



AMERICAN CONSTITUTIONALISM  
 VOLUME I: STRUCTURES OF GOVERNMENT  
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Supplementary Material

Chapter 6: The Civil War/Reconstruction Era - Federalism

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**Note on Federalism in the Confederate South**

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The Confederate Congress in 1861, acting as a constitutional convention, quickly debated and approved a permanent constitution drafted by a select committee. In keeping with the southern view that the slave states had been faithful to the original constitution, the persons responsible for the constitution of the Confederate States of America largely copied the Constitution of the United States. The resulting constitution was soon ratified by the secessionist states.

The Confederate Constitution only slightly modified the Constitution of the United States. The Confederate president was limited to a single, six-year term of office, but was given a more powerful role in setting fiscal policy with a line-item veto and a privileged role in initiating appropriations. The Confederate Congress was prohibited from adopting protective tariffs, passing internal improvements, or interfering with slavery. The post office was required to be self-sufficient. The Constitution reduced the number of states required to force Congress to call a constitutional convention for considering constitutional amendments. The Confederate Constitution said little new about states' rights. No explicit right of secession or nullification was written into the Confederate Constitution.

The troublesome "necessary and proper" clause from Article I, Section 8 of the U.S. Constitution was carried over unchanged into Article I, Section 18 of the Confederate Constitution. The Tenth Amendment of the U.S. Constitution was incorporated into body of the Confederate Constitution in Article VI, Section 6 without any substantive alteration of language. The Confederate Constitution did drop the "general welfare" clause, which was part of Article I, Section 8 of the U.S. Constitution. In the antebellum period, Federalists and Whigs relied on that clause when advocating protectionism and internal improvements. The Confederate Congress was empowered to collect taxes "for revenue necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States."

States' rights played a greater role in the preamble and implementation of the Confederate Constitution. The preamble to the Confederate Constitution declared,

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity invoking the favor and guidance of Almighty God do ordain and establish this Constitution for the Confederate States of America.

Although authorized to do so by the Constitution, the Confederate Congress never established a Supreme Court. Proponents of states' rights blocked efforts to create a Supreme Court for the Confederacy that would have the same appellate power over state courts that Section 25 of the Judiciary Act of 1789 had given to the U.S. Supreme Court. As a result, the several state supreme courts were able to reach independent decisions on the constitutionality actions taken by the Confederate government. Fortunately for the Confederate government, the state supreme courts declared very few national laws



unconstitutional.<sup>1</sup>

State governments in the Confederacy during the Civil War more vigorously challenged national authority than either Confederate state courts or state governments in the Union. In a particularly famous exchange of letters, Georgia Governor Joseph E. Brown in 1862 accosted President Davis over the constitutionality of the military draft. The Confederate Constitution had the same provisions for military affairs as the U.S. Constitution. Brown claimed that the first conscription act passed by the Confederate Congress “disorganize[d]” the state militia and pulled the troops that the governor deemed necessary to the proper defense of the state out of Georgia. Worse, he complained, the law did not make an exemption for the officers of the state government. This threatened to “destroy her State Government by disbanding her law-making power.” If necessary, Brown asserted, he would “use all the remaining military force of the State” to prevent the arrest of state legislators, judges and other essential personnel who might refuse to comply with the draft law, and he would otherwise offer no assistance in implementing a law of such dubious constitutionality.<sup>2</sup> Davis responded by observing that the Confederate Congress was given a clear power “to raise armies” and that the draft was “not only necessary, but . . . it was absolutely indispensable.” So long as the draft was “calculated and intended to ‘raise armies,’” and so long as conscription did not conflict with some other provision in the Constitution, Davis claimed, the draft was a “necessary and proper” law.<sup>3</sup> The grouching of governors like Brown led a generation of historians to argue that states’ rights played a significant role in undermining the Confederacy during the Civil War. More recent work has emphasized the extent to which national leaders like Jefferson Davis won these constitutional and political arguments over military affairs.<sup>4</sup>

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<sup>1</sup> On the Confederate Constitution and judicial review, see Marshall L. DeRosa, *The Confederate Constitution of 1861* (Columbia: University of Missouri Press, 1991); Curtis Arthur Amlund, *Federalism in the Southern Confederacy* (Washington, D.C.: Public Affairs Press, 1966).

<sup>2</sup> Joseph E. Brown, in *Correspondence between Governor Brown and President Davis on the Constitutionality of the Conscription Act* (Atlanta, Ga.: Atlanta Intelligencer, 1862), 4, 7.

<sup>3</sup> *Ibid.*, 17, 18.

<sup>4</sup> For a review, see Richard E. Beringer, et al., *Why the South Lost the Civil War* (Athens, Ga.: University of Georgia Press, 1986).