Dariusz M. Stolicki

Uniwersytet Jagielloński
e-mail: dariusz.stolicki@uj.edu.pl

The Constitution of the Confederate States of America, 1861*

SUMMARY

The Confederate Constitution of 1861 has been an important development in American constitutional law. The Montgomery Convention that drafted the constitution chose not to create an entirely new document, but instead to copy and revise the United States Constitution of 1787. Nearly verbatim identity of most provisions of the two texts highlights the differences arising from deliberate alterations introduced by the Confederates.

This article analyzes those changes in light of their political and legal background and classifies them into three broad categories: first, amendments designed to "restore" the balance of federal and state powers to the states' rights ideal envisioned by Southern political leaders and to check further growth of federal authority; second, provisions designed to augment or clarify constitutional protections of slavery and thereby addressing the direct causes of secession; and third, governmental innovations mostly related to separation of powers and fiscal affairs (such as line-item veto, executive budget, or the single subject rule) that were not directly related to the major sectional controversies of the antebellum era, but instead addressed what the framers of the Confederate Constitution believed to be practical deficiencies of the 1787 Constitution.

While the first two categories are of interest mainly to historians of the antebellum period, as embodying to a large extent the Southern view of the Constitution (though falling short of endorsing Calhounian ideas of nullification and concurrent majority), the last one also influenced many state constitutions adopted during and after the Civil War, thereby permanently contributing to development of American constitutional tradition.

Key words: Confederate States; Confederate Constitution; Montgomery Convention; secession crisis of 1860–1861; American constitutional tradition.

* I would like to thank Professor Andrzej Zięba of the Chair of Constitutionalism and Government Systems at the Institute of Political Studies and International Relations of the Jagiellonian University for valuable guidance and comments on this article.

In February 1861 the delegates of six seceding states (later joined by Texas) assembled in Montgomery, Alabama, to form a new Southern Confederacy. The Montgomery Convention ultimately created two constitutions: the Provisional Constitution of February 8 and the Permanent Constitution of March 11[1]. Those two documents are sometimes overlooked by constitutional historians, despite their considerable importance. They were not only the ultimate outgrowth of the constitutional philosophy of the antebellum South, but also the last politically significant attempt to comprehensively revise the American federal Constitution. While the Confederacy did not survive the war, a study of its Constitution can shed additional light on the origins of secession as well as on the evolution of American constitutionalism.

The Montgomery Convention did not attempt to create an entirely new constitution, but instead opted to adopt, with revisions, the existing Federal Constitution of 1787[2], which was generally held in very high esteem in the South[3]. The Confederate Framers believed themselves to be restoring its "true spirit" allegedly corrupted by the North before the secession[4]. Hence the Confederate Constitution repeated so many of its predecessor's provisions virtually verbatim[5] that a word-by-word comparison of both documents reveals them to be, apart from spelling and punctuation differences, approximately 70% identical.

Given such a close resemblance between the two documents, and the abundance of the commentaries treating of the U.S. Constitution, beginning with the judicial opinions, Congressional debates, and historical sources, and ending with the scholarly works and articles, the analysis of those aspects of the Confederate Constitution that do not diverge from its 1787 predecessor appears

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1 Published in *The Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862, Inclusive, Arranged in Chronological Order*, James M. Matthews (ed.), R. M. Smith, Richmond, VA, 1864 (online at http://docsouth.unc.edu/imls/19conf/, accessed Jun. 1, 2013), pp. 1–26 (hereinafter cited as Confed. Stat.).

2 J. L. M. Curry, *Civil History of the Government of the Confederate States*, B.F. Johnson Publishing Company, Richmond, VA, 1901, p. 50; C. A. Amlund, *Federalism in the Southern Confederacy*, Public Affairs Press, Washington, DC, 1966, p. 17.

3 A. H. Stephens, *A Constitutional View of the Late War Between the States*, National Publishing Company, Philadelphia, PA, 1868–1870, p. 339; C. R. Lee, *The Confederate Constitutions*, University of North Carolina Press, Chapel Hill, NC, 1963, p. 62; J. Davis, *Inaugural Address* (Feb. 18, 1861) [in:] *Journal of the Congress of the Confederate States of America, 1861–1865*, S. Doc. No. 58–234, Government Printing Office, Washington, DC, 1904 (online at http://memory.loc.gov/ammem/amlaw/lwcc.html, accessed Jun. 1, 2013), vol. 1, p. 66.

4 Curry, op. cit., p. 64; R. W. Patrick, *Jefferson Davis and his Cabinet*, Louisiana State University Press, Baton Rouge, LA, 1944, p. 14–15; W. C. Davis, *A Government of Our Own. The Making of the Confederacy*, Free Press, New York, NY, 1994, p. 225; Amlund, op. cit., p. 17–18; K. Michałek, *Podział, ale czy do końca? Analiza porównawcza Konstytucji Skonfederowanych Stanów Ameryki i Konstytucji Stanów Zjednoczonych*, [w:] *Konstytucja Stanów Zjednoczonych Ameryki. Reminiscencje w 220. rocznicę uchwalenia*, J. A. Daszyńska (ed.), Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2009, p. 111–113.

5 G. E. White, *Recovering the Legal History of the Confederacy*, 68 Wash. & Lee L. Rev. 467, 497 (2011).

to be somewhat redundant. This article, therefore, concentrates on the differences between the two constitutions, focusing on their origin, significance, and political context. Pursuant to such approach, one can view the Confederate Constitution as an attempt at constitutional reform, answering both the political demands of the South in the great sectional controversies of the antebellum period, and the deficiencies that the delegates to the Montgomery Convention perceived in the constitution of the United States.

On December 20, 1860, the South Carolina state convention unanimously declared that "*the union now subsisting between South Carolina and other States, under the name of The United States of America, is hereby dissolved*"[6]. Other Deep South states followed: Mississippi (January 9, 1861), Florida (January 10), Alabama (January 11), Georgia (January 19), Louisiana (January 26), and finally Texas (Ordinance of Secession, passed on February 1, only took effect after its approval by the voters on February 23 – on March 2)[7]. The seceding states, however, did not intend to remain fully independent: on December 31, South Carolina Convention adopted a resolution recommending that their delegates meet in a convention to draft a constitution for a new southern confederacy[8]. To obtain concurrence of other southern states, inter-state commissioners have been appointed[9]. A call for convention has also been endorsed by Southern congressmen, including future Confederate President Jefferson Davis[10].

The "South Carolina Program" met with a positive reception with remaining Deep South states[11]. Accordingly, on February 6, 1861, a convention of delegates of the six seceding states met in Montgomery, Alabama[12]. In accord with the initial South Carolina proposal, each state was represented by as many delegates as it had members in Congress before the secession[13], but, as in the Convention of 1787, voting has been by states and each had one vote[14]. Howell Cobb of Georgia was chosen President of the Convention[15].

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6 *An Ordinance to dissolve the union between the State of South Carolina and other States united with her under the compact entitled "The Constitution of the United States of America*." Dec. 20, 1860, *Journal of the Convention of the People of South Carolina*, R. W. Gibbes, Columbia, S.C., 1862, p. 23; see also R. A. Wooster, *The Secession Conventions of the South*, Princeton University Press, Princeton, NJ, 1962, p. 22.

7 *Journal of Congress*, op. cit., vol. 1, p. 7–9; W. Davis, op. cit., p. 14–27.

8 Davis, op. cit., p. 11–12; Wooster, op. cit., p. 23; *Journal of the Convention of the People of South Carolina*, op. cit., p. 92, 143; *Journal of Congress*, op. cit., vol. 1, p. 9.

9 Curry, op. cit., p. 36; Lee, op. cit., p. 9–12.

10 W. Davis, op. cit., p. 13–14.

11 Lee, op. cit., p. 14–19.

12 Wooster, op. cit., p. 58.

13 State delegations have been elected by state secession conventions (except for Florida, whose delegates have been appointed by the state Governor). Lee, op. cit., p. 22.

14 Ibid.

15 *Journal of Congress*, op. cit., vol. 1, p. 16; Curry, op. cit., p. 46.

As members of the Montgomery Convention were well aware, the political situation of the South made it essential that a common government of the seceding states be constituted as soon as possible[16]. Hence immediately upon completing its own organization, the Convention appointed a committee to "report a plan of the provisional government" for the new confederacy[17]. It had taken only two days for the committee to perform this task, and on February 7 Christopher Memminger (South Carolina) reported the draft[18]. After a floor debate next day (held with closed doors), the convention unanimously approved the Provisional Constitution of the Confederate States[19].

In conformity with the original South Carolina plan[20], the Provisional Constitution was based on the United States Constitution[21]. However, mainly due to its provisional character, its governmental structure markedly differed from the prototype. The legislative power of the Confederacy was vested in the Montgomery convention transformed into the Provisional Congress[22]. While the Mississippi and Florida delegations opposed the assumption of legislative powers by the Convention, preferring that new elections be held to Provisional Congress, other states were of the opinion that the delay occasioned thereby would be disastrous for the Confederacy[23]. States retained complete freedom as to the mode of choosing delegates[24] and the principle of voting by states, initially adopted by the Convention[25], has been preserved[26]. The executive branch was to consist of the President of the Confederate States, to be elected by Congress[27]. Until his inauguration the executive powers were to be exercised by Congress[28]. Unlike the U.S. Constitution, the Provisional Constitution did not bar members of Congress from holding other federal offices, and several of the delegates did in fact accept Cabinet offices in the Davis Administration[29]. The judicial power was vested in the Supreme Court, District Courts

16 Curry, op. cit., p. 49; W. Davis, op. cit., p. 63–65.

17 *Journal of Congress*, op. cit., vol. 1, p. 19–22.

18 Ibid., p. 25–30. Memminger was the natural choice for the chairman of the committee, having already authored and published a plan of provisional government which strongly influenced the Provisional Constitution. See C. Memminger (anonymously), *Plan of a Provisional Government for the Southern Confederacy*, Evans and Cogswell, Charleston, SC, 1861. See also Curry, op. cit., p. 48.

19 *Provisional Constitution of the Confederate States*, Feb. 8, 1861, 1 Confed. Stat. 1 (1861).

20 Lee, op. cit., p. 56.

21 W. Davis, op. cit., p. 83.

22 *Provisional Constitution*, *supra*, art. I, § 1.

23 W. Davis, op. cit., p. 103.

24 *Provisional Constitution*, *supra*, art. I, § 1.

25 *Journal of Congress*, op. cit., vol. 1, pp. 17, 19.

26 *Provisional Constitution*, *supra*, art. I, § 2.

27 *Provisional Constitution*, *supra*, art. II, § 1, cl. 1, 2.

28 *Provisional Constitution*, *supra*, art. I, § 6, cl. 19.

29 Patrick, op. cit., p. 45–46.

and other inferior courts that Congress was given power to establish[30]. There was to be established in each State a District Court, to consist of one judge appointed by the President by and with the advice and consent of the Congress, and to have cognizance of all cases that before secession belonged to the jurisdiction of the federal District and Circuit Courts[31]. The Supreme Court was to consist of all district judges[32]. The terms of Congress, President, and judges were to continue "until a permanent Constitution [...] shall be put in operation," but in no case longer than one year after the inauguration of the President[33]. Notably, no state ratification of the Provisional Constitution has been required[34].

With respect to other matters, such as the powers of each of the three branches, inter-branch checks and balances, State-Federal relations, and guarantees of individual rights, the Provisional Constitution closely resembled the U.S. Constitution. The Congress was granted the power to unilaterally amend the Constitution by a two-thirds majority[35], but exercised it only once, on May 21, 1861, by providing for appointment of additional district judges[36].

After adopting the Provisional Constitution on February 9, the Congress proceeded to organize the Confederate government, beginning with the election of the President[37]. Jefferson Davis, ex-Senator of Mississippi, was elected the first Confederate President, and Alexander Hamilton Stephens, a Georgia delegate, ex-Whig Congressman, and a moderate on the issue of secession, was chosen as Vice President[38]. The President-elect assumed office on February 18, after taking the constitutional oath[39]. On the same day the Confederate Congress passed its first statute[40], continuing in force all United States laws enacted before November 1, 1860[41].

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30 *Provisional Constitution*, *supra*, art. III, § 1.

31 *Provisional Constitution*, *supra*, art. III, § 1, cl. 2.

32 *Provisional Constitution*, *supra*, art. III, § 1, cl. 2 and § 2, cl. 2.

33 *Provisional Constitution*, *supra*, preamble.

34 A number of delegates believed that the cooperationists (anti-secession voters) could defeat ratification of the Provisional Constitution at the state level (especially in Georgia and Alabama, where the vote on secession was close), thereby dealing a fatal blow to Southern unity and possibly to secession itself. W. Davis, op. cit., p. 63–65.

35 *Provisional Constitution*, *supra*, art. V.

36 *An Ordinance of the Convention of the Congress of the Confederate States*, May 21, 1861, 1 Confed. Stat. 9. See also W. M. Robinson, *Justice in Grey. A History of the Judicial System of the Confederate States of America*, Russell & Russell, New York, NY, 1968, p. 24–25.

37 Curry, op. cit., p. 52.

38 W. Davis, op. cit., p. 98–123; Lee, op. cit., p. 76–78.

39 J. Davis, *The Rise and Fall of the Confederate Government*, D. Appleton & Co., New York, NY, 1881, p. 231.

40 *Journal of Congress*, op. cit., vol. 1, p. 41; W. Davis, op. cit., p. 124; Curry, op. cit., p. 55.

41 *An Act to continue in force certain laws of the United States of America*, Feb. 9, 1861, Prov. Cong., 1st Sess., c. 1, 1 Confed. Stat. 27 (1861).

As soon as the Provisional Constitution was adopted, Congress on motion of Robert B. Rhett (South Carolina) appointed a committee to draft a Permanent Constitution[42]. The committee consisted of two delegates from each State and was chaired by Rhett himself. After nearly three weeks of deliberations on February 28 the Committee reported the draft Constitution[43]. On motion of Jackson Morton (Florida), delegates adopted a special mode of proceeding thereon: every day they would sit as Congress in the morning, and at noon they would resolve themselves into Convention to debate the Constitution[44]. The Convention proceedings were secret and have been recorded in a separate journal[45].

The work on the Permanent Constitution continued until March 9, with participation of the delegates of the six states represented in the Convention from the start and of the Texas delegation, admitted to the floor on February 26 (Texas formally became one of the Confederate States on March 2)[46]. On March 11 the Constitution was unanimously approved by the Convention[47] and transmitted to the States for ratification[48].

At the heart of the disagreement among the proponents of strong national government and the defenders of state rights was the difference in their analysis of the nature of the Constitution and the Union itself[49]. While the former viewed the Constitution as a sovereign legislative act of the people, of like character as State constitutions (but by its terms supreme to them)[50], the latter considered it to be a compact among the States, establishing a confederacy of coequal sovereigns[51]. The Framers of the Confederate Constitution intended to

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42 Curry, op. cit., p. 63.

43 *Journal of Congress*, op. cit., vol. 1, p. 851–858.

44 Ibid., p. 94; W. Davis, op. cit., p. 236–237.

45 Lee, op. cit., p. 87.

46 Ibid.; Curry, op. cit., p. 60; W. Davis, op. cit., p. 239; *An Act to admit Texas as a member of the Confederate States of America*, March 2, 1861, Prov. Cong., 1st Sess., ch. 24, 1 Confed. Stat. 44.

47 *Journal of Congress*, op. cit., vol. 1, p. 11.

48 W. Davis, op. cit., p. 258.

49 F. McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876*, University Press of Kansas, Lawrence, KS, 2000, pp. vii, 7–192; T. Wieciech, *Unia w myśli politycznej Thomasa Jeffersona*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2012, p. 93–105; R. E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis*, Oxford University Press, New York, NY, 1987, p. 1–12.

50 *See, inter alia*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324–25 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–405 (1819); J. Story, *Commentaries on the Constitution of the United States*, Hilliard, Gray & Co., Brown, Shattuck, & Co., Boston, MA, Cambridge, MA, 1833, §§ 350–369; D. Webster, *Second Reply to Hayne*, U.S. Senate, 21st Cong., 1st Sess. (Jan. 26–27, 1830), [in:] *Register of Debates*, Gales & Seaton, Washington, D.C., 1830, vol. 8, p. 77–78.

51 *Virginia Resolutions of 1798*, (Dec. 21, 1798), [in:] *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, J. Elliot (ed.), J.B. Lippincott & Co., Taylor & Maury, Philadelphia, PA, Washington, DC, 1836, vol. 4, pp. 528, 528–29; *Kentucky Resolutions of 1798* (Nov. 10,

resolve that controversy by reformulating the preamble[52], though they haven't been prepared to fully reject the national character of the government[53]. The Convention rejected a motion to strike out the phrase "We the People of the Confederate States"[54], but inserted immediately thereafter the words "each State acting in its sovereign and independent character." The Confederates also omitted references in the preamble to common defense and general welfare, but, following the example of State constitutions, they made one addition, expressly "invoking the favor and guidance of Almighty God"[55].

Article I of the Confederate Constitution, like the Article I of the U.S. Constitution, dealt with the legislative branch. All legislative powers of the Confederacy were vested in the Congress of the Confederate States, consisting of the Senate and the House of Representatives[56], though a reference to legislative powers "granted herein" was replaced with phrase "legislative powers delegated herein," to emphasize that the Confederate government was one of delegated, and not inherent powers. However, the change was not as important as it may seem, as prior to 1860 the principle that the federal government is one of delegated powers had not been seriously controverted by mainstream political or judicial actors[57].

The Confederate House of Representatives was constituted in the same manner as the U.S. House[58]. The only controversy touching this subject that arose during the Montgomery Convention debates concerned the three fifths compromise, providing that the State representation in the House was proportional to the whole number of free inhabitants and three fifths of the number of slaves[59]. South Carolina motion to base representation on the number of

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1798, and Nov. 14, 1799), ibid., pp. 540, 544–45; St. G. Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States, and of the Commonwealth of Virginia* (1803), Lonang Institute, Livonia, MI, 2003, vol. 1, note D, pt. 1; J. C. Calhoun, *A Discourse On the Constitution and Government of the United States* (1854), [in:] *Union and Liberty: the political philosophy of John C. Calhoun*, R. Lence (ed.), Liberty Fund, Indianapolis, IN, 1992, p. 79, 81–116; Wieciech, op. cit., p. 93–97; G. Van Deusen, *The Jacksonian Era, 1828–1848*, Harper, New York, NY, 1959, p. 133; J. Davis, op. cit., p. 114–168.

52 M. L. DeRosa, *The Confederate Constitution of 1861: an inquiry into American constitutionalism*, University of Missouri Press, Columbia, 1991, p. 20; Amlund, op. cit., p. 22.

53 Michałek, op. cit., p. 107.

54 *Journal of Congress*, op. cit., vol. 1, p. 859; W. Davis, op. cit., p. 237.

55 *Journal of Congress*, op. cit., vol. 1, p. 851.

56 *Permanent Constitution*, *supra*, art. 1, § 1.

57 See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)57; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 439 (1847); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 519 (1858).

58 *Permanent Constitution*, *supra*, art. I, § 2.

59 *Permanent Constitution*, *supra*, art. I, § 2, cl. 3. It is remarkable that while the U.S. Constitution avoided the word "slaves," by replacing it in the three-fifths clause with euphemistic phrase "other persons," the Confederates had no problem with calling them "slaves."

all inhabitants, thereby increasing the political power of States having greater number of slaves[60], initially passed by a 4–3 vote[61], but Mississippi reversed its position afterwards and the three-fifths compromise was restored[62]. Another change to art. I, § 2, approved without dispute, concerned the maximum number of representatives – from one for every 50,000 inhabitants (instead of 30,000 specified in the U.S. Constitution)[63].

The provisions concerning the Senate[64] also did not undergo substantial change. Equal representation of the states, election of Senators by state legislatures, and six-year staggered terms have all been retained. The Convention rejected the proposals tending either to decrease or to increase the number of Senators[65]. The only change consisted of a newly introduced requirement that Senators be elected at the last session of the state legislature preceding the expiration of their predecessors' terms[66].

Provisions concerning congressional elections similarly closely followed the U.S. Constitution. The only major changes concerned the qualifications of members and right of suffrage: the seven-year and nine-year citizenship requirements for members of the House and the Senate, respectively, were abolished, with the Constitution only requiring members of Congress to be citizens of the Confederate States at the time of taking office[67]. On the other hand, aliens were excluded from suffrage, both in federal and state elections[68]. Moreover, the Framers of the Montgomery Constitution wanted to bar citizens from the states that remained loyal to the Union from voting in the South without acquiring Confederate citizenship[69]. Proposals to define who is a citizen of the Confederate States and to constitutionally prescribe qualifications for citizenship have been made, but none were successful[70].

Sections 5 and 6 of Article I of the Constitution, concerning the organization of Congress and privileges of members, were mostly unchanged.

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60 Lee, op. cit., p. 91; W. Davis, op. cit., p. 226.

61 *Journal of Congress*, op. cit., vol. 1, p. 861–862.

62 Ibid., p. 889.

63 *Permanent Constitution*, *supra*, art. I, § 2, cl. 3.

64 *Permanent Constitution*, *supra*, art. I, § 3.

65 *Journal of Congress*, op. cit., vol. 1, p. 863.

66 *Permanent Constitution*, *supra*, art. I, § 3, cl. 1.

67 *Permanent Constitution*, *supra*, art. I, § 2, cl. 2 and § 3, cl. 3.

68 *Permanent Constitution*, *supra*, art. I, § 2, cl. 2. It should be noted that in 1861 several state constitutions extended suffrage to resident aliens who have declared an intention to acquire American citizenship (J. B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1406–1409 (1993)), but this practice was opposed in the South (Ibid., p. 1409).

69 Raskin, op. cit., p. 1414; Lee, op. cit., p. 90.

70 *Journal of Congress*, op. cit., vol. 1, p. 859–860.

The single exception was the clause providing that Congress may, by law, "grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department"[71]. This provision was a result of the compromise on the issue of permitting members of Congress to hold offices in the executive branch – a practice permitted under the Provisional Constitution, but not under the U.S. Constitution[72]. A number of delegates, led by Vice President Alexander Stephens and Secretary of State Robert Toombs (both of Georgia) influenced by the British parliamentary system, argued that presence of the department heads in Congress would improve cooperation between the two branches[73]. Others, however, were reluctant to weaken the traditional separation of powers principles[74]. Ultimately the matter was left for the future Congress, which never exercised the power to admit department heads to the floor[75].

The Montgomery Constitution also introduced another momentous innovation in the traditional separation of powers system – the line-item veto. Art. I, § 7 permitted the President to disapprove not only entire bills[76], but also individual appropriation items included in appropriation bills[77]. The veto could be overridden by two-thirds majority in both houses, in the same manner as an ordinary veto. First introduced in the Provisional Constitution[78] on motion of an Alabama delegate Robert H. Smith[79], its main object was to limit the utility of (frequently wasteful) appropriation riders that could not have been vetoed without leaving essential government programs unfunded[80]. Although President Davis never vetoed a single appropriation item[81], the line-item veto turned out to be the most important of the constitutional innovations introduced in the Confederacy, spreading to more than 40 Southern and Northern states

71 *Permanent Constitution*, *supra*, art. I, § 6.

72 U.S. Const. art. I, § 6, cl. 2.

73 Lee, op. cit., p. 97; W. Davis, op. cit., p. 226–227. *See also* Curry, op. cit., p. 81–82.

74 Lee, op. cit., p. 97–98.

75 Patrick, op. cit., p. 46–47; Curry, op. cit., p. 83; D. P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 Viriginia Law Review 1257, 1382–1384 (2004). In 1863 and 1865 bills for admitting heads of departments to the floor of Congress were introduced in the Senate, but neither of them became law (see *Journal of Congress*, op. cit., vol. 3, pp. 24, 44–45, 146, 153, and vol. 4, p. 533).

76 President Davis vetoed 39 bills during his time in office, none of which was reenacted by the requisite majority of two thirds (Patrick, op. cit., p. 75; see also Currie, *Through the Looking-Glass*, op. cit., p. 1344–1351).

77 *Permanent Constitution*, *supra*, art. I, § 7, cl. 2.

78 *Provisional Constitution*, *supra*, art. I, § 5.

79 Lee, op. cit., p. 64.

80 Lee, op. cit., p. 100; Curry, op. cit., p. 76; DeRosa, op. cit., p. 83–85.

81 Currie, *Through the Looking-Glass*, op. cit., p. 1344.

alike[82]. Several U.S. Presidents, beginning with Ulysses Grant, have unsuccessfully sought introduction of line-item veto at the federal level as well[83].

Line-item veto has not been the only significant change in the Confederate Constitution that strengthened the position of the executive in fiscal matters[84]. Just as important were the restrictions on the congressional appropriations power: in accordance with the Confederate Constitution, Congress could appropriate money from the Treasury only when requested by department heads (through the President) or by a two-thirds majority[85]. The expenses of the legislative branch itself, as well as claims against the government audited and admitted by a special tribunal to be constituted for that purpose, were excepted from this requirement. This amendment, proposed by Alexander Stephens, was again patterned on the British system[86]. Stephens believed such a restriction to be the only was to enforce fiscal responsibility and limit "pork-barrel" spending by Congress[87]. He initially sought to restrict the right to propose appropriations solely to the executive (with an exception for the congressional expenses)[88], but on motion of Benjamin Hill the Convention permitted congressionally-initiated appropriation bills, subject to the two-thirds majority requirement[89].

The second exception to the clause under discussion, concerning claims against the Confederate States, first appeared in the original committee draft[90]. Under the sovereign immunity doctrine in common law systems a sovereign cannot be sued in any court without his own consent[91]. Accordingly, all claims

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82 *Gubernatorial Veto Authority with Respect to Major Budget Bill(s)*, National Conference of State Legislatures (Dec. 2008), http://www.ncsl.org/IssuesResearch/BudgetTax/GubernatorialVetoAuthority withRespecttoMajor/tabid/12640/Default.aspx (accessed Mar. 13, 2013). See also G. D. Braden, D. A. Anderson, *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, Texas Advisory Commission on Intergovernmental Relations, Austin, TX, 1977, p. 333; J. Burkhead, *Government Budgeting*, Wiley, New York, NY, 1956, p. 416.

83 V. A. McMurtry, *Item Veto and Expanded Impoundment Proposals: History and Current Status*, CRS Report RL33635 (2010), p. 4–13.

84 DeRosa, op. cit., p. 85.

85 *Permanent Constitution*, *supra*, art. I, § 9, cl. 9.

86 Lee, op. cit., p. 99.

87 Stephens, op. cit., vol. 2, p. 336. On pork barrel spending in the antebellum Union, see generally L. D. White, *The Jacksonians. A Study in Administrative History, 1829–1861*, Macmillan, New York, NY, 1954, p. 414.

88 *Journal of Congress*, op. cit., vol. 1, p. 27.

89 Ibid., p. 870–871.

90 Ibid., p. 854.

91 See, e.g., *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846); *United States v. Lee*, 106 U.S. 196, 207 (1882); Story, op. cit., § 1669; *American Jurisprudence, 2d Edition*, Thomson West, St. Paul, MN, 1962–, vol. 77, *United States*, §§ 43, 59 & seq.; R. H. Fallon, H. M. Hart, H. Wechsler & al., *Hart and Wechsler's Federal Courts and the Federal System*, Foundation Press, New York, NY, 2003, p. 944–45; C. A. Wright, A. R. Miller, *Federal Practice and Procedure*, Thomson West, St. Paul, MN, 1969–2012, § 3654.

against the United States had to be presented to Congress, which could grant relief by private bill[92]. In 1855 Congress established the Court of Claims to pass upon such claims[93], but as of 1861, that tribunal had no power to render binding judgments and exercised no part of the constitutional judicial power of the United States[94]. The Confederate Framers sought to replicate that arrangement by directing Congress to establish such a court, but the constitutional command remained unfulfilled: while bills to that effect have been introduced during the war[95], none of them was enacted into law[96]. Settlement of claims instead remained principally the responsibility of Congress, the Attorney General[97], and special administrative bodies like the Board of Sequestration Commissioners[98].

The Confederate Constitution contained several other new provisions on fiscal matters, though of lesser import. Article I, § 9 required all appropriation acts to precisely specify dollar amounts of appropriations and purposes for which they should be applied[99]. This provision, introduced at the committee stage[100], addressed an old controversy on constitutionally required specificity in appropriations[101]. It mostly reflected the U.S. practice, but in some respects went beyond that, banning lump-sum appropriations sometimes utilized by the U.S. Congress. During the floor debate in the Convention art. I, § 9 was further amended on motion of William B. Ochiltree (of Texas) by adding a proviso that Congress may not grant additional compensation to any public officer, employee, or contractor for services already rendered or contract already made[102]. This restriction was modeled on art. VII, § 7 of the Texas Constitution of 1845[103]. The last of the new fiscal provisions in the Montgomery Consti-

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92 White, *The Jacksonians*, p. 157–58; D. P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861*, University of Chicago Press, Chicago, IL, 2005, p. 195–96; V. C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 526–27 (2003).

93 *An Act to establish a Court for the Investigation of Claims against the United States*, Feb. 24, 1855, 33rd Cong., 2nd Sess., c. 122, 10 Stat. 612 (1855); Currie, *Democrats and Whigs*, op. cit., p. 196–203; White, *The Jacksonians*, p. 159–161.

94 *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *Gordon's Case*, 7 Ctl. Cl. 1 (1871); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144–145 (1871).

95 See *Journal of Congress*, op. cit., vol. 2, p. 284, vol. 3, p. 24, vol. 5, pp. 87, 379, and vol. 6, p. 74.

96 Robinson, op. cit., p. 492–510.

97 Patrick, op. cit., p. 304; Currie, *Through the Looking-Glass*, op. cit., p. 1379 fn. 519.

98 Robinson, op. cit., p. 493–499.

99 *Permanent Constitution*, *supra*, art. I, § 9, cl. 10.

100 *Journal of Congress*, op. cit., vol. 1, p. 854.

101 See G. Casper, *Separating Power: Essays on the Founding Period*, Harvard University Press, Cambridge, MA, 1997, pp. 80–93, 111–120; White, *The Jacksonians*, op. cit., pp. 126, 131–133.

102 *Journal of Congress*, op. cit., vol. 1, p. 872.

103 *Texas Constitution of 1845*, art. VII, § 7, *Gammel's Laws of Texas*, vol. 2, p. 1277, 1292.

tution was the requirement that the Post Office Department be financed only from postal revenues[104], proposed by Robert Toombs, Confederate Secretary of State[105]. The Convention, however, agreed to give the Post Office two years for attaining financial self-sufficiency[106].

Another important limitation on the legislative power appearing in the Confederate Constitution was the single-subject rule – a requirement that each bill relate to only one subject which should be expressed in the bill's title[107]. The rule was proposed by a Louisiana delegate Duncan Kenner[108], but it had numerous antecedents in state constitutions[109]. Its main object was to prevent legislative logrolling[110], but the single-subject rule also operated to strengthen the executive by preventing Congress from adding rider amendments to appropriations bills and other important measures for the purpose of defeating the presidential veto power (a common practice in the present-day United States[111]).

Unsurprisingly, the subject that attracted most interest in the Montgomery Convention were those provisions of the Constitution that concerned the allocation of governmental powers among the federal and state governments – mostly grouped in the last three sections of Article I. Its provisions in this regard, as in others, were based on the Constitution of the United States, but the Confederate Framers were determined to alter the balance by rejecting expansive construction of the powers of national government advanced during the antebellum period, frequently (but by no means always) over the South's dissent.

Among the "Northern usurpations" sharply opposed by the South on constitutional as well as on policy grounds the issue of protective tariff was possibly the most important one (at least excepting those connected with slavery). In 1828 a controversy over the tariff led to the famous Nullification Crisis when South Carolina threatened to nullify the tariff laws and even

104 *Permanent Constitution*, *supra*, art. I, § 8, cl. 7.

105 Lee, op. cit., p. 100–101; W. Davis, op. cit., p. 227.

106 *Journal of Congress*, op. cit., vol. 1, p. 867. Even after that date, the constitutional mandate was sometimes evaded by enabling the Post Office to borrow money from the Treasury. Currie, *Through the Looking-Glass*, op. cit., p. 1366; Patrick, op. cit., p. 283–284, 288.

107 *Permanent Constitution*, *supra*, art. I, § 9, cl. 20.

108 *Journal of Congress*, op. cit., vol. 1, p. 874.

109 See J. G. Sutherland, *Statutes and Statutory Construction*, Callaghan & Co., Chicago, IL, 1891, §§ 109 et seq.

110 Sutherland, op. cit., § 111; J. Bryce, *The American Commonwealth* (1888), Liberty Fund, Indianapolis, IN, 2005, vol. 1, p. 486.

111 D. R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002*, Yale University Press, New Haven, CT, 2005, p. 70–80.

to secede from the Union[112]. At the heart of the constitutional aspect of the tariff controversy was Article I, § 8, cl. 1 of the Constitution, authorizing Congress "to lay and collect [...] duties, imposts and excises." According to the Southerners, led by John Calhoun of South Carolina, that power could only be legitimately employed for the purpose of raising revenue, and not as an instrument of promoting some industries over others[113]. Hence it should be no surprise that the very first amendment proposed by the South Carolina delegation in the Montgomery Convention to the Enumerated Powers Clause of the Constitution expressly provided that taxes, duties, imposts, and excises are to be laid for revenue only, and that no "duties or taxes on importations from foreign nations [shall] be laid to promote or foster any branch of industry"[114]. Those requirements were complemented by a ban on another form of protectionism – bounties granted from the Treasury for encouragement of industry[115].

To make up for revenues lost due to lowered import duties, Congress was authorized to impose (but only by two-thirds majority in both houses) export duties, forbidden under the U.S. Constitution[116]. Important changes were also introduced to provisions guaranteeing freedom of interstate commerce: a prohibition against "vessels bound to, or from, one state, be[ing] obliged to enter, clear or pay duties in another"[117] was omitted in both the committee draft and in the final document, and states were permitted to lay tonnage duties on seagoing vessels (to the extent not inconsistent with treaties with foreign nations), but only for the purpose of financing river and harbor works[118].

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112 See generally W. W. Freehling, *Prelude to Civil War: the Nullification Controversy in South Carolina, 1816–1836*, Oxford University Press, New York, NY, 1992; R. E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis*, Oxford University Press, New York, NY, 1987; Currie, *Democrats and Whigs*, op. cit., p. 88–118. The confrontation was averted by a compromise in Congress, with the Federal government agreeing to reduction of the tariff. See W. W. Freehling, *The Road to Disunion. Volume I: Secessionists at Bay, 1776–1854*, Oxford University Press, New York, NY, 1990, p. 284–285.

113 J. C. Calhoun, *South Carolina Exposition and Protest* (1831), [in:] *The Papers of John C. Calhoun*, R. L. Meriwether, W. E. Hemphill, C. N. Wilson (eds.), University of South Carolina Press, Columbia, SC, 1977, vol. 10, p. 446; J. Berrien, *Address of the Free Trade Convention* (1831), [in:] *The Journal of the Free Trade Convention, held in Philadelphia, from September 30 to October 7, 1831*, C. Raguet (ed.), Philadelphia, PA, 1831; J. Taylor, of Caroline, *Tyranny Unmasked* (1822), F. T. Miller (ed.), Liberty Fund, Indianapolis, IN, 1992, p. 99–104.

114 *Permanent Constitution*, *supra*, art. I, § 8, cl. 1; *Journal of Congress*, op. cit., vol. 1, p. 864–865.

115 Ibid.

116 R. C. Todd, *Confederate Finance*, University of Georgia Press, Athens, GA, 2009, p. 125. Contrast *Permanent Constitution*, *supra*, art. I, § 9, cl. 6, with U.S. Const. art. I, § 9, cl. 5.

117 U.S. Const. art. I, § 9, cl. 6.

118 *Permanent Constitution*, *supra*, art. I, § 10, cl. 3.

Another constitutional issue that divided the nationalists and the defenders of states' rights in the nineteenth century involved federal financing of major infrastructural projects (mostly roads and canals) known as internal improvements[119]. Most of the proponents of the internal improvements system derived the constitutional authority therefore from the General Welfare Clause[120] and the Commerce Clause[121], while the opponents denied that the Federal government had any power to spend money for purposes not directly connected to its enumerated powers[122]. Constitutional opposition to internal improvements was always particularly strong in the South and it dominated the Montgomery Convention[123]. Hence the Commerce Clause of the Confederate Constitution was amended by inserting a proviso that "neither this, nor any other clause contained in the Constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce"[124]. An exception for coastal and river navigation projects and aids was proposed by Howell Cobb and adopted by the Convention, but only subject to a condition that expenses thereof shall be paid from duties imposed on navigation facilitated thereby[125].

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119 D. P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829*, University of Chicago Press, Chicago, IL, 2001, p. 258–283; idem, *Democrats and Whigs*, op. cit., p. 9–25; M. D. Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun*, Oxford University Press, New York, NY, 1987, p. 78–83, 194–197.

120 U.S. Const. art. I, § 8, cl. 1 ("*The Congress shall have power* [...] *to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States* [...]"). See J. Monroe, *Special Message to the House of Representatives Containing the Views of the President of the United States on the Subject of Internal Improvements* (May 4, 1822), [in:] *Compilation of Messages and Papers of the Presidents*, J. D. Richardson (ed.), Bureau of Nat'l Literature, New York, NY, 1896–1899, vol. 2, p. 144, 164–73.

121 U.S. Const. art. I, § 8, cl. 3. See, e.g., Story, op. cit., §§ 1267–1270; R. V. Remini, *Henry Clay: Statesman for the Union*, W.W. Norton, New York, NY, 1991, p. 225–27; *The Papers of Henry Clay*, J. F. Hopkins, R. Seager (eds.), University of Kentucky Press, Lexington, KY, 1959–1992, vol. 2, p. 448–89; D. Sheffey, *Speech in Congress on the Bonus Bill*, U.S. House of Representatives, 14th Cong., 2nd Sess., Washington, D.C. (Feb. 6, 1817), [in:] *Annals of Congress*, Gales and Seaton, Washington, D.C., 1854, vol. 30, p. 889–90.

122 J. Madison, *Veto Message Regarding the Internal Improvements Bill*, 14th Cong., 2nd Sess., 10 House Journal 534–537 (March 3, 1817); A. Jackson, *Veto Message Regarding the Maysville Road Bill*, 21st Cong., 1st Sess., 23 House Journal 733–742 (May 27, 1830); T. H. Benton, *Thirty Years' View. A History of the Working of the American Government for Thirty Years, 1820–1850*, Appleton, New York, NY, 1854, vol. 1, p. 22–26.

123 Lee, op. cit., p. 95–96.

124 *Journal of Congress*, op. cit., vol. 1, p. 891–892; G. E. White, op. cit., p. 502–503. Jabez Curry (a delegate from Alabama) in his *Civil History of the Government of the Confederate States* presents the desire to avoid political corruption and wasteful expenditures occasioned by pork-barrel projects as the primary motive for this change (Curry, op. cit., p. 87). His explanation, however, is somewhat unconvincing, given the long history of Southern opposition to internal improvements on States' rights grounds, and the fact that problems of corrupt influence and of political machines were of rather minor concern at the time of the Montgomery convention.

125 *Permanent Constitution*, *supra*, art. I, § 8, cl. 3; *Journal of Congress*, op. cit., vol. 1, p. 892.

The delegates did not confine themselves to prohibiting federal spending for internal improvements, but sought to resolve the whole question of congressional power to spend federal money on purposes unrelated to the enumerated powers[126]. This they did by amending the constitutional formula authorizing Congress "to provide for the common defense and general welfare of the United States," substituting much narrower "carry[ing] on the Government of the Confederate States" for the broad reference to "general welfare"[127]. In this manner the Confederate Framers closed one of the major gateways through which federal power expanded in the twentieth century – the *de facto* unlimited spending power.

Somewhat unexpectedly, the clause authorizing Congress to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the Confederate States" also elicited much interest in the Convention[128]. South Carolina moved to strike out both of those powers, but neither of its motions carried[129]. Likewise unsuccessful were the amendments proposed by John Gregg (Georgia), to require qualified majority for passage of naturalization laws[130], and by Thomas J. Withers (S.C.), to limit federal jurisdiction in bankruptcy cases to debtors who were parties in cases pending in the Confederate judiciary[131]. Bankruptcy power under the Confederate Constitution was, however, constrained by a proviso that no bankruptcy law shall discharge any debt contracted before the passage thereof[132] – a limitation that, under the U.S. Constitution, applied solely to state bankruptcy legislation[133].

In the context of the debate on the naturalization clause, Howell Cobb moved to grant Congress a new power to define federal citizenship[134]. He probably sought to eliminate the ambiguity existing in the United States Constitution as to who is a citizen of the United States that gave rise to the famous case of *Scott v. Sandford*[135], where the Supreme Court was confronted

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126 On the subject of this controversy, see generally T. Sky, *To Provide for the General Welfare: A History of the Federal Spending Power*, University of Delaware Press, Newark, DE, 2003, p. 19–242; Story, op. cit., §§ 909–927; J. H. Killian, G. A. Costello, K. R. Thomas, al., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 108–17, Congressional Research Service, Washington, D.C., 2004, p. 161–163; Currie, *The Jeffersonians*, op. cit., p. 116–122, 260–283.

127 *Permanent Constitution*, *supra*, art. I, § 8, cl. 1.

128 *Permanent Constitution*, *supra*, art. I, § 8, cl. 4.

129 *Journal of Congress*, op. cit., vol. 1, p. 866.

130 Ibid.

131 Ibid.

132 *Permanent Constitution*, *supra*, art. I, § 8, cl. 4.

133 Cf. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) and *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

134 *Journal of Congress*, op. cit., vol. 1, p. 867.

135 60 U.S. (19 How.) 393 (1857).

with the issue of citizenship of a freedman resident in one of the United States, but the delegates refused to revisit the issue and rejected the Cobb amendment[136].

The remaining enumerated powers of the Confederate Congress were copied from the U.S. Constitution without substantive changes. The Convention rejected proposals seeking to limit the power to define and punish piracy and offenses against the law of nations[137] and limiting the term of patents to 14 years[138]. Thomas Withers' motion to prohibit Congress from making State courts "tribunals inferior to the Supreme Court" and John Reagan's amendment concerning Presidential use of force abroad, both discussed below, met with a similar fate[139].

A comparison of the enumerations of congressional powers in the Constitutions of the United States and the Confederate States would not be complete without pointing out that, important as the changes were, just as important was the absence of amendments to such provisions as the Necessary and Proper Clause and the Commerce Clause[140]. The former, authorizing Congress to "make all laws which shall be necessary and proper for carrying into execution" the enumerated powers of the Federal government, has by 1861 already received a broad construction[141], which in turn has been sharply criticized by writers associated with states' rights view of the Constitution[142]. The Montgomery Convention, however, retained the clause without amendment[143] – a course that, under the usual canons of statutory interpretation, should imply approval of previous judicial constructions[144]. Indeed, State supreme courts

136 *Journal of Congress*, op. cit., vol. 1, p. 867.

137 Ibid., p. 867–868.

138 Ibid.

139 Ibid., p. 868.

140 Currie, *Through the Looking-Glass*, op. cit., p. 1269; Amlund, op. cit., p. 19–20.

141 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and A. Hamilton, *Opinion on the Constitutionality of the Bank* (1791), [in:] *Legislative and Documentary History of the Bank of the United States*, M. S. Clarke, D. A. Hall (eds.), Gales and Seaton, Washington, DC, 1832, p. 89–91. But see G. N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 Geo. L.J. 119, 130–134 (2006) (describing rejection of *McCulloch*'s broad reading of the clause by the political branches during the Jacksonian era).

142 See, e.g., J. Taylor, of Caroline, *Construction Construed and Constitutions Vindicated*, Shepherd and Pollard, Richmond, VA, 1820; S. Roane, *Hampden Essays* (1819), [in:] *John Marshall's Defense of McCulloch v. Maryland*, G. Gunther (ed.), Stanford University Press, Stanford, CA, 1969, p. 107–154. See also R. K. Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. Marshall L. Rev. 875, 883–907 (2000) and G. Gunther (ed.), *John Marshall's Defense of McCulloch v. Maryland*, Stanford University Press, Stanford, CA, 1969, p. 11–19.

143 *Permanent Constitution*, *supra*, art. I, § 8, cl. 18.

144 *See, inter alia*, Currie, *Through the Looking-Glass*, op. cit., p. 1270 fn. 49; T. H. Watts, *Appointment During Recess of Senate* (May 8, 1863), [in:] *Opinions of the Confederate Attorneys General, 1861–1865*, Rembert Wallace Patrick (ed.), Dennis, Buffalo, NY, 1950, p. 261, 264–265; N. J. Singer, J. D. S. Singer,

have been citing McCulloch as perfectly good law on the issues involving construction of the Necessary and Proper Clause[145]. The power of Congress to regulate interstate commerce – the major constitutional basis for modern expansion of federal regulatory authority – also has not been curtailed[146], except for restrictions on financing internal improvements (discussed *supra*). The Montgomery delegates rejected neither the exclusive character of interstate commerce power[147] nor the broad definition of commerce adopted by the Marshall court in *Gibbons v. Ogden*[148].

Changes introduced in article I, section 9 of the Confederate Constitution, dealing with limitations of Congressional powers consisted mainly of fiscal reforms (discussed above) and of provisions concerning slavery. The "peculiar institution" received strong constitutional protection, most prominently in the form of a clause prohibiting laws "denying or impairing the right of property in negro slaves"[149]. Apart from this general and mostly symbolic declaration (it has been clear to everyone except the most radical of abolitionists that under the United States Constitution Congress was powerless to abolish slavery in the South)[150], the framers of the Montgomery Constitution resolved the controversy on the slavery in the territories that aroused so many passions in the antebellum period by requiring that slavery be "recognized and protected [in all territories] by Congress and by the Territorial government"[151], while guaranteeing to all citizens the right to take their slaves to such territories. These

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Sutherland's Statutes and Statutory Construction, Thomson West, St. Paul, Minn., 2008, § 49:9; Sutherland, op. cit., §§ 403–404; E. T. Crawford, *The Construction of Statutes*, Gaunt, Holmes Beach, FL, 1999, § 233; G. A. Endlich, *A Commentary on the Interpretations of Statutes*, Lawbook Exchange, Clark, N.J., 2005, § 368; *Tomson v. Ward*, 1 N.H. 9 (1816); *Daviess v. Fairbairn*, 44 U.S. (3 How.) 636 (1845); *Whitcomb v. Rood*, 20 Vt. 49 (1847); *State v. Garthwaite*, 23 N.J.L. 143 (N.J. Sup. 1851); *Attorney General v. Brunst*, 3 Wis. 787 (1854); *Shriver v. Harbaugh*, 2 Pitts. 109 (Pa. 1861).

145 S. D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, [in:] *Studies in Southern History and Politics*, J. W. Garner (ed.), Columbia University Press, New York, NY, 1914, p. 107, 132; D. E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism*, Louisiana State University Press, Baton Rouge, LA, 1995, p. 153.

146 *Permanent Constitution*, *supra*, art. I, § 9, cl. 3.

147 *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

148 22 U.S. (9 Wheat.) 1 (1824).

149 *Permanent Constitution*, *supra*, art. I, § 9, cl. 4.

150 Ironically, although the Confederate Constitution could hardly have been more express on the Confederate government's lack of power to abolish slavery, in the last months of the war the Confederates were desperate enough to seriously consider proposals to emancipate and conscript slaves under the congressional power "to raise and support armies." Currie, *Through the Looking-Glass*, op. cit., p. 1298–1306. Indeed, several black regiments were organized under a statute of March 13, 1865 (*Laws and Joint Resolutions of the Last Session of the Confederate Congress*, C. Ramsdell (ed.), Duke University Press, Durham, NC, 1941, p. 118, No. 148), but Congress explicitly provided that while slaves could be enlisted (by their owners), no emancipation would follow, unless in pursuance to state laws and even then only with the owner's consent. *Id* § 5.

151 *Permanent Constitution*, *supra*, art. IV, § 3.

provisions have not only codified the U.S. Supreme Court's decision in *Scott v. Sandford*[152], but imposed on territorial legislatures an affirmative duty to *protect*, and not merely *tolerate* slavery, thereby rejecting Stephen Douglas's compromise Freeport Doctrine, seeking to reconcile *Scott* with popular sovereignty by emphasizing that even after *Scott* territories could fail to enact laws for protection of property in slaves[153].

On the other hand, on the issue of slave trade the Confederate Constitution was far more restrictive than the U.S. Constitution. While the former permitted Congress to ban slave trade (but not before year 1808[154]), a power exercised by the federal government as soon as possible[155], the Confederate Constitution, despite reluctance of some of the delegates[156], required federal legislature to ban overseas slave trade[157], while leaving it free to permit or ban importation of slaves from slaveholding states and territories of the Union[158]. The ban might not have met with unanimous approval in the Deep South[159], but the Convention recognized it to be necessary to influence public opinion in the border states and in Europe[160].

Another important change introduced in art. I, § 9 of the Confederate Constitution was the incorporation of the Bill of Rights (excepting the Ninth and Tenth Amendments) into the text of Article I[161]. Its provisions were included among limitations on the powers of Congress, in accordance with Chief Justice Marshall's decision in *Barron v. Baltimore*[162] holding them inapplicable to the States[163]. The Confederate Bill of Rights faithfully mirrored the first eight amendments to the Constitution of the United States, with one exception: two

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152 60 U.S. (19 How.) 393 (1857).

153 D. M. Potter, *The Impending Crisis, 1848–1861*, Harper & Row, New York, NY, 1976, p. 337; W. W. Freehling, *The Road to Disunion. Volume II: Secessionists Triumphant, 1854–1861*, Oxford University Press, New York, NY, 2007, p. 272.

154 U.S. Const. art. I, § 9, cl. 1; U.S. Const. art. V.

155 *An Act to prohibit the importation of Slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight*, Mar. 2, 1807, 9th Cong., 2nd Sess., c. 22, 2 Stat. 426 (1807).

156 See Lee, op. cit., p. 65–66, 101.

157 *Permanent Constitution*, *supra*, art. I, § 9, cl. 1.

158 *Permanent Constitution*, *supra*, art. I, § 9, cl. 2.

159 See Potter, op. cit., p. 395–401, and Freehling, *Secessionists Triumphant*, op. cit., p. 168–184, for discussion of pre-war Southern proposals to resume the African slave trade. For an account of the indirect but far-reaching effects of the ban on slave trade on the development of slavery in the South and on the political power of the slaveholders, see Freehling, *Secessionists at Bay*, op. cit., p. 136–37.

160 Lee, op. cit., p. 101; W. Davis, op. cit., p. 246–247; Curry, op. cit., p. 89–91.

161 *Permanent Constitution*, *supra*, art. I, § 9, cl. 12–19.

162 32 U.S. (7 Pet.) 243 (1833).

163 See also DeRosa, op. cit., p. 63–65; G. E. White, op. cit., p. 500.

commas were eliminated from the text of the Second Amendment[164], thereby subtly altering its meaning by strengthening the connection between the right to keep and bear arms and the "well-regulated militia." It appears unlikely, however, that the Convention intended this to be a substantive change: there is simply no evidence that the delegates sought to effect a change of an individual right to keep arms into a collective right[165], and the deletion of commas can be adequately explained by general modernization of punctuation. Amendments to the Bill of Rights introduced on the floor of the Convention were also few, and none of them was successful[166]. Most notably, Thomas Withers of South Carolina unsuccessfully moved to limit the right of petition to matters within the legislative power of the federal government[167], likely referring to an old controversy on allowing Congress to receive anti-slavery petitions filed by radical abolitionists since the 1830s[168].

Several changes were made by the Montgomery Convention in the last section of article I, concerning limitations on state powers. Most notable was the abolition of constitutional ban against emitting bills of credit[169]. Apparently the delegates to Montgomery Convention believed that the states were unlikely to return to the pre-1789 practice of issuing large quantities of usually worthless bills of credit that the U.S. Constitution sought to restrict[170]. Besides, they remained powerless to make anything but gold and silver coin a legal tender[171],

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164 Cf. "*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed*" (U.S. Const. 2nd Amend.) with "*A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed*" (*Permanent Constitution*, *supra*, art. I, § 9, cl. 13).

165 For discussion of the individual and collective right views of the Second Amendment, see, *inter alia*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 3025 (2010), and for more detailed discussion, N. J. Johnson, D. B. Kopel, G. A. Mocsary, M. P. O'Shea, *Firearms Law and the Second Amendment: Regulation, Rights, and Policy*, Wolters Kluwer Law & Business, New York, NY, 2012.

166 For example, Howell Cobb unsuccessfully proposed an amendment prohibiting Congress from "requiring of any citizen to perform secular labor on Sunday, except in cases of absolute necessity" (*Journal of Congress*, op. cit., vol. 1, p. 872).

167 *Journal of Congress*, op. cit., vol. 1, p. 873.

168 Freehling, *Secessionists at Bay*, op. cit., p. 310–352; Van Deusen, op. cit., p. 107–109, 133–135; Peterson, op. cit., p. 259–262. The Southern congressmen sought to exclude such petitions, on the account of want of constitutional authority of Congress to interfere with slavery in the South, but a number of Northerners opposed such attempts on First Amendment right to petition grounds. See D. P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861*, University of Chicago Press, Chicago, IL, 2005, p. 3–23; A. C. Hinds, C. Cannon, *Hinds' Precedents of the House of Representatives of the United States*, Government Printing Office, Washington, D.C., 1907–1908, §§ 3343–3348.

169 *Permanent Constitution*, *supra*, art. I, § 10, cl. 1.

170 J. Madison, *The Federalist No. 44* (1788), [in:] *The Federalist Papers*, C. Rossiter (ed.), New American Library, New York, NY, 1961, p. 280–288; Story, op. cit., §§ 1352–1356.

171 *Permanent Constitution*, *supra*, art. I, § 10, cl. 1.

so the danger of runaway paper money inflation known from the 1780s was still guarded against. The Montgomery Convention also enabled the states to impose tonnage duties, though only "on seagoing vessels, for the improvement of its rivers and harbors navigated by the said vessels"[172], and to make interstate compacts for improvement of the navigation of rivers flowing through several States without requiring congressional consent[173].

A major controversy erupted over amendments prohibiting states from abolishing slavery offered by Duncan Kenner of Louisiana and Robert Rhett of South Carolina[174]. The debate pitted the defenders of states' rights against the most ardent proponents of slavery[175], who argued that abolition, even in a single state, would destroy the harmony of the Confederacy and reignite the fight over slavery that ultimately led to secession[176]. The differences caused the Convention to postpone the vote on Kenner and Rhett amendments until the last day of its deliberations, when both proposals were withdrawn in light of an earlier decision to permit the admission of non-slaveholding states[177]. In response William Barry of Mississippi proposed an amendment that would require the consent of all slave states for abolition of slavery in any of them, but it was rejected by an evenly divided vote (Florida, South Carolina, and Texas voted in the affirmative, Alabama, Georgia, and Mississippi in the negative, and Louisiana split three to three)[178].

In the context of adjustments to allocation of powers between the federal and state governments under the Confederate Constitution one additional power granted the States by Montgomery Convention should be mentioned. On motion of Texas delegate John Gregg[179] state legislatures were enabled, by concurrence of two-thirds of each house, to impeach any federal officer "resident and acting solely within the limits of [such] State"[180]. The Senate retained exclusively jurisdiction to try such impeachments in the same manner as those

172 *Permanent Constitution*, *supra*, art. I, § 10, cl. 3.

173 Ibid.

174 *Journal of Congress*, op. cit., vol. 1, p. 875.

175 DeRosa, op. cit., p. 70–73.

176 It has been observed by William W. Freehling that the possibility of abolition of slavery in the Border South states, which the secessionists hoped to entice into joining the Confederacy, was not as far-fetched as it may first appear: the number of slaves and slaveholders in those states was in steady decline (mostly due to slaves being sold down south), and their economies were less slavery-dependent than those of the Deep South (Freehling, *Secessionists at Bay*, op. cit., p. 17–36). Indeed, fear of the abolition in the Border South might have been an important factor in the Deep South's decision to secede in 1860–1861 (Ibid., p. 134).

177 *Journal of Congress*, op. cit., vol. 1, p. 893.

178 Ibid.

179 Ibid., p. 862.

180 *Permanent Constitution*, *supra*, art. I, § 2, cl. 5.

brought by the House of Representatives[181]. A single most important category of officers who fell within the purview of this amendment were district judges[182], but it could have been applied as well to, for instance, collectors of customs. While no state employed this new power throughout the entire course of Confederate history[183], it was certainly indicative of a stronger position of the states in the federal system.

Article II of the Confederate Constitution dealt with the executive branch of government. However, unlike the Philadelphia Convention of 1787, wherein the structure of the executive was one of the more contentious issues[184], the Montgomery Convention, satisfied by the choice made in the U.S. Constitution, retained the presidential model without considering any alternatives[185]. Unlike the structural matters, the provisions for choosing of the President occasioned major controversy in the Convention[186]. Several delegates were willing to dispense with the Electoral College and provide for a new mode of electing the chief magistrate[187], but the Convention was unable to agree on a solution acceptable to the majority of the states, so Article II ultimately incorporated the procedure set forth in the Twelfth Amendment to the U.S. Constitution: electors were to be appointed by the several states and to vote separately for President and Vice President, and if no candidate would attain the majority, the President would be chosen by the House of Representatives, voting by states[188]. More successful were the attempts to modify the Presidential term of office. The original committee draft of February 28 provided for a six-year term[189], and proposals to extend it to seven or even eight years have been rejected[190]. To restrict electioneering and discourage partisanship, the Confederate Constitution barred presidential reelection[191] (the initial draft applied only to consecutive terms[192], but on motion of William Boyce the

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181 *Permanent Constitution*, *supra*, art. I, § 3, cl. 6; R. H. Smith, *An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America*, [in:] *Southern Pamphlets on Secession, November 1860–April 1861*, J. L. Wakelyn (ed.), University of North Carolina Press, Chapel Hill, NC, 1996, p. 195, 211.

182 Robinson, op. cit., p. 41.

183 Lee, op. cit., p. 91–92.

184 E. S. Corwin, *The President: Office and Powers*, New York University Press, New York, NY, 1940, p. 10–17.

185 *Permanent Constitution*, *supra*, art. II, § 1, cl. 1.

186 Curry, op. cit., p. 70–74.

187 Lee, op. cit., p. 103–104; W. Davis, op. cit., pp. 227, 248.

188 *Permanent Constitution*, *supra*, art. II, § 1, cl. 2–5.

189 *Journal of Congress*, op. cit., vol. 1, p. 855.

190 Ibid., p. 875.

191 Amlund, op. cit., p. 24.

192 W. Davis, op. cit., p. 227.

Convention eliminated reeligiblity altogether[193]). The Vice President remained reeligible.

Changes were also made to the clause dealing with President's qualifications. Apart from natural born citizens and citizens of the Confederate States as of the date of the adoption of the Constitution, all Confederate citizens born in the United States before December 20, 1860 (the South Carolina secession) were also eligible[194]. The residency requirement was also slightly modified, by specifying that the President should be for "fourteen years a resident within the limits of the Confederate States, as they may exist at the time of his election"[195]. Those two modifications were plainly included for the benefit of the border states (still loyal to the Union) that the Confederates sought to attract, enabling their citizens (after joining the Confederacy, of course) to run for chief magistracy.

With respect to the powers of the executive the changes introduced in the Confederate Constitution were few and incremental, despite occasional apprehensions about executive power expressed by antebellum Southern leaders[196]. The President was made the Commander-in-Chief of the military and naval forces of the Confederacy[197] and authorized, subject to the requirement of the advice and consent of the Senate, to make treaties and appoint judges, ambassadors, and superior executive officers[198]. His powers with respect to removal of federal officers – a matter on which the U.S. Constitution was silent, though the existence of presidential removal power was recognized by Congress in 1789[199]

193 *Journal of Congress*, op. cit., vol. 1, p. 875.

194 *Permanent Constitution*, *supra*, art. II, § 1, cl. 7.

195 Ibid.

196 See, e.g., A. P. Upshur, *A Brief Enquiry into the True Nature and Character of our Federal Government*, Printed by E. and J. C. Ruffin, Petersburg, VA, 1840, p. 116–117; Calhoun, *A Discourse On the Constitution and Government of the United States*, op. cit., p. 214–216. See also C. M. Wiltse, *John C. Calhoun*, Russell & Russell, New York, NY, 1968, vol. 2, p. 237–267 and vol. 3, p. 422–424.

197 It may be noted here that in an early plan of the Provisional Constitution written by C. Memminger, Congress was to elect the General-in-Chief of the Army, who would be the professional head of the Confederate military, while remaining subordinate to the President (see Memminger, *Plan of a Provisional Government for the Southern Confederacy*, op. cit.). Neither the Provisional nor the Permanent Constitution included any provision to such effect. The position of a single commanding general of the Confederate armies (subordinate to the President) was eventually established by statute, but only in the last months of the war (Act of Jan. 23, 1865, 2nd Cong., 2nd Sess., c. 35, *Laws and Joint Resolutions of the Last Session of the Confederate Congress*, C. Ramsdell (ed.), Duke University Press, Durham, NC, 1941, p. 22).

198 *Permanent Constitution*, *supra*, art. II, § 2.

199 See, e.g., 1 *Annals of Congress* 387–399 (May 18, 1789), 473–599 (June 16–19, 1789), 600–608 (June 22, 1789); A. Hamilton, *Pacificus No. 1* (1793), [in:] *The Pacificus-Helvidius Debates of 1793–1794: Toward the Completion of the American Founding*, M. J. Frisch (ed.), Liberty Fund, Indianapolis, IN, 2007, p. 8–17; J. Marshall, *The Life of George Washington*, C. P. Wayne, Philadelphia, PA, 1807, vol. 5, p. 200; D. P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, University of Chicago

and by the Supreme Court in 1926[200] – were codified, but substantially narrowed[201]: the President could remove the heads of departments and diplomatic officers at his pleasure, but other civil officers only for cause ("when their services are unnecessary, or for dishonesty, incapacity. inefficiency, misconduct, or neglect of duty"), in which case the reasons for removal were to be reported to the Senate[202]. This provision followed on legislative proposals aimed at reducing executive patronage[203] that have been from time to time offered in the U.S. Congress[204]. The committee draft initially prescribed four-year terms for all inferior officers[205], but the Convention decided to leave the matter of their tenure to the discretion of Congress[206]. Presidential recess appointment power was also restricted by adding a proviso barring candidates once rejected by the Senate from reappointment to the same office during their ensuing recess[207].

One unsuccessful amendment concerning executive power that deserves special mention was a proposal by Texas delegate John H. Reagan[208], aimed at resolving the ambiguity surrounding the use of military force abroad without congressional authorization[209]. The Reagan amendment would have clarified that the congressional power to declare war was not to be construed "to prevent the President from adopting all measures necessary to maintain the rights of the Confederate States and protect their citizens in foreign countries," and that during the recess of Congress the President would be free to employ

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Press, Chicago, IL, 1997, p. 36–41; S. B. Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006); M. Jagielski, *Prezydent USA jako szef administracji*, Zakamycze, Kraków 2000, s. 103–106.

200 *Myers v. United States*, 272 U.S. 52 (1926).

201 Amlund, op. cit., p. 24–25.

202 *Permanent Constitution*, *supra*, art. II, § 2, cl. 3.

203 Curry, op. cit., p. 79–80.

204 See, e.g., Benton, op. cit., vol. 1, p. 80–82.

205 Cf. Act of May 15, 1820, c. 102, 3 Stat. 582, prescribing four-year terms for "all district attorneys, collectors of customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for land, registers of the land office, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under the laws of the United States." For discussion of the role of this statute in formation of the spoil system, see White, *The Jacksonians*, op. cit., 316–324.

206 *Journal of Congress*, op. cit., vol. 1, p. 877–878.

207 *Permanent Constitution*, *supra*, art. II, § 2, cl. 4.

208 *Journal of Congress*, op. cit., vol. 1, p. 868.

209 See, *inter alia*, Corwin, op. cit., p. 245–254; S. Dycus, A. L. Berney, W. C. Banks, P. Raven-Hansen, *National Security Law*, Aspen Publishers, New York, NY, 2007, pp. 67–80, 255–283; J. E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 Yale L.J. 845, 850–867 (1996); Currie, *The Jeffersonians*, op. cit., p. 123–128.

the military and naval forces for those purposes[210]. Unfortunately, the Convention not only rejected this proposal, but gave no indication as to whether the amendment was seen as going too far or not far enough in permitting unilateral military action abroad by the executive.

It is difficult to say whether the constitutional position of the Confederate President was stronger than that of his Northern counterpart. He acquired new fiscal powers, but lost the unlimited (though uncertain as of 1861) authority to dismiss inferior executive officers. His position and influence were increased by the extension of his term of office to six years, but at the cost of the opportunity for reelection (though at that time the latter was mostly theoretical: among nine presidents elected in the period between the stabilization of the two-party system after 1825 and the Civil War only Andrew Jackson succeeded in a reelection bid).

The changes in the Confederate Constitution concerning the office of the President do reflect, however, a major shift in the approach of the political elites and the public opinion to the issue of strong executive. The Framers of the U.S. Constitution had to defend themselves against charges of creating a too powerful executive[211], resonating with the contemporaneous public opinion, still deeply suspicious of executive authority with the memories of abuses perpetrated by royal governors still fresh in memories[212]. By 1861, however, the executive came to be viewed as trustworthy, as evidenced by a longer term of office (in 1788 four years have been criticized as too long for a republic[213]) and additional checks (mostly in fiscal matters) against the "irresponsible" legislature.

Article III of the Constitution, treating on the judicial branch, sparked particularly vivid controversies in the Montgomery Convention, focusing on the jurisdiction of federal courts, and particularly on the jurisdiction of the Supreme Court over appeals from the decisions of state courts. The issue has been contentious in the South since 1821, when in *Cohens v. Virginia*[214] the Supreme

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210 *Journal of Congress*, op. cit., vol. 1, p. 878.

211 See, e.g., A. Hamilton, *The Federalist No. 67* (1788), [in:] *The Federalist Papers*, C. Rossiter (ed.), New American Library, New York, NY, 1961, p. 407–411; idem, *The Federalist No. 69* (1788), [in:] ibid., p. 415–423.

212 See generally C. C. Thach, *The Creation of the Presidency, 1775–1789: A Study in Constitutional History*, Liberty Fund, Indianapolis, IN, 2007, p. 1–44; G. S. Wood, *The Creation of the American Republic, 1776–1787*, University of North Carolina Press, Chapel Hill, NC, 1998, p. 135–139; G. A. Tarr, *Understanding State Constitutions*, Princeton University Press, Princeton, N.J., 1998, p. 86–88; G. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 216–217 (1989).

213 A. Hamilton, *The Federalist No. 71* (1788), [in:] *The Federalist Papers*, C. Rossiter (ed.), New American Library, New York, NY, 1961, p. 431–435.

214 19 U.S. (6 Wheat.) 264 (1821).

Court upheld against constitutional challenge section 25 of the Judiciary Act of 1789[215], authorizing appellate review by the Supreme Court of final judgments and decrees of highest state courts in all cases where a federal question was involved and the decision was against the party invoking the federal right or defense[216]. The decision of the Court occasioned sharply negative reactions in the South, especially in Virginia[217]. The opponents of the Court's ruling saw section 25 and *Cohens* as an attack on state sovereignty seeking to subordinate state courts to the federal judiciary[218]. Identical state sovereignty arguments were raised at the Montgomery Convention[219] in support of proposal to constitutionally narrow the appellate jurisdiction of the Confederate Supreme Court to review of the decisions of lower federal courts[220], which fell just one vote (of a Florida delegate) short of success. Nonetheless, the Convention also rejected a motion by Stephen Hale, of Alabama, to codify the *Cohens* holding in Article III[221], leaving the Constitution somewhat ambiguous as to *Cohens'* continued viability.

Significant changes were introduced in the Confederate Constitution with respect to the jurisdiction of the federal courts. Diversity jurisdiction, unpopular among the States' rights supporters as the source of the authority of the federal courts to create general common law rules under *Swift v. Tyson*[222] and as a popular instrument of raising federal questions while bypassing state courts[223], was abolished on motion of Alexander Stephens[224]. Proposals were also made for eliminating jurisdiction in cases between a State and citizens of another State, between citizens claiming lands under grants of different States,

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215 *An Act to Establish the Judicial Courts of the United States*, Sept. 24, 1789, 1st Cong., 1st Sess., c. 20, § 25, 1 Stat. 73, 85.

216 *See further Kentucky v. Griffith*, 39 U.S. (14 Pet.) 56 (1840); T. Sergeant, *Constitutional Law*, P. H. Nicklin and T. Johnson, Philadelphia, PA, 1830, p. 59–67.

217 S. R. Olken, *John Marshall and Spencer Roane: An Historical Analysis of their Conflict over United States Supreme Court Appellate Jurisdiction*, 1990 Journal of Supreme Court History 125 (1990); C. Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States – A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 (1913); A. J. Beveridge, *The Life of John Marshall*, Houghton Mifflin Company, Boston, MA, New York, NY, 1919, vol. 4, p. 358–374; Newmyer, op. cit., p. 911–923.

218 S. Roane, *Algernon Sidney Essays*, "Richmond Enquirer" 1821, May 25, May 29, June 1, June 5, June 8; *Virginia Resolutions of 1821 on the Jurisdiction of the Federal Courts*, [in:] *State Documents on Federal Relations*, H. V. Ames (ed.), University of Philadelphia, Dep't of History, Philadelphia, PA, 1911, vol. 3, p. 103.

219 Robinson, op. cit., p. 468; White, *Recovering the Legal History of the Confederacy*, op. cit., p. 527–529.

220 *Journal of Congress*, op. cit., vol. 1, p. 880–881.

221 Ibid., p. 881.

222 41 U.S. (16 Pet.) 1 (1842). See also Fallon, Hart & Wechsler, op. cit., p. 620–630; J. H. Friedenthal, M. K. Kane, A. R. Miller, *Civil Procedure*, Thomson/West, St. Paul, MN, 2005, p. 203–207.

223 A. Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 89–99 (1997).

224 *Journal of Congress*, op. cit., vol. 1, p. 878; Robinson, op. cit., p. 44; G. E. White, op. cit., p. 513.

and in cases involving aliens, but none were successful[225]. Federal jurisdiction has been excluded in cases brought against a State by aliens or citizens of other States[226], in accord with the Eleventh Amendment[227].

Another interesting change consisted of deletion (at the committee stage) of the words "in law and equity" used to describe cases subject to federal question jurisdiction under the U.S. Constitution[228]. The distinction between law and equity was a peculiar feature of the English legal system and its colonial progenitors in the eighteenth century[229], although it was absent in some of the colonies[230]. The two systems differed mainly as to procedural and remedial rules[231], but there were also some differences as to substantive rules. The entire distinction, however, was alien to those States that, for historical reasons, remained under a greater or lesser influence of the civil law tradition, like Louisiana (whose legal system was based on the French Civil Code) and Texas (where the common law existed in a simplified form, free of many of the historical complexities found in the original states)[232]. In those states where the law-equity distinction existed it came under attack by the proponents of procedural reform, who argued for the so-called fusion of law and equity[233]. It has been believed, however, that constitutional recognition of the law-equity distinction precluded their fusion in the federal judicial system[234]. The deletion of the words referring to the distinction would have solved this problem (though there is no evidence that the delegates had this purpose in mind), but the Confederate Congress made no further steps toward the procedural fusion of law and equity in the Confederate courts[235].

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225 *Journal of Congress*, op. cit., vol. 1, p. 878–879.

226 *Permanent Constitution*, *supra*, art. III, § 2, cl. 1; G. E. White, op. cit., p. 500–501.

227 U.S. Const. 11th Amend.

228 Robinson, op. cit., p. 45; G. E. White, op. cit., p. 513.

229 W. Blackstone, *Commentaries on the Laws of England* (1765–69), G. Sharswood, B. Field (eds.), J.B. Lippincott Company, Philadelphia, PA, 1893, vol. 3, p. 49–54; J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, Little & Brown, Boston, MA, 1846, §§ 25–58; R. W. Millar, *Civil Procedure of the Trial Court in Historical Perspective*, Lawbook Exchange, Clark, N.J., 2004, p. 39–40.

230 E. E. Sward, *A History of the Civil Trial in the United States*, 51 U. Kan. L. Rev. 347, 368 (2003).

231 Ibid., p. 358–361.

232 Robinson, op. cit., p. 301; Millar, op. cit., p. 56; G. E. White, op. cit., p. 513.

233 Millar, op. cit., p. 53–54; C. E. Clark, J. W. Moore, *A New Federal Civil Procedure – I. The Background*, 44 Yale L.J. 387 (1935). See also *New York Code of Civil Procedure* (*Field Code*), N.Y. Laws 1848, c. 379.

234 *Bennett v. Butterworth*, 52 U.S. (11 How.) 669, 674 (1850); *McFaul v. Ramsey*, 61 U.S. (20 How.) 523, 525 (1857); see also *Thompson v. Railroad Companies*, 73 U.S. (6 Wall.) 134, 137 (1867); *Scott v. Neely*, 140 U. S. 106, 109 (1890); *Langtry v. Wallace*, 182 U. S. 536, 550 (1900).

235 The Confederate Judiciary Act made a provision for distinct forms of procedure in cases at law and in equity, except in District Courts located in those states where the distinction was unknown. See *An Act to establish the Judicial Courts of the Confederate States of America*, Mar. 16, 1861, c. 61, §§ 12, 14, 1 Confed. Stat. 75, 77–78.

With respect to the structure of the judicial branch the Confederate Constitution eschewed the approach adopted in the Provisional Constitution[236], and instead followed the pattern of the U.S. Constitution, vesting the judicial power of the Confederate States in one Supreme Court and such lower courts as would be established by Congress[237]. The structure of both the Supreme and inferior courts was left to legislative judgment. Judges were to be appointed by the President by and with the advice and consent of the Senate. Tenure during good behavior was also retained – an amendment by Howell Cobb which sought to limit this principle to Justices of the Supreme Court failed without a roll call vote[238].

Nonetheless, while the constitutional outline of the judicial structure remained identical to the one existing under the U.S. Constitution, in practice the Confederate judiciary has been radically different. Still operating under the Provision Constitution, on March 16, 1861, Congress passed the statute regulating the judicial system[239], which remained its cornerstone even after the Permanent Constitution went into effect. The system, unlike then-existing federal judiciary in the United States, was strictly two-tiered. District courts, to be established in each state[240], were the trial courts, exercising both the jurisdiction formerly belonging to the United States district courts and that which under the Union was exercised by the circuit courts[241]. It was to extend to "all civil suits at common law or in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and where the character of the parties is such, as by the constitution to authorise said court to entertain jurisdiction"[242]. The forms and modes of practice in Confederate district courts were to follow those of state courts[243], in equity as well as at law[244].

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236 White (516–517) observes that the increasing number of district judges, rendering their sitting together as a single court impracticable, as well as unfavorable experiences of the states that experimented with similar institutional designs (see Robinson 421) were the leading causes of the decision to abandon the arrangement initially adopted under the Provisional Constitution.

237 *Permanent Constitution*, *supra*, art. III, § 1.

238 *Journal of Congress*, op. cit., vol. 1, p. 878.

239 *An Act to establish the Judicial Courts of the Confederate States of America*, Mar. 16, 1861, Prov. Cong., 1st Sess., c. 61, 1 Confed. Stat. 75 (1861) (hereinafter cited as *Judiciary Act of 1861*).

240 Ibid., § 2.

241 Ibid., §§ 10, 35, 39.

242 Ibid., § 10. See also Robinson, op. cit., p. 57.

243 *Judiciary Act of 1861*, *supra*, § 14; Robinson, op. cit., p. 61.

244 Cf. Process Act of 1792, May 8, 1792, ch. 36, § 2, 1 Stat. 275, providing for conformity to State practice at common law, but not on the equity side. Also unlike the Process Act of 1792, the Confederate law required "dynamic" conformity. For discussion of differences between "static" and "dynamic" conformity, see Wright & Miller, op. cit., § 1002.

The Judiciary Act of 1861 made no provision for establishment of the Supreme Court, as its organization had already been provided for by the Provisional Constitution[245]. The statute only prescribed that annual terms of the court were to commence on first Monday of January[246]. However, no term of the Confederate Supreme Court has ever been held, as in July 1861 Congress repealed the provision for annual terms, pending enactment of a law organizing the Supreme Court under the Permanent Constitution[247]. But no such statute was ever enacted, impeded by the controversies on appellate jurisdiction raised by the States' rights faction[248], and by quite understandable congressional focus on the conduct of war. Hence the Confederate Supreme Court had never been actually established, and Daniel Webster's nightmare came true: constitutional (as well as statutory) questions were left to seven (and later eleven) state supreme courts[249], "each at liberty to decide for itself, and none bound to respect the decisions of others"[250]. The importance of the district courts, devoid of influence over the jurisprudence of state courts, remained limited[251].

Article IV of the Confederate Constitution focused on interstate relations. Just like under the United States Constitution, full faith and credit was to be afforded to judgments and public records of each state in all other states[252] and all privileges and immunities of citizens guaranteed in each state to citizens of other states[253]. On motion of Stephen Hale of Alabama, the Convention added another guarantee: that property in slaves would not be impaired by their transit through a territory of a non-slaveholding state[254].

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245 *Provisional Constitution*, *supra*, art. III, § 1.

246 *Judiciary Act of 1861*, *supra*, § 1.

247 *An act further to amend an act entitled "An act to establish the judicial courts of the Confederate States of America"*, July 21, 1861, Prov. Cong., 3rd Sess., c. 3, 1 Confed. Stat. 168 (1861). See Robinson, op. cit., p. 420.

248 Robinson, op. cit., p. 437–491; E. W. Moise, *Rebellion in the Temple of Justice: The Federal and State Courts in South Carolina During the War Between the States*, iUniverse, Lincoln, NE, 2003, p. 50–53; G. E. White, op. cit., p. 517–522; Brummer, op. cit., p. 107–108; Currie, *Through the Looking-Glass*, op. cit., p. 1370–1376; J. G. de Roulhac Hamilton, *The State Courts and the Confederate Constitution*, "The Journal of Southern History" 1938, Vol. 4, No. 4, pp. 425, 426–30.

249 Brummer, op. cit., p. 109.

250 Webster, *Second Reply to Hayne*, op. cit., p. 78.

251 De Roulhac Hamilton, op. cit., p. 425.

252 *Permanent Constitution*, *supra*, art. IV, § 1.

253 *Permanent Constitution*, *supra*, art. IV, § 2.

254 *Permanent Constitution*, *supra*, art. IV, § 2, cl. 1; *Journal of Congress*, op. cit., vol. 1, p. 882. Some authorities can be read to support such right even under the U.S. Constitution. At the very least, they establish a position that a "transient excursion" of slaves into a free state does not release them from slavery (see J. Story, *Commentaries on the Conflict of Laws*, Little & Brown, Boston, MA, 1841, § 96; *Massachusetts v. Aves*, 18 Pick. 193 (Mass. 1836); see also In re *The Slave, Grace*, 2 Hagg. Adm. 94, 166 E.R. 179 (Adm. 1827)). In *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851), the Supreme Court (in a unanimous opinion by Taney, C.J.) held the question to be one of state law, to be decided according to the laws of the alleged slave's state of domicile.

In the Confederacy, as in the Union, each state was obliged to extradite fugitives from justice and fugitive slaves[255]. This last obligation is of particular importance, as violations of the Fugitive Slaves Act[256], a major component of the Compromise of 1850[257], by the Northern states have not only contributed to sectional conflict[258], but became one of the major justifications for secession[259]. Yet apart from stylistic revisions, the Confederate Constitution made only one change to this provision, clarifying that slaves lawfully carried into a free state would also be returnable to their masters. Some delegates moved to require states defaulting on their duty to return fugitive slaves to compensate their owners, but without success[260].

The most contentious issue in Article IV, if not the entire Confederate Constitution, arose in connection with the provisions of section 3, concerning the admission of new states[261], sparked by a motion of William Miles of South Carolina to prohibit the admission of non-slaveholding states into the Confederacy[262]. The proponents of the Miles amendment, led by Thomas R. Cobb and Robert Rhett, argued that were the Confederacy to become "half slave and half free," as the Union did, it would be dooming itself to repeat the conflict between slave states and free states[263]. On the other hand the main opponents of the motion, Vice President Stephens and Robert Toombs, were concerned about limiting the Confederacy's ability to attract new states, like those eco-

255 *Permanent Constitution*, *supra*, art. IV, § 2, cl. 2–3.

256 *An Act to amend, and supplementary to, the Act entitled "An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters," approved February twelfth, one thousand seven hundred and ninety-three*, Sept. 18, 1850, 31st Cong., 1st Sess., c. 60, 9 Stat. 462 (1850).

257 H. Hamilton, *Prologue to Conflict: the Crisis and Compromise of 1850*, University Press of Kentucky, Lexington, KY, 2005, pp. 54, 161, 168.

258 Potter, op. cit., p. 130–139; Lee, op. cit., p. 111.

259 See, e.g., *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (Dec. 24, 1860), *Journal of the South Carolina Convention*, op. cit., p. 461; *Report of the Committee on Ordinance of Secession* (1861), [in:] *Journal of the Public and Secret Proceedings of the Convention of the People of Georgia*, Boughton, Nisbet & Barnes, State Printers, Milledgeville, GA, 1861, pp. 104, 111–112; *A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union* (Feb. 2, 1861), *Journal of the Secession Convention of Texas, 1861*, E. W. Winkler (ed.), Austin Printing Company, Austin, TX, 1912, p. 61–66; S. C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War*, Harvard University Press, Cambridge, MA, 2010, p. 11–12.

260 *Journal of Congress*, op. cit., vol. 1, p. 882. The idea of compensation for fugitive slaves was first proposed by Maryland Senator Thomas Pratt during congressional debates on the Fugitive Slaves Act of 1850 (Freehling, *Secessionists at Bay*, op. cit., p. 504–505), when it was turned down due to Deep South opposition, which saw it as a conniving scheme for emancipating Border South slaves. Identical provision was also a part of the Crittenden Compromise – a package of constitutional amendments proposed by Kentucky Senator John J. Crittenden in December 1860 to avert dissolution of the Union (S. J. Res. No. 40, 36th Cong., 2nd Sess., art. 4).

261 W. Davis, op. cit., p. 252–253.

262 *Journal of Congress*, op. cit., vol. 1, p. 883.

263 Lee, op. cit., p. 115

nomically dependent on the navigation of the Mississippi[264]. Ultimately the prohibitory amendment was rejected by a vote of four states (Alabama, Louisiana, Mississippi and Texas) against two (South Carolina and Florida)[265], and the Convention adopted instead a compromise proviso by Thomas Withers (South Carolina) and John Shorter (Alabama), that required two-thirds majority of the full number of each house of Congress for admission of new states[266].

The Confederate Constitution has reformulated the second clause of section 3, authorizing Congress to legislate with respect to federal territory and other federal property. The territorial matters have been placed in a new clause, explicitly authorizing Congress to acquire new territories[267], to provide territorial governments therefor, and to permit the people of such territories to form states and seek admission to the Confederacy[268]. Slavery in the territories received an express constitutional guarantee[269].

Article V of the Confederate Constitution, concerning the amendment process, has been the most extensively revised one in the entire Constitution[270]. In the United States amendments could have been proposed by Congress or by a convention that was to be called when requested by two thirds of state legislatures[271]. In practice, however, no convention for proposing amendments has ever been called, and all amendments originated in Congress. Meanwhile the Montgomery Convention has entirely excluded Congress from the amendment process[272], while reducing to three the number of states at whose request a constitutional convention would have to be called[273]. The Confederate Constitution removed many ambiguities surrounding an article V convention

264 Ibid., p. 116.

265 *Journal of Congress*, op. cit., vol. 1, p. 886.

266 *Permanent Constitution*, *supra*, art. IV, § 3, cl. 1; *Journal of Congress*, op. cit., vol. 1, p. 895.

267 The United States Constitution did not expressly provide for acquisition of new territories, causing some legal difficulties in connection with the Louisiana Purchase of 1803 (Currie, *The Jeffersonians*, op. cit., p. 99–107). Eventually, however, it became settled that the Union has an inherent power to acquire new territories by treaty, annexation, conquest, or discovery (see generally W. W. Willoughby, *The Constitutional Law of the United States*, Baker, Voorhis & Co., New York, NY, 1910, §§ 146–151, vol. 1, p. 324–341).

268 *Permanent Constitution*, *supra*, art. IV, § 3, cl. 3.

269 Ibid.

270 Michałek, op. cit., p. 108.

271 U.S. Const. art. V.

272 The change does not appear that radical when one traces the records of the Philadelphia Convention of 1787, which created the Constitution of the United States. Congressional power to originate amendments has been added (on motion of Alexander Hamilton) as a kind of afterthought – on September 10, at the final stages of drafting process, as an alternative to the already provided for convention process. See M. Farrand (ed.), *Records of the Federal Convention of 1787*, Yale University Press, New Haven, CT, 1911, vol. 2, p. 558–559.

273 *Permanent Constitution*, *supra*, art. V.

under the U.S. Constitution[274], by confining it to consideration of amendments proposed by the states that have requested it to be called and clarifying that each state would have one vote therein. Amendments proposed by the federal convention would have thereafter been submitted to ratification by state legislatures or state conventions (the choice of the mode of ratification belonged to the federal convention), with the number of states requisite for ratification lowered from three fourths to two thirds[275]. The Constitution stipulated that no state may, without its consent, lose equal representation in the Senate, but no provision has been made to entrench constitutional guarantees for slavery.

Article VI of the Confederate Constitution has been somewhat expanded in comparison with the corresponding article of the U.S. Constitution, but its two most important provisions – the Supremacy Clause[276] and the requirement that all federal and state officers take oaths to support the Constitution of the Confederate States[277] – were adopted verbatim for the U.S. Constitution. The Montgomery Convention also confirmed the validity of preexisting engagements and obligations of the federal government[278], and expressly declared the government of the Confederate States to be the legal successor of the government organized under the Provisional Constitution. Finally, the Confederate Article VI incorporated two important provisions of the Bill of Rights – the Ninth and Tenth Amendments. The former asserted that "enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people," but its Confederate counterpart made clear that "the people" referred to were "the people of the several states," and not the people as individuals[279]. The Tenth Amendment, repeated without change in section 6 of article VI, provided that "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 thereof." It should be noted that, like the Framers of the U.S. Constitution, the Montgomery Convention did not use the proverb *expressly* with respect to the phrase "delegated to the Confederate States," leaving the constitutional opening for implied powers[280].

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274 See J. K. Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv. J.L. & Pub. Pol'y 1005 (2007).

275 *Permanent Constitution*, *supra*, art. V; W. Davis, op. cit., p. 228.

276 *Permanent Constitution*, *supra*, art. VI, § 3.

277 *Permanent Constitution*, *supra*, art. VI, § 4.

278 *Permanent Constitution*, *supra*, art. VI, § 2.

279 *Permanent Constitution*, *supra*, art. VI, § 5; G. E. White, op. cit., p. 498–99. This change has been offered on the floor of the Convention by William Miles, of South Carolina. *Journal of Congress*, op. cit., vol. 1, p. 888.

280 Cf. Story, *Commentaries on the Constitution of the United States*, op. cit., §§ 1900–1901.

Lack of changes to the Supremacy Clause is rather surprising, as it seemingly calls into question the entire doctrine of nullification. This was no oversight on the part of the Convention, but instead a result of a difficult compromise between the proponents and opponents of the nullification. The latter have turned out more active on the floor of the Convention. William Boyce (paradoxically of South Carolina) started the debate by offering, on March 6, an amendment expressly rejecting nullification by providing that decisions of the Confederate Supreme Court on constitutional issues "in all cases capable of decision by legal process" shall be binding on the States, and that in "such cases as do not admit of [such a] decision," the controversy shall be conclusively decided by a convention of all states, leaving in all instances no recourse to the dissatisfied states but the right of secession[281]. The Boyce Amendment was introduced as an alternative to an amendment by Christopher Memminger that would have required the federal government to withdraw all military presence from a state when so requested by a state convention[282]. Although the Memminger Amendment did not speak of nullification, it is difficult not to see it as motivated by the memories of the Nullification Crisis, when federal garrison at Fort Moultrie was employed to render the South Carolina's nullification of the tariff meaningless in practice[283], as well as the more recent experience of secession, when the existence of federal military installations in the South was a major source of instability[284]. The Convention, however, was reluctant to endorse either proposal, and all states except South Carolina voted to reject both amendments[285].

The issue returned on March 7, when Benjamin Hill of Georgia offered a detailed amendment setting forth a complete legal framework for dealing with issues of secession and nullification[286]. State governments would be afforded a right to challenge federal statutes before court consisting of the Justices of the Supreme Court and the chief justice of the complaining state. On the other hand, the constitutionality of any alleged nullification law would, on complaint by any aggrieved person, be subject to review by the Supreme Court. Any recalcitrant state would be subject to congressional sanctions in the form of withdrawal of "all or any portion of the privileges and benefits of [the] Confederacy, without releasing such State from the duties and obligations thereof."

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281 *Journal of Congress*, op. cit., vol. 1, p. 873.

282 Ibid.

283 Freehling, *Secessionists at Bay*, op. cit., p. 279.

284 Freehling, *Secessionist Triumphant*, op. cit., p. 466–489; W. Davis, op. cit., p. 207–208; see also M. A. Powell, *Confederate Federalism: A View from the Governors*, Ph.D. Diss., History Dept., University of Maryland, College Park, MD, 2004, p. 79–89.

285 *Journal of Congress*, op. cit., vol. 1, p. 873.

286 *Journal of Congress*, op. cit., vol. 1, p. 877–878.

The second section of the Hill Amendment regulated the secession procedure, and expressly provided that each seceding state would be required to assume "a due proportion of the public debt existing at the time of such withdrawal" and to compensate the Confederate States for costs incurred "in acquiring, securing, fortifying or defending the territory or jurisdiction of such State."

After initial debate, the consideration of the Hill Amendment was postponed, but, according to the journals, it has never been resumed[287]. Nevertheless, the amendment deserves scholarly attention as the only attempt to comprehensively settle the two most contentious constitutional issues that divided the United States before 1860. Failure of the final text of the Confederate Constitution to address the issues of nullification and secession left them, at least formally, open[288]. Yet while nullification, as the Convention debates show, was indeed controversial even in the south, it is difficult to imagine an objection against the right of secession being ever raised in the Confederate States.

Article VII of the Confederate Constitution regulated the ratification process. Ratification by five states was required for approval of the Constitution[289]. After such ratification the Provisional Congress was to set the date for the election of a new Congress and a new President, but it would retain legislative power under the Provisional Constitution until the assembling of the new legislature[290].

Ratification of the Constitution turned out to be mere formality, mostly because the Southern political elites were well aware of the impending threat of war and the resulting pressing need to settle internal difficulties promptly and without too much dissension. Alabama became the first state to ratify the Constitution on March 12 – one day after the Constitution was initially adopted[291]. Georgia (on March 16), Louisiana (on March 21), Texas (on March 23) and Mississippi (on March 26) followed suit[292]. In each of those states the Constitution was ratified by an overwhelming majority[293] and virtually without debate. The only issue of some disagreement was the mode of ratification – whether it can be done by secession conventions, or should new conventions be elected

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287 Lee, op. cit., p. 101–2; W. Davis, op. cit., p. 250.

288 Actually, nullification existed in the Confederacy in all but name (Owsley 4), for due to the absence of the Confederate Supreme Court, state courts had in many cases final say on the constitutionality of federal legislation (DeRosa, op. cit., p. 119). Marshall De Rosa's conclusion that this was an intended feature of the Confederate constitutional system (Ibid., p. 18–38) is, however, a highly disputable one – after all, the Constitution expressly required the Supreme Court to be established.

289 *Permanent Constitution*, *supra*, art. VII, § 1.

290 Ibid., § 2.

291 Lee, op. cit., p. 129.

292 Ibid., p. 130–134.

293 In Georgia the vote was unanimous, while the greatest number of dissenting votes (in Louisiana) was 10 against 94 in the affirmative.

(or the whole matter submitted to popular vote)[294]? Much more difficult was the ratification vote in South Carolina. While the state convention eventually approved the Constitution by 138 yeas against 21 nays, it proposed four amendments: abolition of the three-fifths compromise, prohibition on admission of non-slaveholding states without unanimous consent, limitation of tariff duties, and leaving Congress free to permit slave trade[295]. Florida was the last one of the seven founding states to ratify the Constitution – the state convention assembled only on April 18 and approved the instrument of ratification four days later[296].

While the Permanent Constitution was ratified within a month after its adoption, its coming into effect has been delayed. The Congress, preoccupied with the war business after the attack on Fort Sumter, passed the statute for putting the new government into operation on May 21, 1861[297]. It called for the members of the new Congress and the presidential electors to be elected on the first Wednesday of November. The first session of the new Congress was to meet on February 18, 1862[298], the day on which the Provisional Constitution was to expire, and only then did the Permanent Constitution finally come into effect[299].

Constitutional innovations introduced in the Constitution of the Confederate States can be classified into three categories. The first includes those altering the balance of powers in the federal system for the purpose of transferring powers back to the states or safeguarding states' rights. There is no doubt that the Montgomery Constitution narrowed down the scope of federal powers, primarily the economic ones (with the strikeout of the General Welfare Clause being the most important change)[300]. Yet those changes were quite mod-

294 Lee, op. cit., p. 128–134.

295 Lee, op. cit., p. 134–136; *Journal of the South Carolina Convention*, op. cit., pp. 249, 256.

296 Lee, op. cit., p. 137.

297 *An Act to put in operation the Government under the Permanent Constitution of the Confederate States of America*, May 21, 1861, Prov. Cong., 2nd Sess., c. 64, 1 Confed. Stat. 122 (1861).

298 Ibid., § 3.

299 By that date, six more states have joined the Confederacy and ratified the Permanent Constitution. Virginia, Arkansas, Tennessee, and North Carolina seceded from the Union after Lincoln declared the original seven seceded states to be in rebellion after the attack on Fort Sumter. In both Missouri and Kentucky, rival secessionist and unionist governments were established, and the former applied to the Provisional Congress for admission into the Confederacy (their requests were granted – see Acts of Nov. 28, 1861, and Dec. 10, 1861, Prov. Cong., 5th Sess., cc. 1 and 5, 1 Confed. Stat. 221 and 222). The confederate governments of Missouri and Kentucky were soon driven out of their states by Union forces (neither has ever controlled a major part of its state), but both continued to operate in exile until the end of war, and Senators and Representatives representing them (the latter elected mostly by citizens in Confederate military service – see, e.g., *An Act to provide for holding elections for representatives in the Congress of the Confederate States from the State of Missouri*, Jan. 19, 1864, 1st Cong., 4th Sess., c. 10, 4 Confed. Stat. 173) sat in the Confederate Congress.

300 W. Davis, op. cit., p. 256.

est in comparison with the demands of many of the antebellum States' rights defenders[301]. The Confederate Constitution affected neither the supremacy of the federal law, nor the sweeping scope of the Necessary and Proper Clause, nor even appeals from state courts to the Supreme Court. It remained ambiguous on nullification and failed to endorse Calhoun's principle of concurrent majority[302], and even failed to reaffirm the right of secession.

The Confederacy did not survive long enough to permit assessment of the effectiveness of the safeguards against federal encroachment on States' rights that its founders devised. During the four years of Confederate government's existence, the political practice in the field of State-Federal relations strayed further from the constitutional blueprint than in any other field. While the Montgomery Constitution arguably embodied a model of federalism akin to the traditional American dual federalism established by the U.S. Constitution[303], scholars have observed that what emerged in the first years of the war was something more like an early form of cooperative federalism[304], which thereafter gave rise to a form of negotiated federalism[305]. Moreover, individual states proved capable of successfully nullifying federal laws and opposing federal authority[306], although no provision for such state interposition was made in the Constitution. It was the political strength of the state governments, combined with the prevailing states' rights doctrine and congressional failure to establish the Supreme Court (in plain disregard of the constitutional command), that effected such a striking change in the states' position vis-à-vis federal authority. Finally, while boundaries between federal powers and reserved state powers were initially observed, wartime pressure inevitably pushed the Confederate Government towards centralization[307].

It is impossible to foresee the direction Confederate constitutional law evolution would have taken had the Confederacy survived the war. While the states' rights philosophy was undoubtedly stronger in the South than in the pre-war Union as a whole, it is uncertain whether it would not have abated had secession been successful. It remains unclear to what extent the South-

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301 Fehrenbacher, op. cit., p. 143.

302 Calhoun, *Disquisition on Government*, op. cit.; Calhoun, *Discourse*, op. cit., p. 121, 129–131.

303 *Ex parte Coupland*, 26 Tex. 386, *11 (1862). For the fullest statement of dual federalism principles of the U.S. Constitution as interpreted in the nineteenth century, see *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

304 Powell, op. cit., pp. 22–23, 66–116.

305 Ibid., pp. 23–24, 116–215.

306 F. L. Owsley, *State Rights in the Confederacy*, University of Chicago Press, Chicago, IL, 1925.

307 Amlund, op. cit., p. 43–51; Currie, *Through the Looking–Glass*, op. cit., p. 1294–95 (conscription), 1311–13 (federal control of the economy), 1313–16 (prohibition on cotton planting), 1362–64 (unapportioned direct taxes), 1399; E. M. Thomas, *The Confederate Nation, 1861–1865*, Harper & Row, New York, NY, 1979, pp. 196, 206–210; G. E. White, op. cit., p. 530–31.

ern antifederalism had been the result of the individualistic political traditions of the region, and to what extent of the fact that, as Southern historian Jesse T. Carpenter once succinctly put it, that "geography made South a section, and population relegated it to minority"[308] that saw states' rights as a guarantee of its own distinctive social system and way of life against the North-dominated majority.

The second category of reforms embodied in the Confederate Constitution consisted of additional constitutional safeguards for slavery, devised primarily as a response to political developments of the decade preceding the secession. Sympathy exhibited by many Northerners to escaping slaves, resistance against the delivery of fugitives, opposition to extension of slavery to new territories, abolitionist agitation among blacks as well as whites, and the unfortunate incident at Harper's Ferry all contributed to the growing Southern fears of an assault against the "peculiar institution" and the social and economic system founded on it. It should come as no surprise that the Confederates wished to exclude such a prospect by constitutional as well as political safeguards. The Convention, however, rejected the radical proposals (like the prohibition on admission of non-slaveholding states), and many of the provisions introduced in the Confederate Constitution mirrored the U.S. constitutional law as expounded by the Supreme Court in *Scott v. Sandford*[309] and other cases[310].

From the modern constitutional scholars' point of view, the most interesting group of alterations made in the Confederate Constitution are those governmental reforms connected with neither slavery nor states' rights[311]. They include the fiscal reforms, line-item veto, presidential term reform, and participation of department heads in the debates of the Congress. Some of those provisions later were later widely adopted at the state level. All of them, however, were an important contribution to the American constitutional tradition and perhaps the most permanent legacy of the last politically relevant attempt in American history to create a new federal constitution that was undertaken by the Montgomery Convention.

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308 J. T. Carpenter, *The South as a Conscious Minority, 1789–1861. A Study in Political Thought*, The New York University Press, New York, NY, 1930, p. 33.

309 60 U.S. (19 How.) 393 (1857).

310 *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) and *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851).

311 W. Davis, op. cit., p. 257.

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