court's habeas jurisdiction as integral to protecting individuals from abuses; they read a substantive right to liberty into legal procedure. Supreme Court Justice Joseph Story described the writ as the "bulwark of personal liberty," which could be "applied to every case of illegal restraint." [37] Writing in 1843, Pennsylvannia Congressman Richard Vaux, opined, "Its [habeas corpus] sole object is to prevent oppression and injustice, and give to innocence every opportunity to manifest itself."[38] Drawing on this tradition, some state courts understood their jurisdiction as sacrosanct common law doctrine for protecting individual liberty bestowed on the courts by virtue of the states' sovereign duty to prevent the unlawful detention of its citizens. As discussed *infra* in Part III, state habeas proponents believed the United State Constitution had not explicitly affected the state courts' habeas jurisdiction. Upon entering in to the Constitution, the states had not given up or limited that portion of their sovereignty from which the state courts derived their habeas jurisdiction. Because the state courts' habeas jurisdiction had not been explicitly limited to detention by state officers it was immaterial whether judges issued the writ to state or federal officers.

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[35] ANTHONY GREGORY, THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR 46-55 (2013).

[36] *Id.* Habeas corpus tied in with popular conceptions of personal liberty and an idealized form of English law free from monarchical influence of statutory formality that defined part of revolutionary ideology. Courts' habeas jurisdiction was a consequence of historical experience – largely a function of politics in early modern English history – rather than neutral legal principles, and was distinct in that it was defined both by common law and statute. WERT, HABEAS CORPUS IN AMERICA at 27; Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 679-80 (2008).

[37] Gregory at 64-65. Conception of state habeas as defense against tyranny can be associated with the decentralist position held by the Antifederalists. Joseph Story, *Commentaries on the Constitution of the United States*, Book III, 212 (Melville M Bigelow, ed., Fifth Edition, 1994) *available at* HeinOnline .

[38] RICHARD VAUX, SOME REMARKS ON THE WRIT OF HABEAS 5 (1843).

The earliest state habeas cases involved soldiers seeking discharge from the military. These early state habeas cases arose when young soldiers second-guessed their service and sought discharges for enlisting under age.[39] The Supreme Court of New Hampshire in *State v. Dimick* held that a detention under the color or pretense of United States law "neither confers an exclusive jurisdiction on the courts of the United States, nor ousts the ordinary jurisdiction of the courts of the state."[40] Writing for the Supreme Court of Pennsylvania in *Commonwealth v. Holloway*, noted constitutional authority William Tilghman asserted the right of state courts to discharge those in federal custody, adding that because of the limited availability of federal courts, "it would be an intolerable grievance to have no relief from imprisonment but by application to the [federal] district judge."[41] Notably, Confederate state judges resurrected this later point to justify their habeas jurisdiction; citizens' access to judicial review of imprisonment mattered more than nit picking lines of sovereignty.[42] Nor were these the only courts to assert habeas jurisdiction over soldiers claiming unlawful detention.[43] Mid-nineteenth century

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[39] *See Commonwealth v. Harrison*, 11. Mass. 63 (1814). When a Russian minor apprenticed as a sailor, George Ribkin, had falsely sworn he was twenty one to enlist in the US Army without permission from his master, who then sought a habeas petition on his apprentice's behalf. Because U.S. law required a minor under twenty one to have a parent or guardian's permission to enlist, the court declared Ribkin's enlistment void and discharged him from the Army against the protests of the Government's counsel, who claimed the state courts had no jurisdiction to discharge a U.S. soldier from service. A writ of habeas was not granted as a matter of course. A petitioner must show proper cause why his detention was unlawful and statute could restrict the writ's availability such as where a party was detained under the final decree of a competent court. *See* EDWARD INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS (1849); JAMES KENT, COMMENTARIES ON AMERICAN LAW Vol. 4 636 (1851) *available at* HathiTrust; WERT, at 51. If issued, a writ was directed to the detainer commanding him to produce body of prisoner with the cause of detention. If the judge believed a detention was unlawful, he would discharge the petitioner, who could not be re-imprisoned on the same grounds and who could subsequently pursue private action of trespass for false imprisonment on the detainer. KENT at 637.

[40] 12 N.H. 194, 197 (1841).

[41] 5 Binn. 512, 515 (1813).

[42] *See e.g.,* Pearson's holding in *Bryan*, 60 N.C. 1 (1863).

[43] The Virginia Supreme Court discharged a prisoner held by the U.S. Army in *Pleasants,* 191; the South Carolina Supreme Court unanimously affirmed the right to discharge a minor who had enlisted in the U.S. Army in *Carlton*, 182; the Supreme Court of Pennsylvania in *Murray* asserted habeas jurisdiction over an eighteen year old soldier, but declared the enlistment contract binding, 174-75. Opinions quoted in ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT (1858) *available at* Sabin Americana. The Supreme Court of Pennsylvania later declared the enlistment of a minor in the U.S. Army void and discharged him. *Commonwealth v. Fox* 7 Pa. L.J. 227 (1847). *Cf. In re Ferguson*, 9 Johns.

constitutional authorities Thomas Seargeant and James Kent affirmed state habeas doctrine in the constitutional literature of the day, noting that while many states maintained the doctrine, the Supreme Court admittedly had not decided the issue.[44] Rollin Hurd, author of the leading treatise on habeas, concluded: "It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States."[45] The collective support from state courts and commentators lent credence to the Confederate state judges' position that state habeas was a substantive right rather than purely a matter of procedure; it was imperative for the states to fulfill their sovereign duty to protect their citizens and the courts' habeas jurisdiction was the means to do so.[46] Culminating in the Supreme Court's decision in *Ableman v. Booth,* federal case law suggested that only federal courts could issue habeas writs to federal officers, creating a wrinkle that Confederate state judges had to address in order to argue state habeas existed as a continuous doctrine.[47]

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239 (1812), adjudicated by the Supreme Court of New York in 1812, was the salient case denying state habeas and arose from a petition to discharge an underage soldier who had enlisted without the consent of his father. Writing for the court, judge and noted legal scholar James Kent took an expansive view of what was exclusive to the federal government's jurisdiction, arguing that state jurisdiction was an all or nothing affair, either there was full concurrent jurisdiction or none at all. Because enlistments occurred under the authority of the U.S., claims stemming from proper enlistment are therefore the sole province of federal courts. Although Kent's fellow judges agreed to refuse the writ, they refrained from weighing in on state habeas jurisdiction and effectively overturned Kent's opinion on jurisdiction by exercising habeas jurisdiction in a case with nearly identical facts soon thereafter in *Stacey's Case*, HURD at 180.

[44] THOMAS SEARGENT, CONSTITUTIONAL LAW 265-80 (1822) *available at* HathiTrust. Even Kent, who opposed the writ on the bench, noted in a treatise that in New York after *Stacey* (overturning his decision in *Ferguson*) "The question was therefore settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other states." KENT at 440. Yet, Kent thought it necessarily to include a disclaimer that the appellate right of federal courts shall apply to all cases taken up by state courts that "voluntarily entertain jurisdiction of causes cognizable under the authority of the United States." *Id.* at 442.

[45] HURD at 166. Of the states that had addressed state habeas jurisdiction when Hurd was writing in 1858, Georgia and South Carolina had disclaimed state habeas, but it had been affirmed in Virginia, Georgia, Massachusetts, Maryland, New York, Pennsylvania, and New York. *Id.* at 165-166.

[46] The flagship state habeas cases more explicitly characterized the jurisdiction as a substantive right to liberty than antebellum state habeas cases available. The prior go in to much longer detail *see Bryan*; *cf. Comm. V. Harrison*, 11 Mass. 63 (1814).

[47] The District Court of Kentucky in 1867 explained the federal case law perspective: "The decisions and opinions in the district and circuit courts of the United States, both before and since the decision in Ableman v. Booth, have denied the state jurisdiction…I might fortify my decision by copious extract from the opinions of federal and state judges, but the opinion of the supreme court is so conclusive, and I shall be obliged to quote from it so extensively,

In *Ableman*, the Supreme Court arguably ruled state courts' habeas jurisdiction unconstitutional.[48] In 1854, abolitionist newspaper editor Sherman M. Booth led a crowd to free a former slave working in Wisconsin. After his arrest by a federal officer for aiding and abetting the fugitive slave's escape, Booth obtained a habeas writ from a Wisconsin Supreme Court Justice discharging him on the grounds that the 1850 Fugitive Slave Act was unconstitutional.[49] A federal grand jury subsequently indicted Booth for the same charge, but Booth again obtained a release from the Wisconsin supreme court, after which the U.S. Attorney General filed a petition with the Chief Justice of the United States Supreme Court, Roger Taney, an open supporter of slavery, on the grounds that state courts lacked habeas jurisdiction over federal officers.[50] Taney's opinion in *Ableman* denying the Wisconsin supreme court's habeas jurisdiction fit into a broader jurisprudential trend in federal law constricting the states' concurrent jurisdiction and expanding federal power.[51]

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that I can not, without extending this opinion to an inordinate length, make any further reference to them than has already been made." *In re Farrand,* 8 F. Cas. 1070, 1072 (1867).

[48] Until 1871 when the Supreme Court issued *Tarbles Case*, *supra* note 34, state judges would debate *Ableman*'s scope and implications. That state judges, North and South, during and after the Civil War upheld state habeas doctrine by construing *Ableman*'s holding as controlling only on instances when a state judge issued a writ after a federal court had begun process reflects the doctrine's enduring strength, and the strength of a federal vision wherein state and federal courts shared broader concurrent jurisdiction by virtue of the states' sovereignty. *See* Woolhandler & Collins, *supra* note 33.

[49] *Ableman v. Booth* 62 U.S. 506, 507-8 (1858).

[50] Id., 508; For further information, *see* ARTHUR T. DOWNEY, CIVIL WAR LAWYERS: CONSTITUTIONAL QUESTIONS, COURTROOM DRAMAS AND THE MEN BEHIND THEM 41-42 (2010).

[51] *See*, *supra* note 49 regarding how the lower federal courts denied state habeas. *See also, Slocumb v. Mayberry* 15 U.S. 1 (1817), the Supreme Court ruled that the Rhode Island state court did not exceed its jurisdiction by bringing a writ of replevin against the cargo of a ship held in custody by a US official under an embargo law because the federal law only extended exclusive federal jurisdiction to the ship; *Sturges v. Crowninshield* 17 U.S. 122 (1819), the Court asserted the supremacy of the federal prerogative whenever the two sovereigns come into contact; *M'Clung v. Silliman* 19 U.S. 598 (1821), the Court held that a state court could not issue the writ of mandamus to a U.S. land surveyor because he was acting as a functionary of U.S. law. Further, the federal government expanded its habeas authority over those detained by state officers, with acts in 1833 and 1844 nationalizing habeas corpus. GREGORY, *supra* note 35, at 85. The 1833 Force Act granted federal judges habeas authority over any prisoner for an act pursuance to a United States Law, prompted by South Carolina's detention of federal tariff officials during the Nullification Crisis. Act of Mar. 2, 1833, ch. 57, 4 Stat. 632, "An Act Further To Provide For The Collection Of Imports." The 1842 Habeas Corpus Act granted federal courts habeas jurisdiction over foreigner nationals held by state officials. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539. These acts were more symbolic of the way the wind was blowing, as "the changes to habeas jurisdiction did not really come into effect until after the Civil War." GREGORY at 86.

Writing for a unanimous Court, Taney portrayed state habeas as a usurpation of federal power threatening to upset the careful balance of federalism, a viewpoint shared later by the Davis administration.[52] State habeas doctrine, Taney declared, rested on the presumption of the state courts' paramount power.[53] In practice state habeas meant "no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the state in which the party happens to be imprisoned."[54] Taney's concern was rooted in the belief that state judges beholden to local interests would control federal officers, upsetting national policy; implicitly state habeas would allow northerners frustrate fugitive slave collection.[55] A harmonious federal structure therefore required federal exclusivity – federal courts exclusively may issue habeas writs to federal officers. Taney argued

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[52] On this point, the Lincoln and Davis administration's agreed, though the former was more effective in having its way. Solicitor of the Union War Department, William Whiting issued a circular on July 1, 1863, that conscription officers should follow Taney's instructions in *Ableman,* the only duty to state judges was to respond that the prisoner/petitioner was in their care. Provost Marshall General James B. Fry, Circular No. 36, The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies [*hereinafter* OR], ser. 3 vol. 3, 460-61 (July 1, 1863)(citing an opinion by Hon. William Whiting, Solicitor General of the War Department). The Supreme Court of Pennsylvania similarly read *Ableman* to have ended state habeas, which the court went on to characterize as "simply the Calhoun heresy of nullification." *Kneeder v. Lane*, 45 Pa. 238, 294 (1863). Unlike in the South, northern state judges did not strongly assert their habeas jurisdiction over conscriptees during the war, leading Civil War historian Randall to treat state habeas in the North as an annoyance for the Lincoln administration by a small number of local judges employing state habeas to oppose conscription. RANDALL, *supra* note 28, at 428-32. The U.S. Congress passed the Indemnity Act of 1863 in order to protect federal officials from state courts jurisdiction so that acting on the President's orders provided a complete defense and required removal of actions against federal officers to the Federal courts. *Id.* at 428; *see also*, James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers*, 60 MICH. L. REV. 589 (1922).
[53] *Ableman* at 514.
[54] *Id.*
[55] Earl Maltz suggests Taney conceived of the Court as a neutral arbiter – in spite of its place in the federal government – well positioned to mediate conflicts between the state governments and federal branches. Maltz, *Slavery, Federalism, and the Constitution*, *supra* note 33 at 105-6. *Ableman* should consequently not be read as a strong endorsement of federal power so much as of the Supreme Court's power. Taney Biographer Bernard Steiner questioned how anyone could speak of Taney as a States rights man after reading *Ableman*, an advocate of Jacksonian federalism. BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT 424 (1922). A large number of scholars suggest he acted primarily to serve the slave interests. FEHRENBACHER, *supra* note 2; GREGORY at 89(The constants in both *Ableman* & *Dredd Scott* are a support for slavery and opposition to legal obstruction to slavery, rather than any principled attachment to either federal supremacy or states' rights).

that the Tenth Amendment stated as much.[56] Any attempt for a government to exceed its sovereign boundaries would result in "lawless violence."[57] This position was informed by Taney's dual sovereignty conception of the Union. In Taney's view, both governments derived power directly from the sovereign people and the Supreme Court had been granted final authority in the Constitution to arbitrate disputes about whether state and federal governments wandered outside their proper spheres.[58] The Constitution had been entered into by the states as an agreement.[59] Per the binding contractual terms of that relationship, states had given up part of their sovereignty to secure harmony, making distinct sovereignties, independent within their constitutionally granted spheres.[60] For the sovereignty of both governments to be respected, complete separation was imperative, and state habeas threatened that separation. Wisconsin then had no right to confer state habeas jurisdiction.[61] Consequently, upon receiving a writ from a state judge, a federal officer need only supply a return answer explaining that the petitioner is in custody under federal authority, at which point the state judge must desist.[62]

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[56] *Ableman* at 518. U.S. Const. amend X (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).

[57] Ostensibly to ameliorate states' rights supporters, Taney went on to assert the "highest honor of sovereignty" for the states was to place "untarnished faith" in observing the compact in which they had entered, and the Constitution to which they had emphatically pledged support. *Id*. at 515. Only federal courts could effectively "guard the states from any encroachment upon their reserved rights by the General Government." *Id.* at 524.

[58] Taney expanded on the Court's position in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)(holding the United States Supreme Court as the ultimate authority over state courts in civil matters under federal law, so the Supreme Court has appellate power over any state supreme court decision touching on federal law).

[59] *Scott v. Sandford* (Dred Scott) 60 U.S. 393, 448-49 (1856).

[60] *Ableman* at 515-16.

[61] Jurisdiction must be conferred by a government or sovereignty and, according to Taney, the United States had neither conferred the habeas authority claimed by the Wisconsin court, nor did Wisconsin have the power to do so. *Id.* at 515-16. "no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another independent government." In fact, Taney pointed out, Wisconsin statute mandated a state judge remand a person brought up on a habeas corpus if a U.S. court had begun process. *Id.* at 516. Since "the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between two sovereignties." *Id.* at 523

[62] Since "the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between two sovereignties." *Id.* at 523.

But this position was hardly convincing for many and was even at odds with the spirit of Taney's opinion in *Dred Scott v. Sandford*.[63] Confederate state judges in great detail refuted Taney's reading of constitutional history to argue that state habeas jurisdiction was an inextricable part of the states' sovereignty under the United States and Confederate Constitutions.[64] Taney's reasoning in *Ableman* and jurisprudence generally protected slavery either by supporting the states' or federal prerogatives.[65] Perhaps, after secession excised abolition as an issue from the South, southern jurists felt impelled to protect state sovereignty by supporting state habeas because antebellum southern jurisprudence on state sovereignty had been predicated on support for slavery. In the Confederacy, judges could engage with states' rights on their own terms as part of a legal doctrine independent from slavery. Regardless of personal reasons, Confederate state judges insisted state habeas did not disrupt the federal balance by subordinating the national government to the states under either Constitution – it only created

[63]GREGORY, *supra* note 35, at 87("In *Dred Scott,* Taney upheld the rights of slaveholders, as protected and recognized under state law, above the supremacy of Congress in its efforts to forbid slavery in the territories. But in *Ableman v. Booth,* Taney upheld the federal supremacy in the Fugitive Slave Act above the rights of states to issue writs of habeas corpus to free deferral prisoners. The constants in both decisions are a support for slavery and opposition to legal obstruction to slavery, rather than any principled attachment to either federal supremacy or states' rights.").

[64] So to, modern federal courts scholars increasingly question the strength of Taney's argument. William Duker argues the Suspension Clause's location, contemporary commentary and records of the state ratification conventions suggest there was a fear of federal interference with personal liberties, and that state courts were the proper forums for redressing unjust detention claims. DUKER, *supra* note 33, at 126-35. Duker prominently injected this argument to existing constitutional historiography, but this is by no means a minority position. Noted federalism scholar Akhil Amar reads William Duker to have "established that the very purpose of the habeas non-suspension clause of Article I, section 9, was to protect the remedy of state habeas from being abrogated by the federal government." Amar, *supra* note 33, at 70. Anthony Gregory similarly posits, "The status of the American states as free and independent before the adoption of the Constitution, and the American understanding of habeas as a common law right merely acknowledged, not created, by state statutes and constitutions, suggest that it was understood at the birth of the American nation that state courts had the power to review federal detentions – a radical states' rights power and institutionally diffuse check on federal authority." GREGORY at 62-63. Ann Woolhandler and Michael Collins argue nothing in debates over 1789 Judiciary Act or Habeas Statute suggests federal exclusivity for habeas outside criminal prosecutions and constitutionally granted maritime jurisdiction. "To interpret the statute as making federal court jurisdiction exclusive may therefore resort to a common law of federalism whereby the Court might decide that reading the statute to make the grant exclusive is necessary to avoid needless conflict in the federal system." Woolhandler & Collins, *supra* note 33, at 15. Moreover, the availability of habeas corpus would be virtually non-existent if Congress had not created lower federal courts, and without a grant of widespread habeas jurisdiction to inferior courts and the Supreme Court's appellate jurisdiction by *ex parte Bollman* 8 U.S. 75 (1807); DUKER at 140.

[65] Whether Taney was animated solely by the goal of protecting slavery is a matter of debate beyond this study, *supra* note 55.

equality between state and federal courts for the purpose of enforcing state citizens' right to liberty and strengthening the separation of powers by preventing executive tyranny. State habeas represented a cooperative federalism where state sovereignty was respected through the state courts' jurisdiction over federal officers, but the states were not subsequently empowered over the federal government. Support for state habeas did not necessarily entail support for a strong compact theory of federalism wherein states' could nullify federal laws or secede.

By defending state habeas doctrine, Confederate state judges aligned with a moderated compact theory of federalism. As a more moderate form of states' rights than secessionism, state habeas had a broad appeal to a range of judicial personalities. State habeas doctrine was attractive to judges who held state sovereignty in high regard, but were not entirely convinced about the legality of secession. Support for state habeas as a procedure did not constrain judges from ruling against states' rights on a case's merits, so was appealing as a flexible states' rights doctrine. The doctrine maintained that nothing in early constitutional history proved the states had given up any portion of their habeas jurisdiction so as prevent them from issuing writs to federal executive officials. State habeas jurisdiction was constitutionally sound as long as state courts did not directly interfere with the federal judiciary in contravention of the Supremacy Clause. Nullification and secession, on the other hand, presumed that what the states as sovereigns had bestowed they could also take away, that states shared authority commensurate with the Supreme Court's to interpret the constitutionality of national laws.[66] State habeas

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[66] RANDALL, *supra* note 28, at 14. "The people, they said, may bestow supreme power where they will, and what they bestow they may recall. Thus the people of the States, possessing the right to bestow supreme governmental power as they should see fit, conferred such power upon a general government as their agent, limiting, to that extent, their State governments, but not limiting their own sovereignty." Because the Union was a compact between sovereign equals, each state had an equal right to construe national laws' constitutionality, a power commensurate with that of the Supreme Court because the federal government could not be expected to decide the extent of its own power. See positions taken by Robert Y. Hayne and John C. Calhoun described by Mathew Brogdon in, *Defending the Union: Andrew Jackson's Nullification Proclamation and American Federalism* 73 REV. OF POL. 245, 251-52 (2011)(Hayne took extreme states' rights position that because the Union was a compact between sovereign equals,

doctrine did not necessitate such a strong assertion of state sovereignty over the federal government so resonated with a wider spectrum of position on federalism. Once a federal judge asserted jurisdiction over a prisoner, state habeas jurisdiction did not exist. The spirit of state habeas was cooperation. State courts were the functional equivalents to lower federal courts for the purpose of protecting individual liberty from executive abuse, but state judges were not constrained by the doctrine from supporting expansive military policies.

What mattered to state habeas doctrine was that prisoners could have detention reviewed by a judiciary body, not whether a state or federal courts could accomplish this goal. The purpose of concurrent habeas jurisdiction then was to provide access to judicial review. [67] It was imperative for the states as sovereigns to ensure citizens had access to judicial review in state courts. A state's sovereign duty was satisfied by providing access to habeas corpus for its citizens, not by asserting the state courts' jurisdiction took priority over, or even enjoyed parity with, the federal courts outside the habeas realm.[68] State habeas doctrine captured the central feature of Confederate state judges' jurisprudence – what can be termed nascent Confederate constitutionalism – in that states' sovereignty was respected, but that respect was not the same as support for nullification or secessionism within the Confederacy; the judges opinions, and the Confederate Constitution, did not present a new federalism where the states enjoyed sovereign

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each individual state has the right to construe federal law and refuse to abide, to "nullify," by those laws that are repugnant to the state). Note, the most prominent proponent of extreme states' rights, John C. Calhoun, relied less on the doctrine of state sovereignty, because concurrent jurisdiction deferred too much to the national government, preferring the concurrent majority theory that a state majority was needed to affirm national policy in that state. FEHRENBACHER, *supra* note 2, at 52.

[67] Constitution recognizes concurrent jurisdiction between federal and states courts on a number of circumstances; litigants today often have a choice between bringing litigation in federal or state court. State habeas proponents argued state habeas was like certain contract claims electable by petitioner to pursue in federal or state courts.

[68] Nor was state habeas at odds with a nationalist position. Even Alexander Hamilton in FEDERALIST NO. 82 presumed the states' jurisdiction would carry on exactly as before under the United States Constitution. "I hold that the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal, and I am even of opinion that in every casein which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth."

power writ large as secessionist rhetoric suggested.[69] By defending state habeas, judges projected a sincere attachment to states' rights, which was still flexible regarding the extent of national power.

The ambiguous and flexible role of states' rights in the antebellum South was encapsulated within southerners' relationship with state habeas. While the South had a robust tradition of habeas corpus, pro-slavery,[70] antebellum southerners sided with expansive federal power to effectuate the fugitive slave laws and opposed antislavery forces use of state habeas jurisdiction. Southerners applauded the Supreme Court's opinion in *Prigg v. Pennsylvania*, effectively striking down habeas writs from free states that undermined slavery.[71] Likewise, southerners extolled Taney's *Ableman* opinion.[72] This reaction seems to substantiate Fehrenbacher's conclusion that no coherent states' rights constitutionalism existed.[73] But if

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[69] *See* discussion of the Confederate Constitution in Part III *infra*. The majority of southern jurists and politicians did not reject the South's right to secede from the Union, but support for the Confederacy's formation did not mean there was widespread support for secession or nullification as constitutional doctrines once the abolitionist threat had been eliminated. After secession, there were differing opinions about the role of strong states' rights in the Confederacy. In a speech in 1860, R. Barnwell Rhett, another prominent Confederate founder, politician, and drafter of the Provisional Constitution, asserted that the U.S. Constitution, as adopted by the states, created a limited government and "the faithful supporter of the Union…will not consent that the Union of the Constitution shall be set aside, and another Union, under the control of mere arbitrary power wielded by a northern majority to abrogate states' rights', shall be established in its stead." ROBERT BARNWELL RHETT, A FIRE-EATER REMEMBERS: THE CONFEDERATE MEMOIR OF ROBERT BARNWELL RHETT 12-14 (ed. William C. Davis University of South Carolina Press 2000).*Cf.* Regarding the Confederacy's Provisional Constitution, Davis commented: "We have changed the constituent parts, but not the system of our government. The Constitution formed by our fathers is that of these Confederate States, in their exposition of it, and in the judicial construction it has received, we have a light which reveals its true meaning." JEFFERSON DAVIS, THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY, Vol. 1, 36 (James D. Richardson, ed., 1966).

[70] GREGORY, *supra* note 35, at 82, 51-55.

[71] 41 U.S. 539 (1842); GREGORY at 66. Antislavery forces relied on the legal right for state courts to issue habeas writs, rather than legislation, to combat slavery in spite of arguments that cases arising from fugitive slaves were exclusive to the federal government. *See e.g. Norris v. Netwon* 7 West. Law J. 515 (Circuit Court, D. Indiana 1850)(the court made a strong assertion for state habeas "There can be no higher offense against the laws of humanity and justice, or against the dignity of a state and its laws, than to arrest a free man within its protection, with the view of making him a slave. And this may often be done with impunity, if the remedy by the writ of habeas corpus may not be resorted to."); Joel Tiffany, *A Treatise on the Unconstitutionality of Slavery* (1849), "It must be observed that *all* are entitled to the privileges of that writ."

[72] ROBINSON, *supra* note 29, at 441-43(particularly response by Robert Toombs); DUKER, *supra* note 33, at 153.

[73] Scholar of the Confederacy Emory Thomas observed, "Most people live in a state of tension between what they are and what they want to be, but this tension was especially intense in the Old South," because southerners professed value for liberty and equality while perpetuating an aristocratic slaveholding system. THOMAS, *supra* note

states' rights was merely a functional doctrine with no deeper resonance with southerners, why would state judges craft intricate states' rights arguments? Why not defend slavery as a constitutionally protected property right, pure and simple?[74] States' rights evidently mattered enough to southern judges for them to make complex arguments in favor of state habeas during the war for the existence of slavery. State habeas then reflects both how states' rights were often employed instrumentally during the antebellum period and how state judges projected a sincere attachment to states' rights when slavery was no longer an issue. This observation is frustratingly ambiguous, but it also indicates an understandable human element. Judges sought to preserve states' rights as long as the doctrine did not get in the way of winning the war or fending of abolitionism.

By crafting intricate states' rights arguments during the war, state judges exhibited an impulse to give meaning to states' rights that has been lost on many scholars.[75] Whether this impulse was genuine or a coping mechanism to assuage guilt over complicity in centralization cannot be known. The judges' attachment after all was subordinate to the more practical reality that conscription was necessary to win the war to protect southern slave society. But, the judges also embraced an unsettled antebellum doctrine and elaborately defended their jurisdiction. So, the impulse to project a sincere attachment to states' rights was very real, and state habeas

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2, at 20. This incongruity applied to states' rights, the sincerity of which, Thomas posits, was weakened when southern politicians sought protection from the national government to extend slavery West in the 1850s. *Id.* at 33. Antebellum historian William Freehling emphasizes secessionism as a doctrine that only appealed to a small minority, that the majority of southerners acquiesced to disunion only to make safe slavery. WILLIAM W. FREEHLING, ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT, 430, 438 (2007). Fehrenbacher characterized southern states' rights constitutionalism as a strategy to defend slavery, used interchangeably with majoritarian politics to maximize southern national influence. FEHRENBACHER, *supra* note 2, at 80-81.

[74] Slavery's place in the Constitution was fiercely debated during the antebellum period, but there was a consensus that the Constitution protected slaveholders' property rights evidenced by the Fugitive Slave Provision. *See* EARL MALTZ, SLAVERY AND THE SUPREME COURT, 1825-1861 (2008); *cf.* DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009)(arguing the constitution enshrine contain affirmative proslavery position).

[75] Gardner, *Southern Character*, *supra* note 3, at 1226.

proved a perfect vehicle because it allowed judges to satisfy that impulse while supporting the war effort. Military centralization beginning in 1862 provided the impetus for judges to embrace state habeas, and sparked a wider debate amongst Confederate policy makers about how to honor the states' rights without hindering the war effort.

Part III – Conscription and the Confederacy's Constitutional Identity Crisis

By spring of 1862, the Confederacy's manpower deficit convinced the Davis administration that conscription was imperative to conduct a successful war effort. Compounding the South's shortage in men and material, the southern states had at times withheld arms and men from Confederate armies for service in state militias.[76] This had not initially been problematic. North and South conceived of the war as a limited conflict that would involve a handful of battles before a speedy resolution was reached.[77] But, after the Battle of Bull Run in 1861, it became apparent that the war would not only continue for the foreseeable future, but would require massive amounts of men and material as the fighting would span across the entire country. Confederate military fortunes sank in early 1862 after Union forces seized a number of key strategic positions; a Union army even appeared on the brink of capturing Richmond during spring of 1862. The bleak military situation created the impression that something had to be done to bolster the Confederacy's dissolving forces. Legislators became convinced that volunteers were not filling the ranks as fast as they were depleted, so they turned to conscription.[78] Jefferson Davis agreed and advocated for conscription as imperative to retain soldiers with short term enlistments, a means to create uniformity and regularity within the military system, and a

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[76] OWSLEY, *supra* note 6, at 6-7.
[77] Historian James McPherson describes the North's initial perception of the war as: "This was a national strategy of limited war – very limited, indeed scarcely war at all, but a police action to quell a rather large riot. This limited national strategy required a limited military strategy." MCPHERSON, *supra* note 14, at 75. Even in 1862 the War was still conceived of as an attempt to regain control over rebel territory, rather than entailing a destruction of southern slave society. *Id.* at 77.
[78] MOORE, *supra* note 5, at 12-13.

necessity to distribute the burdens of war equally amongst the Confederate people.[79] Davis justified conscription as inherent to Congress's constitutional authority to raise armies.[80]

Congress passed the (First) Conscription Act on April 16, 1862, permitting Davis to call out all men between eighteen and thirty-five who were not otherwise legally exempted. The Act also stipulated that conscripts could hire substitutes from men not liable for duty pursuant to War Department regulations.[81] Those regulations required those applying for military exemption to provide a certificate substantiating their qualification for exemption to an enrolling officer; principals furnishing substitutes had to furnish the substitute to the enrolling officer, who would then provide the principal with a certificate of exemption.[82] Growing demand for troops prompted another conscription act expanding the draft age in September 1862.[83] Another exemption act and further regulations followed to close loopholes and narrow access to

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[79] *Id.* at 13-14. Moore describes the people's reception at the time: "Generally speaking, where the law pressed most heavily opposition to it was strongest. Conscription was quite naturally received with favor by those who had already volunteered and by their families at home. Every able bodied man at home who was not courageous and patriotic enough to volunteer, they thought, ought to be forced into the army." *Id.* at 18.

[80] Confederate Const., art. I, §8, cl. 12; Practically conscription was the solution to three pressing concerns: to retrieve the mistake of short term enlistments, to create regularity in the military system, and to secure an equal distribution of the burdens of war. MOORE at 14; Currie suggests Jefferson Davis's expansive vision of congressional power mirrored and derived from Chief Justice Marshall's in *McCulloch v. Maryland*. Currie, *supra* note 23, at 1280-84.

[81] "An Act to Provide for the Public Defense" [*hereinafter* First Conscription Act], §1, *in* STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE FIRST SESSION OF THE FIRST CONGRESS 1863-64 40 (R.M. Smith, ed., Richmond 1864) *available at* HathiTrust. After the President made the call for conscription all men within the specified range were to enroll with enrolling officers, who could be state officers if the Governor consented to their use for national conscription. Once enrolled a man became liable for military duty and if he refused the call to active service – whenever casualties in existing state regiments necessitated replacements – the conscripted man could be apprehended and detained as a deserter. "An Act to exempt certain persons from enrollment for service in the Armies of the Confederate States [First Exemption Act]," *Id.*, § 6, § 9 at 62-63. War Department regulations required those applying for exemption to provide a certificate evincing their qualification for exemption to an enrolling officer; principals furnishing substitutes must furnish the substitute to the enrolling officer who would then provide the principal with a certificate of exemption. General Orders No. 30, OR, ser. iv, vol. 1, 1097-1100; General Orders No. 37, OR, ser. iv, vol. 1., 1123-24.

[82] *Id*.

[83] Second Conscription Act on September 27, 1862, expanding the age of those liable for conscription to forty-five and requiring those already enlisted to serve for the war's duration. "An Act to Amend an Act entitled 'An Act to provide further for the public defense, approved April 16, 1862 [*hereinafter* Second Conscription Act]," *in* STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE SECOND SESSION OF THE FIRST CONGRESS 1863-64 16 (R.M. Smith, ed., Richmond 1864) *available at* HathiTrust.

exemption.[84] Disputes with enrolling officers began to arise in late 1862 as those who had previously procured exemption were drafted. At this time, the weakening rural economy, an overburdened transportation infrastructure, and mass displacement of citizens all made the war a more desperate struggle for southerners who, after Lincoln's Emancipation Proclamation, understood that slave society's existence was at stake.[85] Against this backdrop, conscription forced the Confederacy's identity crisis out in to the open. State leaders and a vocal minority of politicians in Richmond in the General Government publically objected to military centralization as contrary to the states' rights principles upon which the Confederacy was founded.

Uncertainty about the role of states' rights was enshrined within the Confederate Constitution. At first glance, the Confederate Constitution sharply diverged from the United States Constitution on states' rights, most apparent through the replacement of "We the People" with "We, the people of the Confederate States, each State acting in its sovereign and independent character."[86] A number of provisions similarly announced states' rights principles by explicitly repudiating how the United State Constitution had been interpreted to infringe on the states' sovereignty. The drafters notably cut Congress's power to pass legislation for "the general Welfare," the rationale for a number of federal policies repugnant to southerners from

[84] Second Conscription Act. October 11, 1862, "An Act to exempt certain persons from military duty, and to repeal (first exemption [Second Exemption]," *Id.* at 32; for example: laborers no longer were considered railroad personnel and a "20 negro rule" for exempt overseers. On May 1, 1863 Congress repealed the Second Exemption Act and imposed further restrictions, such as in §4 by requiring that exempted state officers also be exempted by their states. STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE THIRD SESSION OF THE FIRST CONGRESS 1863-64 77 (R.M. Smith, ed., Richmond 1864) *available at* HathiTrust.
[85] *See*, ESCOTT, *supra* note 14, at 45-47, 55-57.
[86] The Confederate Constitution's drafters reiterated that the locus of sovereignty lay with the states rather than the people else, CONF. CONST. art. I, § 1 reads: "All legislative powers herein delegated shall be vested in a Congress of the Confederate States…" The drafting committee had further specified in Article I that congressional power had been "delegated" by the states rather than "granted" by the people. CONF. CONST. art. I, § 1; *See also* CHARLES R. LEE, THE CONFEDERATE CONSTITUTIONS 89 (1963). In Article VI, the drafters likewise revised the U.S. Constitution's Tenth Amendment to clarify that the individual states ranked above "the people" in the new federal scheme by including "are reserved to the States respectively;" a version of the old Ninth Amendment also became a clause in the new Article VI, evidencing the importance of state sovereignty to the Confederate drafters. *See* CONF. CONST. art. VI; *cf.* U.S. CONST. amends IX & X; White, *supra* note 22, at 498. Compliance with national legislation would theoretically be at the states' discretion rather than by federal coercion.

1820-1850.[87] But other sections, namely those on executive power, seemed to cut against states' rights principles.[88] The Confederate Constitution closely resembled that of the United States. Much of the ambiguity in the United States Constitution regarding the President's military prerogative survived in the Confederate Constitution. Although southerners frequently invoked the principles embodied within the Articles of Confederation as animating secession, there was no real discussion of returning to such a pure states' rights model. So, while the Confederate Constitution addressed many of the South's primary complaints from the antebellum period, the drafters had not left a clear roadmap for navigating the boundaries between federal and state power.[89] Uncertainty about the extent to which states' rights would be honored permeated politics from the Confederacy's founding.

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[87] White at 502. Professor David Currie likewise argues that the denial of congressional authority to impose protective tariffs, to grant bounties for the encouragement of industry, and to build roads or canals for the promotion of commerce represent the southern response to sectional controversies from the antebellum period. Currie, *supra* note 23, at 1267 (citing CONF. PROV. CONST. of Mar. 1861, art. I, § 8, cl. 1, 3; art. IV, § 3, cl. 3). In practice, Currie posits the most significant revision for state sovereignty were those in Article I, Section 8, clause 1, circumscribing the Confederate Congress's power to raise revenue, so that ulterior purposes could not be present, and by stipulating further that national revenue could only be used to pay the debts of the Confederacy, to provide for the common defense, and to support the Confederate Government. *Id.* at 1268. *Cf.* Jeffrey Jenkins problematizes the view of a states' rights consensus on these issues: "While the members of the newly-formed Confederate states saw eye-to-eye on slavery, this was not the case on protective tariffs and internal improvements. Thus, it seems reasonable that these two issues would reemerge as primary issues in the politics of the Confederacy." Jeffrey A. Jenkins, *Partisanship and Confederate Constitution-Making Reconsidered: A Response to Bensel*, 13 STUD. AM. POL. DEV. 279, 284 (1999).

[88] CONF. CONST. art. II, § 2 stipulated that the President would retain much of the power that the U.S. President had, including the right to appoint Supreme Court justices; Lee argues, "the Confederate President probably had more authority than his Federal counterpart, particularly in view of the executive and the item veto provisions of the Confederate Constitution." CONF. CONST., art. II, § 2; LEE, 107. The drafters made the amendment process slightly easier by permitting just three states to summon a constitutional convention and amendments would be ratified by two-thirds vote by the states or the convention. CONF. CONST., art. V, § 1. This provision set a noticeably lower bar than the Articles of Confederation, which secessionists often pointed to as the embodiment of states' rights in their constitutional arguments. However, the amendment article could cut both ways for states' rights, permitting the states to freely amend the Confederate Constitution, but also making federal change possible with fewer of the states' consent.

[89] In this way Confederate Constitution mirrored United States Constitution.

A larger constitutional discourse about the extent of federal power was perceptible in the congressional debate over the Confederate Supreme Court.[90] The Confederate Attorneys General frequently addressed federalism issues, at times concluding the Confederate Government exceeded its authority, but more commonly justifying expansive national power over jurisdictional realms claimed by the states, such as the jealously guarded right to appoint officers within state regiments serving in the Confederate Army.[91] In Richmond, those responsible for the war's administration perennially favored a strong federal prerogative and tended to get their way; after all, defending slavery required a robust national defense.[92] But states' rights were not completely forgotten in the Confederate Supreme Court debate. The Confederate Constitution stipulated that there would be a Supreme Court and the Senate Judiciary Committee, at Davis' behest, offered a bill to establish the Court in March 1862.[93] This bill was indefinitely postponed after a debate arose regarding whether or not to repeal the Judiciary Act provision for Supreme Court review of state judgments.[94] During the following session of Congress in September 1863, another attempt was made to set up the Supreme Court in order to address a number of questions

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[90] The Confederate District Courts tackled civil rights issues stemming from the Sequestration Acts, which permitted legislative confiscation of property belonging to northerners, and validated a curtailment of constitutional property protection for the sake of a more effective war effort. Daniel W. Hamilton, *The Confederate Sequestration Act*, 52 CIVIL WAR HIST. 373, 389-93 (2006).

[91] The Attorney Generals opinions offer insight into the legal challenged faced by the CSA, carried a great deal of weight with the Davis Administration and have been central to scholarship on confederate constitutionalism. ROBINSON, *supra* note 29, *at* 513-20; An example of an Attorney General ruling against national power in the opinion from May 9, 1862 by Thomas Hill Watts, *in* THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861-1865 91 (Rembert W. Patrick ed., 1950) [hereinafter, CSA Attny Gnrl Ops.](finding a congressional act providing for allowances for deceased soldiers in violation of the states' police powers over estates); Examples of the Attorney General siding with Confederacy: May 16, 1862, Watts, *id.* at 95-96; August, 14, 1862, Watts, *id.* at 141.

[92] For further information on constitutional conflict in the Confederacy see OWSLEY, *supra* note 6; NEELY, *supra* note 2; AMLUND, *supra* note 2.

[93] Currie, *supra* note 23, at 1369.

[94] *Id.* at 1369-70; Judiciary Act of Mar. 16, 1861, §45 *in* STATUTES AT LARGE OF THE PROVISIONAL CONFEDERATE STATES OF AMERICA, 98, 107 (R.M. Smith, ed., Richmond 1864) *available at* HathiTrust.("That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, hwere is drawn in question the validity of a treaty or statute of, or an authority exercised under the Confederates States…the decision may be re-examined, and reversed or affirmed in the Supreme Court of the Confederate States"). Currie notes that this provision mirrors §25 of the Judiciary Act of 1789.

that had arisen, such as whether an income tax would be constitutional, and to fulfill the constitutional mandate.[95] Yet, opponents pointed to the history of the United States' Court, which time and again, they cautioned, had sanctioned the expansion of federal power to the states' detriment.[96] Opponents and proponents vigorously debated the virtues and drawbacks of establishing a Supreme Court. The former won the argument – a Supreme Court would be beholden only to Richmond rather than to protect the states' sovereignty, they argued.[97] The Senate consequently voted in favor of establishing the Court only after the 1861 Judiciary Act's provision for Supreme Court review of state supreme court decisions was repealed; the Confederacy federal judiciary would not have appellate power over state courts as in the United States.[98] The bill then stalled in the House. These congressmen advanced states' rights by constraining the federal judiciary on one hand, while expanding military centralization on the other. In this way, the Supreme Court debate was symbolic of the constitutional identity crisis.

Debate over the Confederate constitutional identity crisis crystallized in the politics surrounding conscription. A number of state and national politicians immediately resisted conscription as an undue exercise of federal power and a violation of states' rights. In particular, Georgia's Governor Joseph E. Brown took a stand against conscription, adamantly refusing to direct state officers to assist the federal enrolling officers and elicited a firm rebuke by Secretary of War George W. Randolph for seeking to enroll large numbers in state service to exempt them from conscription.[99] In a series of publicized exchanges with Davis, Brown summarized the main states' rights arguments against conscription: "This Act not only disorganizes the military system of all the States, but consolidates almost the entire military power of the States in the

[95] Currie at 1370.
[96] *Id.* at 1375.
[97] *See*, *Id.* at 1371-75.
[98] *Id. at* 1375 (*citing* House Proceedings (Mar. 18-20, 1863), *reprinted* in 49 Southern Historical Society Papers: Proceedings of the First Confederate Congress, Third Session in Part, at 25, 27 (1992)).
[99] May 26, 1862, OR, ser. iv, vol. 1, 1129; June 17, 1862, OR, ser. iv, vol. 1, 1154.

Confederate…and enables him at his pleasure to cripple or destroy the civil government of each State, by arresting and carrying into the Confederate service the [State] officers."[100]

Brown was not the sole critic by any means. Other governors, such as South Carolina's Governor Andrew G. Magrath, refused to aid in conscription, and Senator Robert A. Toombs of Georgia and Vice President Alexander H. Stephens led opposition to conscription in Richmond.[101] The vocal minority were drowned out at the political level as Congress steadily expanded conscription liability and narrowed exemptions, so that the state courts became the locus for contesting conscription.

Because there was no Confederate Supreme Court, state courts were the primary forums for adjudicating constitutional grievances in the Confederacy. Conscripts turned to state courts because those courts enjoyed greater public confidence than federal courts and because judges embraced state habeas so accepted their petitions.[102] State courts were more readily accessible and familiar than federal courts in the antebellum period, and it was reasonably assumed that a local judge would be more sympathetic than a federal appointee. There were also fewer federal courts to which a detained conscription could appeal.[103] Because state courts shared concurrent

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[100] April 22, 1862 *in* CORRESPONDENCE BETWEEN GOVERNOR JOSEPH BROWN AND JEFFERSON DAVIS ON THE CONSTITUTIONALITY OF THE CONSCRIPTION ACT 14 (Atlanta Intelligence Print, 1862) *available at* HathiTrust.
[101] MOORE, note 5, at 21-25; OR, ser. iv, vol. 1, 1140.
[102] Hamilton, *supra* note 23, at 433-34. At the Confederacy's outset, Congress declared the United States laws as of November 1, 1860 would be law in the Confederate States, so United States federal precedent would remain controlling in the Confederacy. "An Act to Continue in Force Certain Laws of the United States of America," Feb. 9, 1861, *in* Statutes At Large, *supra* note 94, at 50. Secession did not alter state precedent either because the states did not see secession as an interruption in their sovereignty, as Robinson writes, "No change had been necessary in the organic or statutory law except the simple substitution for the word *Confederate* for *United* wherever the name or of the federal union occurred…The executive, legislative, and judicial branches served out their terms under the new confederation in in complete harmony with the will of the people…The transition was so orderly and natural that the very fact of secession fails to appear in many classes of State records….The State judicial systems remained intact…" ROBINSON, *supra* note 29, at 70-71. *Cf.* Firebrand secessionist and Confederate Senator William Yancey argued U.S. precedents should never be followed and that the Confederate Constitution ought to be construed on its own terms Currie, at 1375 (Citing senate Proceedings (Mar. 17, 1863) (statement of Sen. Yancey), reprinted in 48 Southern Historical Society Papers, at 318, 318–19 (1992).
[103] ROBINSON at 122-173. The Confederate District Courts essentially replaced the United States Courts and continued to operate throughout the war, but there were far fewer Confederate courts than state courts.

jurisdiction with Confederate courts under state habeas doctrine, and because there was no appeal available from state to federal courts absent a Supreme Court with appellate review, the state courts' decisions were of greater importance than in the North, or at any time since in American history.[104] The Davis administration accepted as much by litigating conscription controversies in state courts, correctly assuming legal actions in state courts would command more popular respect; as discussed in Part V Davis could have instructed officers to ignore the writs.[105] Conscription litigation invariably involved those claiming exemption – generally men who had provided substitutes – who had been arrested by conscripting officers. Detained conscripts petitioned state judges for habeas writs and conscription officers responded by rejecting the judges' jurisdiction over federal prisoners, prompting the North Carolina, Georgia, and Alabama supreme courts to address state habeas jurisdiction.

Part IV – State Courts' Defense of State Habeas

The Alabama, Georgia, and North Carolina supreme courts handed down opinions in favor of state habeas within months of each other in 1863. Almost a year after a Mr. Bryan obtained a discharge in 1862 for providing a thirty nine year old substitute, a Lieutenant J.D. Young arrested Bryan on June 16, 1863 under the Second Conscript Act because Bryan's substitute had become liable for conscription when Congress expanded the conscription call past thirty-five. [106] Bryan applied for a habeas petition to the North Carolina supreme court. North Carolina Supreme Court Chief Justice Richmond M. Pearson wrote the majority opinion for *in re Bryan*, joined also by Associate Justice William H. Battle in a concurrence. In Georgia's Middle District, J.K. Wimberly applied for a habeas writ alleging illegal restraint by two enrolling

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[104] Brummer, *supra* note 13, at 388.
[105] AMLUND, *supra* note 2, at 86.
[106] *In re Bryan,* 60 N.C. 1 (1863); Second Conscription Act, *supra* note 84.

officers, J.L. Mims and J.D. Burnett.[107] Georgia Supreme Court Justice Charles J. Jenkins delivered the opinion in *Mims v. Wimberly*, responding to the enrolling officer's argument: "the case is within the limits of the sovereignty assigned by the Constitution to the Confederate States, and a habeas corpus issued by a State Judge or Court has no authority within said limits."[108] The Alabama court encountered a fact pattern mirroring that of *Bryan* in two separate claims, the gravamen of both was an alleged unlawful detention after having procured a substitute.[109] Alabama Supreme Court Justice George W. Stone wrote the majority opinion for *ex parte Hill*, and Chief Justice A.J. Walker wrote a dissent. Written by judges with varied attitudes about Richmond's authority and jurisprudential leanings, the opinions came to the same conclusion that state habeas was constitutional as an incident to state sovereignty.

Hill, Bryan, and *Mims* exemplify that state habeas resonated with a range of jurisprudential personalities. Pearson was agreed by contemporaries to be one of the premier common law lawyers in the country.[110] Justice Battle disagreed often with Pearson's strong

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[107] The record indicates only that Wimberly was "in truth and in fact" exempt from military duty from the Conscription Acts. *Mims v. Wimberly*, 33 Ga. 587, 588 (1863)

[108] *Id.*

[109] *Ex parte Hill*, 38 Ala. 458 (1863). A Mr. W.B. Armistead had procured a substitute who was not liable for conscription, at which time Armistead was discharged. He was later held in custody as liable for conscription by L. H. Hill, a Confederate enrolling officer, and sought discharge through a habeas petition. Hill applied for a writ of prohibition to the Alabama Supreme Court to enjoin further proceedings by the probate judge to which Armistead had made his habeas petition. A Charles H. Dudley applied for a remedial writ against a state chancellor to obtain a full hearing on habeas corpus and then a discharge from custody as a conscript.

[110] Born in 1805 to old revolutionary stock, Pearson entered the University of North Carolina at age fifteen and graduated with highest honors as class valedictorian before he began to read law under Judge Leonard Henderson, of Granville County. Thereafter Pearson embarked on a long and august legal career, founding his own law school, winning election in 1836 as one of the youngest judges ever to the State Superior Court. Pearson was proud of his aristocratic background, but lived plainly as a farmer and displayed an uncommonly strong devotion to the rule of law and the common law "When every other court in the state had been closed during the Civil War, the old log office which he occupied at his home at Richmond Hill was opened." Justice Battle would later note of Pearson in his History of the Supreme Court of North Carolina, "As a common law lawyer the country has, I think, produced few equals and scarcely any superiors to Judge Pearson." Jeffrey Pritchard, *Richmond Mumford Pearson*, *in* 5 LIVES OF GREAT AMERICAN LAWYERS 233-42 (William D. Lewis ed., 1908).

assertion of habeas jurisdiction, and openly hostile posturing towards Richmond.[111] Modern scholars have portrayed Alabama's G.W. Stone as a federalist in states' rights clothing.[112] Stone biographer William Brantley argues that Stone's was a Marshall-style federalist whose support for strong national power to the detriment of states' rights cost him his seat on the Alabama court.[113] Jenkins, a reluctant secessionist and former Whig, was a friend of Jefferson Davis, and had even been considered for a cabinet position.[114] That these men with such disparate backgrounds agreed about a contentious doctrine underscores the attractiveness of state habeas doctrine. State habeas was common states' rights ground for the judges to take, appealing as a way to preserve state sovereignty without constraining the judges' rulings on the merits.

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[111] Born in 1802, William H. Battle was educated at the University of North Carolina, was a member of the House of Commonsbefore he was promoted to the SuperiorCourt in 1839. He was appointed to the Supreme Court in 1848 to fill a vacancy, and was almost unanimously elected to the SupremeCourt in 1852. Walter Clark, *History of the Supreme Court of North Carolina*, *in* CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NORTH CAROLINA 623-24 (1919). Historian Memory F. Mitchell argued Battle was more unpredictable than his colleagues, maintaining an independent course. Memory F. Mitchell, Legal Aspects of Conscription and Exemption in North Carolina 1861-1865 90 (1965) *See also*, Battle's opinion diverging from Pearson's in *Gatlin v. Walton*, *supra* note 21; *Johnson v. Mallett,* 2 Win. 13 (1864); *Bridgman v. Mallet*, 2 Win. 112 (1864).

[112] With little formal education, Stone had only begun studying law under a distinguished member of the Fayetteville, Tennessee bar after pursuing a mercantile profession. Licensed to practice in 1834, Stone years was appointed to the circuit court bench less than ten years later. He resigned in 1849 to return to private practice, but was elected as an associate justice of the Alabama Supreme Court in 1856 and again in 1862. Stone was known for both his high respect for the letter of the law and willingness to abide by the law's evolution; at one pint he declared a statute he himself had written while at the bar void. Francis Gordon Caffey, *George Washington Stone*, *in* 6 LIVES OF GREAT AMERICAN LAWYERS 167-70 (William D. Lewis 1909).

[113] WILLIAM H. BRANTLEY, CHIEF JUSTICE STONE OF ALABAMA 159 (1943). *Cf.* Timothy Huebner, has argued Stone was flippant on states' rights, animated by conflicting political and contradictory jurisprudence: "Although Stone cited some of the most nationalistic opinions of the Marshall Court to assert Confederate power, he also blamed the Marshall Court for creating many of the constitutional and legal problems that led to the creation of the Confederacy. Stone struggled to explain this discrepancy but had little success, for he referred to the 'heresies' of the Supreme Court in one sentence only to affirm its 'distinguished ability' and "long and brilliant history" in the next." TIMOTHY HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890, 165-66 (1999).

[114] Born in South Carolina on January 6, 1805, Charles J. Jenkins was educated at Willington Academy in Abbeville District, South Carolina, a noted institution that boasted John C. Calhoun as an alumnus. Upon his graduation from Union College in 1824, Jenkins relocated to Georgia to study law in the office of Hon. J. McPherson Berrien and passed the bar in 1829. Two years later the Georgia legislature elected him as Attorney General of the State of Georgia and Solicitor of the Middle Circuit, after which Jenkins pursued a career as a state and national politics as a Whig. In 1860, Governor Joseph Brown appointed Jenkins as an associate justice of Georgia's Supreme Court. Although reluctant for Georgia to secede without an overt act by the Lincoln administration, Jenkins supported the right of secession and had allegedly been considered for a cabinet post by Jefferson Davis. Charles Jones, *the Life and Services of ex-Governor Charles Jones Jenkins* (Atlanta, J.P. Harrison & Co., 1884), 6-19 (accessed through HathiTrust).

By linking state habeas with state sovereignty the majority in these three cases honored states' rights procedurally. State habeas jurisdiction, Pearson argued in *Bryan*, was derived from North Carolina's sovereignty. A judge's authority to protect state citizens through habeas was an obligation that had continued unabated in North Carolina from the King's obligation "to inquire by his courts into the condition of any of his subjects."[115] Battle was even more direct about the connection between North Carolina's sovereignty and its judges' habeas jurisdiction.[116] Detailing how North Carolina had become a sovereign state after the Revolution, Battle argued that, of the duties imposed by sovereignty, "none was higher than that of protecting all her citizens in the full and free enjoyment of life, liberty and private property," accomplished by judges through the writ of habeas corpus.[117]

The understanding that state habeas was integral to state sovereignty was shared by Stone in *Hill* and Jenkins in *Mims.* Jenkins argued that the states, in their independent and sovereign capacities, had formed the United States.[118] The United States Constitution preamble had lent itself to all manner of confusion by obfuscating that the locus of sovereignty lay with the states. "[H]appily for us" Jenkins noted, the Confederate drafters had replaced "We the people" with "We, the people of the Confederate States," thereby conforming to "the truth of history."[119] That the states as sovereigns had granted their courts' authority to issue habeas writs to whomever

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[115] *Bryan* at 42. The King had the obligation "to protect all of his subjects in the enjoyment of their right of personal liberty."

[116] Battle began his opinion by succinctly stating the question before the court was "to inquire whether the State gave up any portion of that sovereignty, which was necessary to be retained for the purpose of enabling her to discharge the duty of protecting the personal liberty of her citizens." *Id*. at 29.

[117] *Id.* at 28.

[118] *Mims* at 592. In Jenkins' reading of history, "we find ourselves, at every step, treading in the footprints of State sovereignty, the most severe test, the clearest demonstration, is to be found in the ratification, which alone gave efficacy to the instrument." *Id.* at 590. This account closely resembles that given by Davis, see note infra re ratification. Further, resembles Calhoun's account of the founding: "For it was the several States, or, what is the same thing, their people, in their sovereign capacity, who ordained and established the Constitution." JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT, AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, 131 (Richard K. Cralle ed., 1851) *available at* HeinOnline.

[119] *Id.* at 591.

may unlawfully detain state citizens, and that neither Constitution had explicitly taken that habeas jurisdiction away, was the "truth of history" for Jenkins. Georgia had not "yielded prerogative of protecting the personal liberty of her citizens." [120] In a similar way Stone was wary of how the United States government had encroached on the states' sovereignty. He concluded that if the question before a court was whether a federal officer had erroneously applied authority to a person outside the subject matter of his proper jurisdiction, then courts of either government may determine the question "of such erroneous application of authority, unless the law, in its terms, inhibit such inquiry."[121] Because the states existed as separate sovereigns, they, through their judges, could exercise overlapping power to review whether an enrolling officer had acted outside his authority. For Stone, the relevant question was whether a usurpation of power had occurred, rather than whether power had been applied properly, so state and federal judges were equally competent to remedy an unlawful detention.

State habeas, the judges argued, embodied the sovereign's imperative to preserve individual liberty. This obligation had its roots in the common law. Pearson took pains to explicate state habeas' connection with the common law. For Pearson, the statutes conferring habeas jurisdiction on North Carolina's courts substantiated the preexisting common law jurisdiction that had remained unbroken from colonial times; that habeas jurisdiction derived from the common law featured more prominently in Pearson's opinion than in other judges'.[122]

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[120] *Id.* at 593.
[121] *Hill* at 463. Stone based his conclusion on reading of *Slocumb v. Mayberry* and *McClung v. Silliman, supra* note 51.
[122] *Bryan* at 43-45, noting the North Carolina Habeas Corpus Acts copied longstanding English habeas statutes and that one need only look to North Carolina positive law if they were unconvinced of the courts' common law jurisdiction. Secession theory held a state's sovereignty had not been fundamentally changed by secession from the Union because the states had acted as established and recognized sovereigns. JOHN W. BURGESS, THE CIVIL WAR AND THE CONSTITUTION Vol.1 77 (1901), *available at* HeinOnline. Thus the habeas jurisdiction attached to North Carolina's sovereignty when it entered the union had continued unabated into the Confederacy. The other judges made little mention of the actual state statutes conferring habeas jurisdiction except in passing. *Cf* In response to such arguments, Mr. Strong, arguing on behalf of the Confederacy, stated: ""The common law itself, in this state,

Judges' habeas authority occupied a rarefied position for Pearson as the means by which North Carolina fulfilled its sovereign duty to protect its citizens; the writ was a substantive right of all North Carolina citizens enforced by the courts' common law jurisdiction.[123] Opposed to federal courts, whose authority must be conferred by the Constitution, state courts may derive their jurisdiction from common law principles.[124] This expansive understanding of state courts' common law jurisdiction vis-à-vis federal courts was acknowledged by John Marshall in *ex parte Bollman*.[125] State judges' common law authority to issue habeas writs was a "sacred trust" flowing from North Carolina's sovereignty to ensure laws were administered so as not to infringe on personal liberty, part and parcel to the Bill of Rights North Carolina was bound to maintain.[126] Jenkins and Battle likewise underscored how state habeas satisfied the states' sovereign duty to protect individual liberty.[127]Procedural access to the writ then was framed as a manifestation of the substantive rights states owed to their citizens. Judges' habeas jurisdiction was more than a pleading procedure. It was integral to effectuating the states' sovereign duty to protect citizens'

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depends for its force upon a statute. And the Legislature could uproot it tomorrow, and establish the code of Napoleon in its stead." *Bryan* at 37.

[123] Understood in early American law, habeas procedure assumed substantive quality incidental to subject hood then citizenship. Halliday & White, *supra* note 36.

[124] *Bryan* at 48. Because state courts' authority flowed from the common law, Pearson argued, "the power of the Legislature to confer jurisdiction is unlimited."

[125] *Ex Parte Bollman* 8 U.S. 75 (1807) suggested habeas was a substantive right at common law. Chief Justice Marshall acknowledged the state courts' expansive common law jurisdiction, stating, "Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles." *Id.* at 93. Regarding habeas as part of that jurisdiction, Marshall further suggested all common law courts innately could exercise the writ without indicating any limit upon that power if the prisoner be in federal, opposed to state, detention: "The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Id.* at 94.

[126] *Bryan* at 28. "Our conclusion is, that the Court has jurisdiction to discharge a citizen by the writ of habeas corpus, whenever it is made to appear that he is unlawfully restrained of his liberty by an officer of the Confederate States; and that when a case is made out, the Court is bound to exercise the jurisdiction which has been confided to it "as a sacred trust, " and has no discretion and no right to be influenced by considerations growing out of the condition of our country, but must act with a single eye to the due administration of the law, according to the proper construction of the acts of Congress." *Id.* at 47. Even Taney could not help but pay service to the writ's venerated place in Anglo-American jurisprudence after Lincoln first suspended the writ, writing: "From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench" *ex parte Merryman* 17 F. Cas. 144, 150 (1861).

[127] *Mims* at 587; *Bryan* at 30-31.

The judges clarified that state habeas was not a new doctrine in order to give the their use of state habeas legitimacy under United States precedent. State habeas, they indicated, was not something the judges had conjured up out of thin air, but existed as part of a continuum of constitutional states' rights in American legal history. Battle specified that the United States Constitution's Tenth Amendment had been "unnecessary, as the General Government had no powers except what the States had granted to it."[128] Pursuant to this view the state courts' existing jurisdiction continued unhindered under the United States Constitution. Except where expressly excluded, state courts enjoyed concurrent jurisdiction with the federal courts, even on cases arising under federal law.[129] Because none was more important than the state judges' habeas jurisdiction, the judges reasoned, there was no reason to think the states had agreed to limit their courts' habeas jurisdiction in any way.[130] Battle doubted that North Carolina or any other state court would have ever assented to a constitution under which they lost habeas jurisdiction, regardless of whether detention was under the aegis of state or federal authority. Battle wrote: "A jurisdiction so essential to the great privilege of going where one may please – a privilege which every citizen of the State would wish to enjoy as freely as he did the air he breathed – the State courts would hardly have parted with, except upon the most urgent necessity."[131] Pearson made clear that under the United States Constitution, power emanated from the states, so the onus was on those asserting federally exclusive jurisdiction to show that a positive grant existed to oust state jurisdiction; Congress must prove it first has the authority to

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[128] *Bryan* at 29.
[129] *Id.* at 29-30.
[130] And of all the jurisdictional realms over which the state courts had previous cognizance, Battle argued, "none were more important" than habeas corpus. *Id.* at 30. In FEDERALIST NO. 82 Hamilton extolled concurrent jurisdiction. "Among the cause, of which the State courts had previous cognizance, none were more important than those in which they claimed the right to inquire, through the means of writs of habeas corpus, into the reasons for the imprisonment of person alleged to be illegally restrained of their liberty."
[131] *Bryan* at 30-31.

take away the state jurisdiction, and then that it has exercised that power.[132] Nothing in the historical record of the United States or Confederacy, Pearson observed, explicitly had limited the states' habeas jurisdiction. On the contrary, he argued, federal and state precedent supported state habeas jurisdiction.[133] Stone and Jenkins likewise sought to legitimize state habeas under United States precedent.[134]

Notably, Jenkins was the only one to address state habeas under the Confederate Constitution at length. There was no question for him that Georgia had entered the Confederacy as a sovereign power, and the sovereignty of its people remained explicitly unimpaired.[135] To limit Georgia courts' habeas jurisdiction, "it must appear that by the Constitution exclusive jurisdiction has been given to the Confederate Courts," in order to divest state courts of their previous jurisdictional authority, and no such thing had occurred in the Confederacy according to Jenkins.[136] But, Jenkins was not seeking to establish a new states' rights argument. His treatment

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[132] *Id.* at 21(*quoting* Jurist William Tilghman).

[133] For state support, Pearson pointed to*, inter alia, State v. Brearly*, 5 N.J.L. 555 (1819) and treatises by Hurd and Kent Pearson reasoned the weight of precedent from state courts was on his side: "It must be presumed that this long series of cases which establish the concurrent jurisdiction of the State Courts, and their power to put a construction on acts of Congress, when necessary to the decision of a case before them, is supported by the most clear and satisfactory reasoning…" *Bryan* at 20-21. Not only did state decisions support habeas jurisdiction, but so did federal precedent according to Pearson, particularly *Slocumb v. Mayberry*, *supra* note 51, in which a customs officer, suspecting an intention to violate the U.S. embargo laws, seized a vessel in Newport Rhode Island. The owners of the cargo aboard the ship brought an action in state court seeking a writ of replevin, which the state judge granted, to have the cargo discharged from the custom officer's control. The Supreme Court affirmed the state court's action because it determined the U.S. officer was entitled only to detain the ship under the federal law, not the cargo. Although *Slocumb*'s facts differed from the present case – habeas was not involved – Pearson understood *Slocumb* to broadly support state courts' concurrent jurisdiction when a federal officer detained an object or person without proper congressional authorization; "…so, it is directly in point to show that a State court has jurisdiction wherever the law gives no authority to detain the person or the thing; and, in order to decide that question, the State court has power to put a construction on the act of Congress under which the officer justifies the imprisonment or detention." *Bryan* at 22.

[134] *See* Jenkins argument that one need only look to U.S. law to understand why state habeas was unproblematic to the federal scheme as part of the states' concurrent jurisdiction. Procedurally, Jenkins pointed out, judicial power under the U.S. Constitution extended to cases "between citizens of different States," but plaintiffs could elect between pursuing their claims in state or federal courts. *Mims* at 595.

[135] *Id.* at 593.

[136] *Mims*, 595. "The first paragraph, second section, third article, of the Constitution, defines the extent of the judicial power of the Confederate States. There are sundry specifications, and among others this, 'all cases arising under the laws of the Confederate States,' and such is the case before us. But it is not declared that this jurisdiction shall be exclusive."

of the Confederate Constitution served to further corroborate his argument that state habeas doctrine had existed under the United States Constitution.

In order to rely on United States precedent the judges had to address *Ableman.* Pearson read the Supremacy Clause in the United States Constitution to require state courts not to interfere with the federal judicial process by issuing a habeas writ after a federal court had asserted its jurisdiction over the matter. This, Pearson asserted, had been the holding in *Ableman* because, in that case, the U.S. Marshall detaining the petitioner had been acting on a federal district court's indictment. Taney had not overturned state courts' habeas jurisdiction over federal detainees before federal process began.[137] The wider implication of *Ableman* "against the jurisdiction of the State courts in all cases where one is restrained of his liberty" by a federal officer was merely *obiter dictum* and could not be taken seriously lest "such an inference…do great injustice to that able jurist [J. Taney]."[138] Jenkins likewise asserted that compliance with *Ableman* required only that, upon learning that a Confederate district court with jurisdiction over the subject of detention had begun proceedings, a state judge dismiss the writ to avoid conflict.[139] State habeas was a matter of comity between the two judiciaries. Consequently, the judges agreed state habeas served as part of the separation of powers under the United States and Confederate Constitutions.

State habeas doctrine had particular value to the separation of powers in nascent Confederate constitutionalism because state habeas checked executive action in theory, without hamstringing executive action it practice. *Hill* and Bryan show that state habeas provided a states' rights check on executive power that allowed for different outcomes. On the merits of Bryan's case, Pearson decided to discharge Bryan based upon earlier holdings that the language of the

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[137] *Bryan* at 23.
[138] *Id.* at 23-24.
[139] *Mims* at 596.

Conscription Acts controlled when in conflict with War Department regulations.[140] In *Hill* Stone concluded that one petitioner had been properly discharged by a probate court under the First Conscription Act, but had then become liable under the Second Conscription Act's expansion of the conscription age; congressionally authorized War Department regulations stipulated that exemption lasted only as long as the substitute remained not liable for conscription.[141] The other petitioner could not be discharged as the War Department alone could hear questions of fraud *vel non* cases involving substitutes; such an inquiry involves only how federal officers make a factual decision under lawful authority.[142] Although Stone did not discharge the petitioners, he

[140] *In re Irvin*, 60 N.C. 59 (1863), Pearson reasoned that the Second Conscription Act did not make those serving as substitutes liable for conscription because they were already bound in service, and it would be redundant for the act to merely reclassify them as liable to effectuate the Act's purpose of increasing the Army. Yet, the Secretary of War's regulation holding principals liable required that the substitutes had become liable for conscription, to which Pearson responded: "A decent respect for our law-makers forbids the courts from adopting a construction which leads to the conclusion that it was the intention, by the use of general words, to include within the operation of the act, substitutes who were already bound for the war; not for the purpose of affecting them, but for the indirect purpose of reaching parties who had furnished substitutes, and in that, was asserting a power, which is at least doubtful, and certainly involves repudiation, and a want of good faith." *In re Meroney* 60 N.C. 61 (1863), Relied on a similar interpretation of the Conscript Act with regards to the substitutes, Pearson pointed out that a different construction, such as that embodied by the War Department's regulation in question, was inconsistent with a congressional act. Further, to render the substitutes service void so as to exempt the principal, the War Department regulation would have had to insert an additional condition to the substitution contract – that a substitutes not be afterward be made liable by a subsequent act of Congress – which could only be accomplished legislative, rather than an bureaucratic, act. For Battle *see Id.* at 65.

[141] "The order of May [General Order No. 37] is too clear to admit of a cavil or doubt. It provides, that the exemption obtained on putting in a substitute, "is valid only so long as the substitute is exempt." This regulation, being made pursuant to authority conferred by congress, has the binding efficacy of law. It was part of the public law when Mr. Armistead put in his substitute, and therefore became part and parcel of the act done. He cannot complain of a breach of governmental faith, for he is charged with a knowledge of the terms on which his substitute was received. Neither can it, with any plausibility, be contended, that the order of 19th of May, declaring when the exemption shall expire, must be restricted in its operation to a certain limited number of contingencies, on the happening of some one of which the exemption of the principal shall cease. If under forty, he ceased to be legally exempt when the call was made for conscripts up to that age; and Mr. Armistead's exemption, by reason thereof, then ceased to be valid." *Hill* at 475.

[142] Reading General Order No. 82, November 3, 1862, Stone argues: "In passing upon the question of fraud vel non, the commanding officer, commandant of conscripts, or secretary of war, as the case may be, must necessarily and uniformly hear and decide upon evidence, and draw inferences from facts. These things inhere in the very nature of the inquiry to be made. They always come up, and, hence, are not the accidents of the particular case. They are like the preliminary proofs, and documentary exemplifications, which pertain to the functions of a land-office register, in the matter of pre-emption claims. To allow the State courts to re-try or re-examine the facts on which such decision is pronounced, is to give to the courts of the State government appellate jurisdiction over the commanding officers, commandant of conscripts, or the secretary of war; officers who receive their appointments from the Confederate government, and who are specially charged, by that government, with the performance of these functions. The issue is not solely, nor even mainly, between the principal and the substitute. The Confederate government is directly

still extolled the role of state courts as part of the separation of powers to protect against executive tyranny.[143] Stone saw his opinion as the "true construction" of the conscript acts and regulations regarding substitutes to be followed by enrolling officers.[144] Judicial oversight of executive officers by federal or state officers was necessary.

Jenkins argued state habeas was a contemplated benefit to the separation of powers in the Confederacy. He reasoned that the Supremacy Clause specifically bound "the judges in every state" because state judges were not able to interpret the scope of Confederate laws as they applied to state citizens.[145] Jenkins believed the obligation placed upon judges to obey the Confederate Constitution "removes any well-founded apprehension that they will unduly obstruct or hinder the Confederate government in the exercise of its proper functions."[146]

Pearson likewise emphasized that state habeas strengthened the balance of judicial power against their executive counterparts. While a prisoner was detained, the reasoning went, either state or federal judges were equally competent to construe national laws to determine whether detention was lawful; his argument was supported by the fact that state courts interpreted federal

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concerned in the result; and, in its military service, will be the chief sufferer from a reversal of the decision pronounced by the commanding officer, or other officer acting in the premises. State courts have no authority to re-try the question of fraud vel non, in the matter of putting a substitute into the army, under the rules above copied." *Hill* at 470.

[143] According to Stone, state habeas did not upset the federal balance because state courts were only discerning where federal authority ended so as to protect individuals, pursuant to their duty as agents of the state sovereign. In the case of Mr. Armistead, the question of law, namely, whether Armistead's initial discharge exempted him from later conscription under the Second Conscription Act involved "nothing more nor less than determining whether the officer rightly decided the legal question as to the effect of the substation and discharge 'the accident' in Mr. Armistead's case," so could be decided by a state court. *Id.* at 465-66.

[144] *Id.* at 474.

[145] *Mims* at 598.

[146] *Id. Cf*, David Currie suggests Jefferson Davis largely acted within Confederate Constitution and Congress was generally willing to follow strong national policies - "virtually everything can be made necessary and proper to military success." Currie, *supra* note 23, at 1399. Fehrenbacher concluded, "the truly striking feature of this constitution written and adopted by representatives of the deep South is not the extent to which it incorporated states-rights doctrines, but rather the extent to which it transcended those principles in order to build a nation." FEHRENBACHER, *supra* note 2, at 63. Richard Bensel asserts confederate governing culture and Constitution were much more centralized than those of the Union. Richard F. Bensel, *Southern Leviathan: The Development of Central State Authority in the Confederate States of America* 2 AM. POL. DEV. 90 (1987).

law and the Constitution as a matter of course.[147] His position relied on the assumption that review by a proper judicial authority is what mattered so that executive officers did not infringe on individual liberty. State habeas review did not interfere with executive action in Pearson's estimation because executive officers did not have the power of judicial review. State judges were not usurping enrolling officer's authority, but rather exercising the judiciary's proper constitutional role of reviewing executive construction of congressional acts.[148] In response to Justice Walker's position in an earlier case where he had argued that the Conscription Act delegated the War Department with quasi-judicial power precluding state court review, Pearson argued that: 1) Congress could not make the Secretary of War a judge without violating constitutionally mandated separation of powers, 2) Congress had in fact not attempted to delegate judicial power as there were no plain and direct terms suggesting as much, 3) if such judicial power existed in conscription officers, federal courts would be excluded from reviewing their decisions as well.[149] If a judge were to follow Walker's logic that enrolling officer's decisions were unreviewable would be an abdication of judicial authority; it was "surely not" the case that individual liberty depended "solely on the action of the War Department and its subordinate officers."[150]

The defense of state habeas was a manifestation of the reasonable expectation that state judges would play an active role in the Confederacy's separation of powers. Confederate policy makers sought to weaken the federal judiciary by limiting review of state court decisions. Their decision marked a divergence from United States federalism wherein, after the Supreme Court's

[147] *See Slocumb, supra* note 51.
[148] Pearson reiterated that any construction by a Confederate district court would be controlling and non-reviewable by state courts, but because the executive branch has no judicial power "any construction it might give to an act of Congress would be the subject of review, either by the State courts or the Confederate courts; and when a citizen is unlawfully deprived of his liberty or property by an executive officer, acting under an erroneous construction of an act of Congress, the State courts may give redress as in *Slocumb v. Mayberry*." *Bryan at* 25-26.
[149] *Id.* at 26-29.
[150] *Id.* at 28-29.

ruling in *Martin v. Hunter's Lesssee*, all state court decisions touching on civil matters of federal law were subject to appeal to the United States Supreme Court.[151] With no Confederate Supreme Court, the state courts assumed a new role as judges asserted their habeas jurisdiction, representing a new vision for the Confederacy's judicial structure. State judges carved out more autonomy for state courts than in the United States, thereby honoring state sovereignty, without disturbing the exercise of federal power by the Davis administration. Alabama's Chief Justice Walker questioned why this respect for states' rights was even necessary. Walker's dissent reflected the perspective that, with the internal threat to slavery gone, the nuances of states' rights were not important while a war for the survival of Confederacy raged – an opinion his fellow judges had disavowed by defending state habeas.

Walker challenged the arguments that state habeas was essential to state sovereignty. In a tone reminiscent of Taney's in *Ableman,* Walker claimed that the use of state habeas was nothing more than judicial politicking. Boiled down, state habeas was about whether a state judge could "by writ of habeas corpus, supervise, control, and annul the act of officers of the Confederate States."[152] As they had under the United States Constitution, the Confederate states had delegated war powers to provide for the national defense, so were bound to not interfere with the execution of congressional law pursuant to those powers. A portion of sovereignty had been relinquished, leaving executive officers as the sole authorities to investigate and decide conscription liability.[153] If a citizen's liberty was wrongfully impaired, the error must be

[151] *See supra* note 58.
[152] *Hill* at 430. In 1861 Walker had set a similar tone in *ex parte Kelly,* 37 Ala. 474 (1861), by holding, based on *Ableman v. Booth*, that state courts had no jurisdiction to interfere with a detention under federal law.
[153] *Hill* at 435. "I do not say that congress can abridge or qualify the jurisdiction of the State courts. The want of authority in the State tribunals, to supervise and control the executive officers of the Confederate States, in the exercise of their appointed functions, by the writs of injunction, replevin, habeas corpus, or other process, results from the delegation in the constitution of an unqualified power to execute the laws which congress may enact, and not from any denial of such authority by act of congress. If a State court can not correct, under a writ of habeas corpus, the errors of the enrolling officers engaged in enforcing the law of conscription, it is because the constitution

corrected through Confederate courts because, "to concede the power of a State court to apply that remedy, and thus to interfere with, and control and govern as to the manner of executing the law, is to confess that the power of execution is qualified and restricted to such mode and to such line of conduct as a State judge may approve."[154]

The experience of northern judges utilizing habeas to discharge individuals held under the Fugitive Slave Law tainted the very exercise of state habeas in Walker's estimation. Northern judges had employed state habeas to press an abolitionist agenda, and Walker claimed southern judges were likewise abusing their power.[155] Bordering on indignation Walker questioned: "upon what ground, then, can it be maintained, that the State courts can interfere with the execution of the conscript law, and yet were without power to interfere with the enforcement of the Fugitive Slave Act?"[156] National defense would suffer if a judge could "utterly subvert the application of the power to raise armies to that State," which could in turn induce "peculiar rulings" in other states.[157] Further, state habeas would unjustly leave an enrolling officer open to criminal conviction for false imprisonment only because "a state court differs from him upon the question

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bestows the power to execute the law without any qualification that it shall be done in a manner consistent with the judgment of a State judge, and not because congress has suspended, or can suspend, the writ of habeas corpus." *Id.* at 479

[153] *Hill* at 479. ""The States gave the power without qualification. This gift

[154] *Id.* at *478.* "I maintain, that so much of that jurisdiction as is exercised in the application of judicial correctives to the irregularities and errors of the executive officers of that government, charged with the enforcement of the conscript law, is necessarily exclusive; and that such officers, when acting within the limits of their authority, can not be interfered with by a State court, although they may commit errors." *Id.* at 477-78

[155] The northern judges been animated by sectional antipathy, employing state habeas to oppose congressional prerogative with "a boldness and ingenuity without parallel in the history of the country." *Id.* at 490.

[156] *Id.* at 489. War Department clerk Robert Kean observed, on February 26, 1864, "It is pitiful to see how closely the factionists of North Carolina and Georgia, in their resistance to the conscription by the abuse of the habeas corpus, are imitating the tactics with which the Abolitionists fought the fugitive slave law." Robert G. Kean, INSIDE THE CONFEDERATE GOVERNMENT: THE DIARY OF ROBERT GARLICK HILL KEAN (1957). In a letter from mid-1863, Assistant Secretary of War J.A. Campbell similarly linked contemporary state habeas with the abolitionists' use of habeas, expressing frustration that the state habeas problem could not presently be settled: "The Department has been forced to inquire into the extent of the jurisdiction of local judges to determine such questions. It is well known to you that the writ of habeas corpus was the favorite instrument by which the Abolitionists sought to defeat the fugitive slave law. In some cases they decided that law to be unconstitutional, and discharged from the custody of the Federal officers those who were held for violation of it." July 21, 1863, to Hon. E. Barksdale, OR, ser 4, vol. 2, 656.

[157] *Id.* at 499.

which he is bound to decide."[158] Drifting into hyperbole, Walker warned that judges with peculiar views clothed with state habeas power could disband an army in a day.[159] After Lincoln recast the war as a struggle over the existence of slavery by issuing Emancipation Proclamation, winning the war had become all the more imperative. In the early days of the war, reunion may have been possible without dismantling slavery. After the Emancipation Proclamation, however, the war represented an existential struggle for slave society's survival, so dedication to particulars of states' rights unnecessary at best, and a threat to the South at worst.[160] But, Walker understood that his view was very much in the minority. By the time Walker wrote his dissent, "[t]he question has been now, expressly and by implication, passed upon by several of the appellate State tribunals in our Confederacy; and in no case known to me has an appellate State court sustained the doctrine, which I maintain."[161] Although he remained convinced that legal reasoning and precedent was on his side, and that a hypothetical Confederate Supreme Court would agree, Walker resigned himself to "suffer the State jurisdiction to be exercised, to the

[158] *Id.* at 499. The Union anticipated this concern and passed an Indemnity Act so that federal officers would not be held personally liable for, inter alia, carrying out the draft. James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers,* 20 Mich. L. Rev. 589 (1922).
[159] *Hill* at 499. The Davis Administration took a similar view. In a message to Congress on February 3, 1864, Davis characterizes state judges exerting habeas as an undue obstruction to conscription. The danger, Davis warned, could come from just one judge for, "If a single judge, in any State, should hold the act to be unconstitutional, it is easy to see that that State will either furnish no soldiers from that class, or furnish them only when too late for the pressing need of the country." OR ser 4, vol. 3, 69. Even with the law on the Confederacy's side, Davis expressed aggravation that appealing decisions through the courts would create a delay that "will be tantamount in its consequences to a discharge." Id.
[160] "Emancipation, then, became a crucial part of northern military strategy, an important means of winning the war. But if it remained merely a means it would not be a part of national strategy – that is, of the purpose for which the war was being fought. Nor would it meet the criterion that military strategy should be consistent with national strategy, for it would be inconsistent to fight a war using the weapon of emancipation to restore a Union that still contained slaves. Lincoln recognized this. Although restoration of the Union remained his first priority, the abolition of slavery became an end as well as a means, a war aim virtually inseparable from Union itself." McPherson, *supra* note 14, at 85. Argument has been made that speculated emancipation produced hysteria in the South from the war beginning. WILLIAMS, *supra* note 6, at 171-72.
[161] *Hill* at 503-4

extent agreed upon by this court, without further controversy."[162] The Davis administration shared Walker's view of state habeas and chose to tolerate its use until 1864.

Part V – The Davis Administration and State Habeas

The Davis administration's relationship with state habeas shifted from tolerance to hostility over the course of 1862-1864. The state judges did not need consent from the Davis administration to exercise habeas jurisdiction, but Davis could well have instructed conscription officers to just ignore state habeas writs.[163] Denying state courts' authority would likely have been problematic. Such a blatant power grab would have undermined the Davis administration's authority and sparked further states' rights outrage over conscription. But, the administration had a valid precedential argument based on *Ableman* to deny state habeas; the Lincoln administration had ostensibly instructed conscripting officers to ignore state habeas writs. The initial tolerance for state habeas can be understood as an expression of respect for states' rights. The war's development into a total struggle weakened that respect for state habeas as a proxy for states' rights. The delays imposed by litigating conscription in state courts, and the systemic discharge of conscripts by Pearson in particular, aggravated the administration enough in early 1864 to suspend the writ across the Confederacy.

Early in the war, Jefferson Davis extolled habeas corpus as a bulwark of personal freedom. In a message to Congress in late 1861, Davis characterized Lincoln as one who

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[162] *Hill* at 504.

[163] Historian Burton J. Hendrick concluded Jefferson Davis quickly abandoned states' rights philosophy "when faced with the inexorable realism of war" and only the opposition of other leaders such as Alexander Stephens made him tread warily on the path towards centralized nationalism. HENDRICK, STATESMEN OF THE LOST CAUSE: JEFFERSON DAVIS AND HIS CABINET, 429-30 (1939). An influential work on why the Confederacy failed posits Confederate nationalism failed, and that states' rights had little effect on the war effort. BERINGER, ET AL, *supra* note 6, at 428-29. Paul D. Escott has argued Davis failed to respond to the needs of the common people. ESCOTT, AFTER SECESSION: JEFFERSON DAVIS AND THE FAILURE OF CONFEDERATE NATIONALISM (1978). The interplay between the self identity crisis and state habeas provide fuller context than these works give Davis' complicated relationship with states' rights. The administration's relationship with habeas further marks the irretrievable shift in policy where states rights lost meaning and winning the war for independence took precedence over all else.

threatens judges for maintaining the writ of habeas corpus, thereby trampling justice and law "under the heel of military authority."[164] Implicitly, his administration valued the rule of law as embodied by habeas corpus. In an exchange with Georgia's Governor Brown in mid-1862, Davis denied that conscription would upset the balance between federal and state power: "The right of each State to judge in the last resort whether its reserved powers had been usurped by the general government, is too familiar and well settled a principle to admit of discussion."[165] Similarly, in a letter to the Governor of South Carolina, Davis sought to assuage anger about conscription by pointing to the state courts as a proper venue for solving disputes arising from exemption claims: "Let him apply to the judges of the land for relief from the action of the Confederate officer, and if the State law be indeed valid and operative in his favor he will be released."[166] Davis's attitude reflected the reality that the war was initially perceived as a limited conflict. Harmonious relations between the state and federal government were necessary for a successful war effort, and Davis consequently was more respectful of states' rights than later in the war. In late 1862, Davis informed the Mississippi legislature that he had intended for state rather than federal officials to administer the conscription process to further diminish points of contention between the two governments.[167] Through 1862, the war was not yet a struggle over the existence of slavery because Lincoln had yet to embrace emancipation. Internal problems in the Confederacy multiplied as the war went on, and the administration increasingly contended with a discontented populace as commodity prices skyrocketed and supplies became scarce, leading to riots by

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[164] Davis to Congress, November 18, 1861, *supra* note 69, at 140-41.
[165] Davis to Brown, July 10, 1862, *Id.* at 54.
[166] Davis to Gov. Francis W. Pickens, September 3, 1862. *Id.* at 74-75. Further placed state courts on par with federal courts as avenue to redress grievances: "The Confederate courts, <u>as well as those of the State</u>, possess ample powers for the redress of grievances, whether inflicted by legislation or executive usurpation, and the direct conflict of executive authorities presents a condition of affairs so grave and is suggestive of consequences so disastrous that I am sure you cannot contemplate them without deep-seated alarm." *Id.* at 75.
[167] Speech to legislature of Mississippi at Jackson on December 26, 1862, *in* 8 THE PAPERS OF JEFFERSON DAVIS 572-73 (Lynda L. Crist & Mary Seaton Dix eds., 1995).

women in a number of southern cities.[168] On January 1, 1863, the Emancipation Proclamation raised the stakes by making the war about the very existence of slavery as opposed to slaveholders' rights. In his memoirs, Davis wrote, "[Lincoln] put arms in their hands, and trained their humble but emotional natures to deeds of violence and bloodshed, and send them out to devastate their benefactors."[169] The Davis administration's respect for states' rights waned as the war became a harsher struggle, and the functionaries of the administration increasingly spoke out against state habeas.

The administration never really agreed with the doctrine's legal basis. The administration's legal representatives aligned with Walker in *Mims* and the spirit of Taney's decision in *Ableman.* The Davis administration acted against its own best legal judgment to accommodate state habeas out of respect for the judges' association of state habeas with state sovereignty. In contrast, the Lincoln administration instructed army officers to explain why conscripts were held upon receiving a habeas writ from a state judge, and to then refuse to respond to any further commands.[170] The Davis administration was tolerant of state habeas by comparison, even if its leaders agreed with Washington about the doctrine. As conscription litigation proliferated, the question of who would pay the attorney's fees became increasingly pressing. On November 26, 1862, Attorney General Thomas H. Watts gave his opinion to Secretary of War James A. Seddon that it was permissible for enrolling officers to retain counselors for litigation arising from exemption claims to be paid out of conscription funds.[171] The question of who would pay for the Confederacy's legal representation in state courts

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[168] ESCOTT, *supra* note 14, at 49, 60.
[169] JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT, vol. 2, 193 (1912) *available at* HathiTrust.
[170]Provost Marshall General James B. Fry, Circular No. 36, OR, ser. 3 vol. 3, 460-61 (July 1, 1863)(citing an opinion by Hon. William Whiting, Solicitor General of the War Department). *See also,* RANDALL, *supra* note 28, at 429-432.
[171] CSA ATTNY GNRL OPS, *supra* note 91, at 183.

persisted, and a few weeks later Watts had to clarify that the Department of Justice would not be footing the bill.[172] Notably, Watts did not deny the state courts' jurisdiction. That federal officers were drawn in to state courts to litigate the particulars of conscription was undoubtedly an annoyance, but, at least in 1862, the Attorney General did not treat this as extraordinary.

By 1863, the attorneys representing the Confederacy in the flagship state habeas cases had taken a stronger stand against the doctrine. In *Bryan*, District Attorney George V. Strong argued on behalf of the Confederacy with the help of Thomas Bragg, a former Confederate Attorney General and later Governor of North Carolina. Bragg and Strong reflected the administration's position that state habeas was an improper assertion of states' rights based upon recent antebellum history and precedent, claiming that "[t]he old Union was destroyed, not by the encroachments of the General Government upon the rights of the State, but by the encroachments of the fanatical States of the north and northwest upon the Constitution."[173] These arguments failed to gain traction in the state courts, and the administration consequently faced a growing number of state conscription cases.

When Attorney General Watts did directly address the legal basis for state habeas later in 1863, he equivocated, indicating state habeas was improper for conscripts without completely denying the doctrine as unconstitutional. In response to how a Military Department commander should respond to a habeas writ issued on behalf of a conscript, Watts was ambiguous about whether the General had authority to detain the individual in question, "by virtue of his powers and duties to defend the country, independent of any specific laws of Congress."[174] The General,

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[172] Thomas H. Watts to James Seddon, December 15, 1862, *id.* at 188-191.
[173] *Bryan* at 14-15.
[174] Thomas H. Watts to Davis, August 8, 1863, CSA ATTNY GNRL OPS, 313, "It may be that General Buckner, as a Military Commander of a Department, by virtue of his powers and duties to defend the country, independent of any specific laws of Congress, had the right to arrest and hold temporarily, suspicious persons, to prevent them communicating with, or otherwise giving aid and comfort to the enemy."

Watts opined, was required to answer the writ with specificity and the prisoner should be brought before the judge or "could not otherwise enjoy his full constitutional privileges" to be heard by himself and counsel.[175] Watts suggested state habeas existed by virtue of the constitutional right to trial and the states' sovereignty, stating it was "undoubted" that state judges could issue the writ within the territorial limits of the state.[176] But then, Watts tacked in the other direction, and, echoing Taney in *Ableman*, suggested to Davis that, "[w]hen…it is ascertained, in proceedings under the writ of *habeas corpus* issued by a State Judge or State Court, that the prisoner is held by a Confederate Officer, under the Authority of the Confederate States, for any matter over which the Confederate laws operate, the State judge or State Court can proceed no further."[177] The latent opinion that state habeas was unconstitutional became more prominent as the war dragged on and more conscription cases arose.

Through 1863 and 1864, judges actively engaged with and enforced evolving conscription law. Most courts unequivocally announced that the national government could not, and therefore did not, make a contract exempting principals from all future military service – a claim often raised by habeas petitioners.[178] The Georgia supreme court's holding in *Weems v. Farrell* serves as an example. Liable for service under the First Conscription Act, Joseph Farrell availed himself of section thirteen of the Act by enlisting himself and then procuring a substitute, thirty seven-year-old John O. Sullivan (too old for military service under the Act at that time) to

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[175] General Buckner had only replied, "Abe Tipton is held as an open and avowed enemy of the Confederate Governemnt. He is held by the Military Authorities, under the laws of the Confederacy." *Id.* at 313.
[176] "The Court or Judge of a State has the clear right to inquire in this mode of proceeding for what cause, and by what authority the prisoner is confined within the territorial limits of the State Sovereignty." *Id.* at 314.
[177] Id. *at* 314.
[178] Courts often relied on a Massachusetts case from 1815, *Commonwealth v. Bird*, as precedent for the principle that a state, much less the national government, could not endanger itself by contracting with an individual so that he "can never afterwards be compelled to lend his aid to the government, although the existence of the State may be threatened by the most formidable foreign or domestic enemy." 12 Mass. 443, 447 (1815). Cited by, *inter alia*, *Gatlin v. Walton*, *supra* note 21; *ex parte Tate* 39 Ala. 254 (1864); *ex parte Mayer* 27 Tex 715 (1864).

serve in his stead as was permitted by War Department regulations at the time.[179] War Department General Orders No. 29 & 30 stipulated that an exemption procured by providing a substitute was valid only so long as the substitute was legally exempt.[180] When the Second Conscription Act expanded the age for military service to forty, Sullivan became liable. The enrolling officer Colonel Weems argued that, Farrell was no longer exempt pursuant to General Order No. 29. Farrell appealed for a habeas writ after Weems then took Farrell into custody as a conscript. The court ruled that if a contract for exemption existed for Farrell, it had expired. Farrell had to comply with the exemption terms imposed by the Confederacy, and if there was any conflict between the Conscription Act and Order No. 29, the latter controlled because Congress had not annulled it, as it had other War Department orders.[181]

The judges' support was not unequivocal. They pushed back against War Department regulations on the fringes of the conscription regime. The Supreme Court of Texas reasoned that nothing in the Constitution prohibited Congress from violating contractual obligations (this had only been denied to the states), and that the *ex post facto* provision related only to criminal legislation.[182] Other courts took a more generous view of whether an exemption contract had been formed. Assuming an exemption contract had been formed, the Court of Appeals of South Carolina discharged a man who had been exempted as an overseer on the basis that subsequent legislation changing the exemption qualifications for overseers could not operate retroactively absent a clear intention to do so.[183] The Supreme Court of Alabama relied on contract law in 1864 when it held that a party has a right to have acceptance and approval of an exemption application within a reasonable time, and that if a reasonable time has passed after such an

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[179] *Weems v. Farrell*, 33 Ga. 413 (1863).
[180] *Id.*
[181] *Id.*
[182] *Ex parte Mayer* at 719.
[183] *Ex parte Graham* 13 Rich. 277 (1864).

application was made, exemption could be assumed.[184] Judges thus utilized state habeas to define the boundaries of the War Department's regulations and the evolving conscription-exemption regime. Although they did not undermine Confederate conscription as a policy, these habeas cases parsing out War Department regulations created what the administration increasingly considered unreasonable delays.

Over 1863 and 1864, the administration faced mounting military and political problems that strained public tolerance for state habeas. Confederate defeat at Gettysburg, the loss of the Mississippi when Vicksburg fell, and the reality that Europe would not intervene for the Confederacy collectively created a severe loss of confidence amongst the southern populace.[185] Rampant inflation compounded the government's military problems and exacerbated the burdens of war on the people.[186] A series of new legislation in early 1864 signaled the dire measures Confederate leaders thought necessary to continue the war. In addition to a still more expansive conscription act, Congress passed laws establishing higher taxes, a compulsory funding measure to reduce the currency in circulation by as much as two thirds, an act strictly regulating the trade of commodities, and the suspension of habeas corpus.[187] The administration understood that the war had become a total conflict, with armies seeking to destroy each other and sap the enemy people's will to continue rather than to hold strategic positions. Union armies were marching in to the heart of the Confederacy. The future of slavery and the southern way of life hung in the

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[184] *Ex parte Mitchell* 39 Ala. 442 (1864).
[185] Thomas, 256. So much so that Davis declared on August 21, 1863 "a day 'fasting, humiliation, and prayer' in the Confederate States. On this day the President invited his countrymen to go to their 'respective places of public worship' and to pray for divine favor 'one our suffering country.'" 245.
[186] Emory Thomas writes, "Military and diplomatic circumstances were reflected in the Confederacy's marketplaces. A gold dollar, which had cost three dollars in Confederate paper in January 1863, cost eighteen to twenty dollars by December. Secretary of the Treasury Memminger estimated in December that more than $700 million worth of notes were circulating in an economy capable of absorbing $200million." THOMAS, *supra* note 2, at 257.
[187] *Id.* at 263-65.

balance. Faced with these pressures, respect for state habeas as a symbolic extension of states' rights no longer carried enough weight to justify letting the judges continue their jurisdiction.

By the latter half of the war, Jefferson Davis labeled state courts exercising habeas as obstructionist. Even if judges were not setting men free en masse, state courts that were open to habeas petitions slowed down the conscription process. In a message to Congress on February 3, 1864, Davis stated state judges exerting habeas were an undue obstruction to conscription. The danger, Davis warned, could come from just one judge for, "If a single judge, in any State, should hold the act to be unconstitutional, it is easy to see that that State will either furnish no soldiers from that class, or furnish them only when too late for the pressing need of the country."[188] Even with outcomes favorable to the Confederacy's side, Davis expressed irritation that appealing decisions through the courts would create a delay that "[would] be tantamount in its consequences to a discharge."[189] Habeas petitions to state courts presented particular difficulties for Confederate conscription in Davis's estimation as, "[a] petition for a habeas corpus need not and ordinarily does not declare the particular grounds upon which the petitioner claims his discharge…and every enrolling officer will be kept in continual motion to and from the judge, until the embarrassment and delay will amount to the practical appeal of the law."[190] In light of all the trouble potentially caused by judges, legal forms seemed evidently less relevant: "Must the independence for which we are contending, the safety of the defenseless families of the men who have fallen in battle and of those who still confront the invader, be put in peril for the sake of conformity to the technicalities of the law of treason?"[191] Davis's shifting position on state habeas illustrates how the Confederacy's constitutional identity crisis concerned

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[188] OR ser 4, vol. 3, 69.
[189] *Id.*
[190] *Id.*
[191] *Id.*

policymakers until the war's progress made sensitivity to states' rights too much of an inconvenience to countenance. As conditions in the Confederacy deteriorated, the delay posed by permitting state habeas jurisdiction and the small number of conscripts discharged by judges like Pearson pushed Davis's respect for state habeas to the breaking point.

The president was hardly alone in this view. Other members of the administration shared frustration and disdain for state habeas state courts. In a letter dated March 19, 1864, Secretary of War Seddon complained of interfering judges to one of his generals: "This Department has experienced much embarrassment from the eccentric decisions of inferior judges who have had the power to issue writs of habeas corpus, and can appreciate the difficulties that General Greer has had to encounter on that subject."[192] Robert Kean, Chief of the Bureau of War, captured the administration's attitude that judges exercising state habeas were misappropriating the writ to further an anti-confederate agenda, writing in his diary in the immediate aftermath of *Bryan* that "The Local judiciary are doing what they can to defeat the conscription and encourage desertion in many places… I mistrust that these feelings have a good deal to do with these decisions by which they thwart and obstruct the execution of the conscription."[193] Yet, no policy was implemented to impair state habeas on a broad level until 1864 when Congress suspended habeas across the Confederacy.

Congress had suspended habeas twice before at Davis' urging in more limited circumstances. In February of 1862, Congress authorized the suspension only in places where there was "such danger of attack by the enemy as to require the declaration of martial law for their effective defense," and placed an expiration date on this authority thirty days after the

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[192] Letter to General Edmund Kirby Smith, OR ser 4, vol. 3, 231.
[193] May 20, 1863, Kean, *supra* note 156. *Cf* attitude of War Clerk John B. Jones, who expressed concern over Jefferson Davis assuming absolute power (October 19, 1864) and preference conscription superintendents gave the rich (December 6, 1864), JOHN B. JONES, A REBEL WAR CLERK'S DIARY, 443, 457 (1958).

following meeting of Congress.[194] Davis then suspended the writ in counties along the coast of Virginia, eastern Tennessee, and a swath of South Carolina where Union forces or southern unionist sympathizers threatened the Confederacy.[195] Late in 1862, Congress again gave the President authority to suspend the writ until February 1863.[196] This time suspension applied wherever the public safety so required, but a provision required Davis to investigate the cause of military arrest to ensure release for improperly detained persons.[197] A year passed until Davis again asked for the writ's suspension. In February 1864 he pleaded with Congress to pass a more expansive suspension act, citing state courts' use of their jurisdiction to obstruct the draft.[198] Congress then granted the most expansive habeas suspension across the entire Confederacy for a laundry list of offenses including "attempts to avoid military service," that would remain in effect until mid-September 1864.[199]

The administration had grown frustrated with the delays caused by state habeas proceedings. The systematic release of prisoners by Pearson particularly hit a nerve with the administration,[200] signaling transition from tolerance of state habeas to hostility. In early 1864, a delegation from North Carolina met with Davis, who perfunctorily dismissed the question of

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[194] Act of Feb. 27, 1862, *in* STATUTES AT LARGE, *supra* note 81, at 12.
[195] Currie, 1328-1329.
[196] Act of Oct. 13, 1862, *in* STATUTES AT LARGE, *supra* note 83, at 39.
[197] *Id.* §2: "The President shall cause proper officers to investigate the cases of all persons so arrested, in order that they may be discharged, if improperly detained, unless they can be speedily tried in due course of law."
[198] *See* notes 193-195 and accompanying text.
[199] Act of Feb. 15, 1864, *in* STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE FOURTH SESSION OF THE FIRST CONGRESS 1863-64 28-30 (R.M. Smith, ed., Richmond 1864) *available at* HathiTrust Neely frames the February 1864 Act as the request to end civil liberties in the Confederacy. Represented a departure from earlier request to suspend habeas, it was framed as the need for protection from disloyalty within the heart of the Confederacy. NEELY, *supra* note 2, at 166. Argues that, similar to Lincoln, Davis showed little sincere interest in constitutional restriction on government authority in wartime. *Id.* at 167.
[200] Pearson took an expansive view of state habeas jurisdiction even after Congress passed a comprehensive grant for the suspension of habeas corpus across the Confederacy. Addressing the Act's scope in *in re Roseman*, Pearson concluded that the petitioner's case was not covered because by applying for the writ the petitioner was not seeking to "avoid" service, which implied that the petitioner would have kept out of the way "taking to the woods, instead of coming up and appealing to the courts to decide upon their rights." 1 Win. 443, 445 (1863). But the other North Carolina judges' unwillingness to push the boundary of state habeas was more representative of the general relationship between state judges and the doctrine. J.G. de Roulhac Hamilton, *The North Carolina Courts and the Confederacy*, 4 N.C. HIST. REV. 366 (1927).

whether the suspension of habeas corpus clothed the President with dictatorial powers. He replied, "[w]ell if it does, it does not show that I would abuse the power."[201] Perceived disruption arising from Pearson's decisions, more than any other judge, prompted Davis to recommend suspension of the writ.[202] In a letter to Thomas Bragg, who had argued for the Confederacy in *Bryan*, Davis wrote that he would begrudgingly accept a Pearson decision releasing a conscript, "although I do not believe that his decision is right."[203] Significantly, Davis did not explicitly assert that judges could not hear these cases, only that they, particularly Pearson, had become an unnecessary nuisance. Davis placed faith in the North Carolina supreme court's other justices to counteract Pearson's meddling influence. Should they fail and should Pearson continue to "pursue a factious course," Davis ominously pledged "I shall not shrink from the issue."[204] Once habeas had been suspended, Davis believed the war effort would run more smoothly absent "treasonable practices" by obstructionist state judges.[205]

Conclusion

By ruling on state habeas jurisdiction, judges sought to reconcile states' rights with the demands of war. *Bryan*, *Hill*, and *Mims* reveal how state habeas doctrine both gave meaning to states' rights and embodied a new federal schema in the Confederacy. The consensus regarding state habeas in these cases – particularly because state habeas had been an unsettled doctrine in the antebellum period – embodies a unifying impulse amongst judges to honor states' rights by defending state habeas as integral to state sovereignty. J.G. de Roulhac Hamilton has observed

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[201] January 23, 1864, JEFFERSON DAVIS PAPERS, *supra* note 167 at 199.

[202] Hamilton, *The North Carolina Courts*, at 390 Detractors called Pearson a traitor and predicted that North Carolina would become a haven for all those desiring to shirk their military duties. Van Zant, *supra* note 21, at 70-71.

[203] "The decision of Judge Pearson releasing the conscript in the case before him will of course be respected until the action of the appellate court, for the case was before him prior to the passage of the law suspending the writ of habeas corpus; and although I do not believe that his decision is right, the public interest will not suffer by awaiting the result of the appeal in the one case before him" March 7, 1864, OR ser 4, vol. 3, 201.

[204] *Id.*

[205] Resolution to House of Representative, OR ser 4, vol. 3, 429-30 (May 14, 1864).

that the unanimity with which state judges accepted conscription was a "wonder" when eleven courts, each of last resort because no federal appeal existed, independently construed organic law.[206] The unanimity with which state judges accepted state habeas and the commonalities of reasoning in the flagship state habeas cases are an unexplored wonder. Northern judges did not universally defend state habeas doctrine, even though northern state judges had been the primary advocates for state habeas before the war. Notably, the Supreme Court of Michigan in *in re Spangler* adopted a tone similar to Walker in *Hill* to rule state habeas unconstitutional.[207] After the war's conclusion, northern courts remained divided regarding state habeas until the Supreme Court in *Tarble's Case* ruled conclusively on the doctrine.[208] That southern courts were unanimous on state habeas during the war represented the judges' attachment to states' rights while a countervailing impulse to win the war led those judges to affirm military centralization. State habeas consequently provides unique insight into how judges, and the Davis administration, wrestled with the question of whether states' rights had independent legal force.

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[206] Hamilton, *supra* note 24, at 448.
[207] *In re Spangler*, 11 Mich. 298, 307 (1863)(Echoing Taney in *Ableman*, the Michigan Supreme Court reasoned: "The Constitution was not framed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home: for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the general government, and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities."). *Cf. Commonwealth ex rel. M'lain v. Wright*, 3 Grant 437 (The Supreme Court of Pennsylvania defending state habes jurisdiction).*See also*, *ex parte Anderson*, 16 Iowa 595 (1864)(Lukewarm defense of state habeas by the Supreme Court of Iowa, case decided on other grounds) by Supreme Court of Iowa in *ex parte Anderson.*
[208] *See In re Farrand*, *supra* note 47; *ex parte Hill*, 5 Nev. 154 (1869)(Supreme Court of Nevada in followed *Ableman* and denied state habeas).