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DRAWING LINES OF SOVEREIGNTY: STATE HABEAS DOCTRINE AND THE SUBSTANCE OF STATES' RIGHTS IN CONFEDERATE CONSCRIPTION CASES

*Winthrop Rutherford **

*I have heard some express the opinion that it would have been better not to have made a Constitution for the Confederate States until after the war was over!*¹

INTRODUCTION

Across the Confederacy, state judges uniformly claimed jurisdiction to issue habeas writs to confederate conscription officers on behalf of conscripts claiming unlawful detention. State judges based this authority to issue habeas writs to federal officers on the state habeas doctrine, pursuant to which a state court had co-equal jurisdiction with federal courts to determine the lawfulness of a habeas petitioner's detention. Today state habeas doctrine would constitute a gross violation of jurisdictional lines separating federal and state sovereignty;² federal courts have exclusive jurisdiction to determine whether a federal prisoner's detention is lawful.³ Even during the antebellum period state habeas was constitutionally controversial, resulting in a robust and divided body of antebellum state and federal precedent, and featured in the broader judicial and political disputes over the boundaries of states' rights. In the flagship Confederate state habeas conscription cases issued by the supreme courts of North Carolina, Alabama, and Georgia in 1863, only one state supreme court judge dissented from holding state habeas as constitutional under both

* J.D., 2015, University of Virginia School of Law; M.A. (History), 2015, University of Virginia; B.A., 2011, University of Virginia. Many thanks to Aryana Gharagozloo, without whose indefatigable support I would not have finished this article, and to Professor Cynthia Nicoletti for her patience.

1. *Ex parte Walton*, 60 N.C. 350, 359 (1864) (quoting Chief Justice Richmond M. Pearson, North Carolina Supreme Court).

2. *Harris v. Nelson*, 394 U.S. 286, 290–91 (1949).

3. *See* 28 U.S.C. § 1651(a) (2012).

the United States and Confederate constitutions.⁴ By staking a claim to the jurisdictional space of state habeas these confederate state judges made an unequivocal statement about how they envisioned the balance of state and federal sovereign power in the Confederacy. While confederate state judges defended state habeas as an extension of state sovereignty, they were the first in American legal history to widely endorse conscription as constitutional.⁵ This was an unprecedented expansion of federal power that subordinated the states' sovereign prerogative to raise militias.

The dialogue about national conscription and state habeas between state judges and the Jefferson Davis administration sheds light on a constitutional identity crisis about states' rights absent an abolitionist threat within the Confederacy. The states' rights ethos of secessionism had rested on the compact theory of federalism, pursuant to which states were equal with the federal judiciary as arbiters of the Constitution because the United States derived its sovereignty from the sovereignty of the several states, and the prior could not supersede the latter. Because the sovereign states had formed the federal sovereign through a compact, a state could exit the constitutional compact should that state believe the federal government improperly infringed upon its sovereignty. The Davis administration's apprehension about state habeas was that, because a conscript could challenge conscription's constitutionality in a habeas petition, the determination of whether that conscript's detention was lawful put Confederate military policy in the hands of a multitude state supreme (or even lower state) courts. State habeas provided a unique forum, unfettered because no Confederate Supreme Court was established, for confederate state judges to determine the boundaries of states' rights in the Confederacy. Given this forum, confederate state courts generally did not stake a claim to jurisdictional parity with a future Confederate Supreme Court, or fully embrace the states' rights ethos of secession. Confederate state judges reviewed the constitutionality of conscription to determine lawfulness of a habeas petitioner's detention, but were largely silent about whether confederate states could nullify what the states construed as onerous federal legislation. State habeas doctrine diverged from the

4. See *Ex parte Hill*, 38 Ala. 429, 430 (1863).

5. Act of Apr. 16, 1862, ch. 31, Pub. Laws, 1st Sess., § 1, in *STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE FIRST SESSION OF THE FIRST CONGRESS* 45 (R.M. Smith ed., Richmond 1864) [hereinafter *STATUTES AT LARGE*, 1862].

states' rights of secession in that the state habeas doctrine did not hold the states, or their courts, were equal with the Supreme Court as arbiters of the Constitution. These judges did not seek to diverge from antebellum state habeas doctrine, which presumed state and federal courts had co-equal authority to determine the lawfulness of a prisoner's detention, but did not presume to extend the states' coequal jurisdiction beyond the determination of lawfulness. Confederate state judges eschewed the states' rights of secessionism for the moderated variant underlying the state habeas doctrine, in which state habeas acted as a procedural check on abuses of federal power without a broader substantive claim to the states' sovereign prerogative.

State judges embraced state habeas as the vehicle to ensure the integrity of state sovereignty amidst national military centralization. Confederate state habeas cases serve as indicia of the boundaries to which states' rights took root within the confederate legal landscape and the genesis of a confederate constitutional culture forged by state judges. This emerging constitutional culture was distinguished by states' rights more elastic than those animating secession because substantive rights of the sovereign states as sovereigns, such as that to raise a militia, were constitutionally subordinate to federal military power. This suggests the states' rights for which the Confederacy ostensibly had been formed did not resonate, amongst legal actors, at least outside the politics of slavery.

The state courts' embrace of state habeas deepens our understanding of Confederate legal history.⁶ Law professors David P.

6. Historians agree as to the centrality of states' rights ideology to Confederate leaders. One school of thought concludes that southern constitutionalism was purely instrumental for defending slave interests. See generally DON E. FEHRENBACHER, *CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH* (1989); ALBERT BURTON MOORE, *CONSCRIPTION AND CONFLICT IN THE CONFEDERACY* 162–63 (1924) (concluding that state courts neglected to “maintain the dignity and prerogatives of the States against encroachments of the Confederate Government,” because state sovereignty as a political philosophy has never taken root on the bench, and that the judges “were . . . completely indoctrinated” to follow Marshall Court precedent favoring federal over state power); MARK E. NEELY, JR., *SOUTHERN RIGHTS: POLITICAL PRISONERS AND THE MYTH OF CONFEDERATE CONSTITUTIONALISM* 7–8 (1999) (arguing that many state judges, like southerners themselves, preferred order to grander libertarian principles; and thus, acted as ready accomplices to Richmond's centralizing policies); EMORY M. THOMAS, *THE CONFEDERATE NATION: 1861–1965* 32 (1979) (noting that “in 1860, states' rights was a viable doctrine in Southern minds”). Pursuant to this school of thought, whether southerners turned to majoritarian politics or states' rights depended on what position proved a more effective defense for slavery. Historians on the other side of the spectrum hold that sincere attachment to states' rights crippled on the Confederacy. See generally FRANK OWSLEY, *STATE RIGHTS IN THE CONFEDERACY* (1925); MAY SPENCER RINGOLD, *THE ROLE*

Currie and G. Edward White examined the Confederacy's constitutional identity crisis—the tension between the Confederacy's secessionist founding principles and the unprecedented expansion of confederate federal power during the War—in the context of the Confederate Congress and Constitution.⁷ White addresses the Confederacy's judicial architecture under the new Constitution and the war's central legal issues to conclude that the Confederacy was plagued by an internal and external struggle regarding how to live up to states' rights ideals while also expanding military power to fight the war.⁸ In Currie's account, the Confederate Constitution represented a measured half step in the direction of states' rights, and the Confederate Congress, as well as the Davis administration to a lesser extent, readily controverted those secessionist states' rights principles in the Constitution for the sake of the war effort.⁹ J.G. de Roulhac Hamilton likewise addressed the confederate constitutional identity crisis in his seminal work on state courts in the Confederacy.¹⁰ Hamilton presents a trend wherein judges raised states' rights argument in their opinions before inevitably accepting the general government's strong war-time prerogative.¹¹ White and Currie's findings can be applied to the jurisdictional aspect of the conscription cases, where a multitude of legal voices wrestled with the constitutional identity crisis in an evolving judicial context. How judges could give credence to

OF THE STATE LEGISLATURES IN THE CONFEDERACY 24, 37 (1966); FRANK E. VANDIVER, *REBEL BRASS: THE CONFEDERATE COMMAND SYSTEM* 125–26 (1956). For examples of more recent scholarship examining internal fissures within the Confederacy, please see the following sources, see RICHARD E. BERINGER ET AL, *WHY THE SOUTH LOST THE CIVIL WAR* 65–81 (1986); WILLIAM W. FREEHLING, *THE SOUTH VS. THE SOUTH: HOW ANTI-CONFEDERATE SOUTHERNERS SHAPED THE COURSE OF THE CIVIL WAR* xiii (2001); STEPHANIE MCCURRY, *CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH* 2 (2010); DAVID WILLIAMS, *BITTERLY DIVIDED: THE SOUTH'S INNER CIVIL WAR* 1, 2 (2008).

7. David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1261–62 (2004); G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 528–31 (2011).

8. White, *supra* note 7, at 528–31.

9. Currie, *supra* note 7, at 1260–62.

10. See generally J.G. de Roulhac Hamilton, *The State Courts and the Confederate Constitution*, 4 J. S. LEGAL HIST. 425 (1938) (arguing the Confederacy was harmed by the lack of a national supreme court).

11. See *id.* at 447–48. Hamilton characterizes the state habeas conscription cases as a missed opportunity for making a stronger stand on state habeas, acquiescing to Richmond's centralizing policies.

It is clear that by the middle of 1864 the state courts had all fully accepted the military power of the Confederacy. Even Chief Justice Pearson, its most consistent and logical opponent among all the judges—as well as the most interesting and colorful judicial figure in the Confederacy—however great his disagreement with his colleagues, yielded in good faith to their decisions.

Id. at 447.

states' rights while supporting centralization makes sense when it is understood that the exercise of state habeas jurisdiction was an expression of state sovereignty. White, Currie, and Hamilton's works raised the question of what happened to all the South's states' rights rhetoric once the war began. State habeas provides the answer: judges took care to represent state habeas as a proxy for state sovereignty rather than use that jurisdiction as a platform to strike at military centralization.

Those who have studied the confederate conscription cases at length missed the meaning of the state judges' decision to embrace state habeas jurisdiction. James G. Randall identified the jurisprudential fodder contained in Union state habeas cases, but failed to capitalize on the opportunity of expanding his analysis beyond a cursory treatment, or recognizing the doctrine's role in the Confederacy.¹² Law professors Alfred Brophy and James Gardner do not remark on state habeas as a distinct legal issue in their studies of state conscription cases.¹³ The former adopts the methodology of contextualizing decisions within the judges' antebellum political affiliations, the latter focuses on whether the judges employed regionally distinct constitutional analyses. Neither perceived anything substantively out of the ordinary in state judges' reasoning beyond the prominence of the doctrine of necessity.¹⁴ Hamilton and historian Sidney Brummer give greater attention to state habeas, but do not incorporate the doctrine into a larger argument. Hamilton gives little analysis beyond detailing the arguments for and against state habeas in a prominent North Carolina conscription case.¹⁵ Brummer takes note of how state habeas "vitally" affected relations between the Confederate and state governments, but gives no additional commentary other than outlining the three habeas cases discussed below.¹⁶ Currie

12. JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 432 (2d ed. 1951) "The decisions on the subject read like commentaries on the fundamental doctrine of our constitutional law and are replete with citations drawn from the *Federalist*, Marshall, Story, Kent and other sources that rank among our legal classics." *Id.*

13. Alfred L. Brophy, "Necessity Knows No Law": *Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 69 *MISS. L.J.* 1123-25 (2000). See generally James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 *TEX. L. REV.* 1219 (1998).

14. Brophy, *supra* note 13; Gardner, *supra* note 13.

15. See Hamilton, *supra* note 10, at 433-40; see also *Ex parte Hill*, 38 Ala. 429, 436 (1863).

16. Sidney D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, 8 *LAW. & BANKER & S. BENCH & B. REV.* 387, 397-400 (Charles E. George ed., 1915).

gives state habeas only a cursory mention in a footnote.¹⁷ All reached these conclusions because the state habeas cases' outcomes did not fit the normative states' rights mold, leading these scholars to ignore the significance of state habeas jurisdiction.

A study of state habeas contextualizes a Confederate struggle for constitutional identity. Both Currie and White portray the Confederate Congress's failure to establish a Supreme Court as central to the constitutional identity crisis.¹⁸ For White, the debate over whether to establish the Supreme Court, as was constitutionally mandated, captures the Confederacy's essential spirit: "it was constantly struggling to establish its identity as a government separate from, as well as the agent of, the states that formed it."¹⁹ White's observation manifests in the administration's relationship with state habeas. Because the administration disagreed with the legal basis for state habeas, but participated in state habeas litigation instead of circumventing the state courts, the administration respected the judges' decision to honor states' rights through state habeas. How the administration grappled with whether to suspend habeas illustrates the shifting boundary of the administration's respect for states' rights, expanding on Currie and White's work and our understanding of Confederacy.²⁰

This article expands on recent interest in state habeas as a constitutional doctrine by federal courts scholars.²¹ These scholars

17. Currie, *supra* note 7, at 1331 n.318. Currie opines that the Confederate Attorney General "might have been on firmer ground had he said simply that state jurisdiction to release Confederate prisoners, like state power to tax the Bank of the United States, was the power to interfere with legitimate operations of the central government." *Id.*; compare *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408–09 (1871) (holding no state habeas corpus jurisdiction), with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (holding states do not have the power to tax the federal government).

18. White, *supra* note 7, at 516–29; Currie, *supra* note 7, at 1366–77; see also, CURTIS A. AMLUND, *FEDERALISM IN THE SOUTHERN CONFEDERACY* 83–84 (1966); WILLIAM M. ROBINSON, *JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 437–57 (1941); W. BUCK YEARNs, *THE CONFEDERATE CONGRESS* 37–38 (1960). In an on and off debate, Congress decided it would only establish a Supreme Court without appellate jurisdiction over state courts due to persistent fears born from the antebellum experience with the Marshall Court that a Court would trample on states' rights. Congress never got around to actually establishing that Court, but proceeded to implement the very centralized war policies congressman had that feared the Court would sanction.

19. White, *supra* note 7, at 528.

20. See discussion *infra* Part III.

21. See generally WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 126 (1980) (arguing that the original intent of the habeas clause was to protect state's powers of habeas relief); JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 2 (2011) (analyzing the political evolution of habeas corpus throughout American history); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425,

have not critically examined Confederate state judges' defense of state habeas. Consequently, there is a gap in the scholarship between *Ableman v. Booth* and *Tarble's Case*,²² in which the Supreme Court first addressed and then conclusively struck down the state habeas doctrine as unconstitutional. This article fills that gap by presenting the ways in which state habeas jurisdiction was defended in practice as an offshoot of state sovereignty, characterized as a bastion for individual liberty, and conceived of as an integral component in the separation of powers.

Part I of this article covers the origins of the state habeas doctrine and explores how conscription brought the tension between the Confederacy's founding states' rights principles and military centralization to the fore of an evolving discourse between statesmen and judges. Part II examines the three flagship cases on state habeas jurisdiction,²³ as well as how state habeas empowered state courts in the Confederacy's federal structure absent a Supreme Court. Arguments for state habeas illustrate how judges conceived of habeas jurisdiction as an extension of state sovereignty by framing the jurisdiction as a substantive liberty right integral to sovereignty and a crucial judicial check on execu-

1510 (1987) (arguing that federal courts should not be allowed to suspend state-law habeas); Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 4 (1995) (arguing that discussions of the "collateral review of state court convictions" should focus on the twentieth century); Earl M. Maltz, *Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle Over Fugitive Slaves*, 56 CLEV. S. L. REV. 83, 83-84, 104 (2008) (examining the constitutionality of the Supreme Court's state habeas power holding in *Abelman*); Ann Woolhandler & Michael G. Collins, *The Story of Tarble's Case* in FEDERAL COURTS STORIES 141, 141 (Vicki C. Jackson & Judith Resnik eds., 2010) (discussing the constitutionality of the Supreme Court's decision holding state courts lack jurisdiction to grant habeas relief for federally detained persons).

22. State habeas doctrine was unsettled after *Ableman v. Booth*, 62 U.S. 506 (1859), where the Supreme Court ruled the Wisconsin Supreme Court's use of state habeas to free a prisoner indicted by a United States district court unconstitutional. *Tarble's Case* reiterated the points made by Taney in *Ableman* and can be understood as a clarification that *Ableman's* holding had ruled state habeas jurisdiction unconstitutional by stating:

Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman v. Booth*, and *The United States v. Booth*, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further.

Tarble's Case, 80 U.S. 397, 410-11 (1871).

23. See *Ex parte Hill*, 38 Ala. 458 (1863); *Mims v. Wimberly*, 33 Ga. 587 (1863); *In re Bryan*, 60 N.C. 1 (1863).

tive power. Finally, Part III explores how the Davis administration's relationship with state habeas doctrine marked the evolving boundaries of the administration's deference to states' rights principles.

I. ANTEBELLUM STATE HABEAS AND CONFEDERATE CONSTITUTIONALISM

In the early 1800s the writ of habeas corpus evolved beyond procedure to a substantive right to liberty. American colonists had copied portions of the English Habeas Corpus Act of 1679 verbatim in colonial charters and incorporated habeas into American courts' common law jurisdiction.²⁴ By the Revolution, all thirteen colonies' legal systems had access to the writ, which Americans had begun to conceive of as a distinct right, part of the fabric of their nascent American law apart from that administered by English governors, and as a substantive legal doctrine rather than solely a common law procedural device.²⁵ United States Supreme Court Justice Joseph Story described the writ as the "bulwark of personal liberty," which could be "applied to every case of illegal restraint."²⁶ Writing in 1843, Pennsylvania Congressman Richard Vaux, noted of habeas corpus, "[i]ts sole object is to prevent oppression and injustice, and give to innocence every opportunity to manifest itself."²⁷ State courts drew on this tradition to support their habeas jurisdiction extension to federal officers, holding the exercise of that jurisdiction as central to a sacrosanct common law doctrine for the protection of individual liberty pre-dating the Constitution itself.²⁸

24. ANTHONY GREGORY, *THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR* 52 (2013).

25. *Id.* at 53–55. Habeas corpus tied in with popular conceptions of personal liberty and an idealized form of English law free from monarchical influence of statutory formality that defined part of revolutionary ideology. Courts' habeas jurisdiction was a consequence of historical experience—largely a function of politics in early modern English history—rather than neutral legal principles, and was distinct in that it was defined both by common law and statute. WERT, *supra* note 21, at 27; Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 679–80 (2008).

26. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 111, 206 (1833). Conception of state habeas as defense against tyranny can be associated with the decentralist position held by the Antifederalists. *Id.*

27. RICHARD VAUX, *SOME REMARKS ON THE WRIT OF HABEAS CORPUS: AND PROCEEDINGS UNDER THE SAME* 5 (1843).

28. A writ of habeas was not granted as a matter of course; a petitioner must show proper cause why his detention was unlawful and the statute could restrict the writ's

The earliest state habeas cases involved soldiers seeking discharge from the military. These cases generally arose when underage soldiers second-guessed their martial enthusiasm and sought discharge by virtue of their age.²⁹ The Supreme Court of New Hampshire in *State v. Dimick* held that a detention under the color or pretense of United States law “neither confers an exclusive jurisdiction on the courts of the United States, nor ousts the ordinary jurisdiction of the courts of the state.”³⁰ Writing for the Supreme Court of Pennsylvania in *Commonwealth v. Holloway*, noted constitutional authority and jurist William Tilghman asserted the right of state courts to discharge those in federal custody, adding that because of the limited availability of federal courts, “it would be an intolerable grievance to have no relief from imprisonment but by application to the district judge.”³¹

Mid-nineteenth century constitutional authorities Thomas Seargeant and James Kent affirmed state habeas doctrine in the constitutional literature of the day, noting that while many states maintained the doctrine, the Supreme Court admittedly had not

availability such as where a party was detained under the final decree of a competent court. See EDWARD INGERSOLL, *THE HISTORY AND LAW OF THE WRIT OF HABEAS* 1–2 (1849); WERT, *supra* note 21, at 51. If issued, a writ was directed to the detainer commanding him to produce body of prisoner with the cause of detention. If the judge believed a detention was unlawful, he would discharge the petitioner, who could not be re-imprisoned on the same grounds and who could subsequently pursue private action of trespass for false imprisonment on the detainer. 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 637 (1826).

29. See, e.g., *Commonwealth v. Harrison*, 11 Mass. (11 Tyng) 63, 163–64 (1814). George Ribkin, prenticed as a sailor, falsely swore he was twenty-one to enlist in the United States Army without permission from his master, who then sought a habeas petition on his apprentice's behalf. *Id.* at 64–65. Because United States law required a minor under twenty-one to have a parent or guardian's permission to enlist, the court declared Ribkin's enlistment void and discharged him from the Army against the protests of the Government's counsel, who claimed the state courts had no jurisdiction to discharge a United States soldier from service. *Id.* at 63, 65; see also *Case of J.H. Pleasants*, AM. JUR. & L. MAG. 257, 258 (1834) (discharging a prisoner held by a United States Marshal); *In re Carlton*, 7 Cow. 471, 472 (N.Y. 1827) (affirming the right to discharge a minor who had enlisted in the United States Army); *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812) (asserting habeas jurisdiction over an eighteen year old soldier, but declared the enlistment contract binding); ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT* 165, 171 (1858); cf. *In re Ferguson*, 9 Johns. 239 (N.Y. 1812). This was the silent case denying state habeas and arose from a petition to discharge an underage soldier who had enlisted without the consent of his father. Writing for the court, judge and noted legal scholar James Kent took an expansive view of what was exclusive to the federal government's jurisdiction, arguing that state jurisdiction was an all or nothing affair, either there was full concurrent jurisdiction or none at all. *Id.* at 240. Because enlistments occurred under the authority of the United States, claims stemming from proper enlistment are therefore the sole province of federal courts. *Id.*

30. 12 N.H. 194, 197 (1841).

31. 5 Binn. 512, 515 (1813).

decided the issue.³² Rollin Hurd, author of the leading antebellum habeas corpus treatise, concluded: "It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States."³³ Support from state court judges and legal commentators provided the precedential support for the Confederate state judges' construction of state habeas as a substantive right attendant state sovereignty. Federal case law, culminating in the Supreme Court's decision in *Ableman v. Booth*, generally presented the countervailing position that only federal courts could issue habeas writs to federal officers; a wrinkle that Confederate state judges had to address because, in one of the first congressional acts, the Confederacy adopted United States case law as controlling precedent.³⁴

32. THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A COLLECTION OF POINTS ARISING UPON THE CONSTITUTION AND JURISPRUDENCE OF THE UNITED STATES WHICH HAVE BEEN SETTLED BY JUDICIAL DECISION AND PRACTICE 280 (1822). Even Kent, who opposed the writ on the bench, noted in a treatise that in New York after *Stacey* (overturning his decision in *Ferguson*), "[t]he question was therefore settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other states." KENT, *supra* note 28, at 401.

33. HURD, *supra* note 29, at 156. Of the states that had addressed state habeas jurisdiction when Hurd was writing in 1858, Georgia and South Carolina had disclaimed state habeas, but it had been affirmed in Virginia, Georgia, Massachusetts, Maryland, New York, and Pennsylvania. *Id.* at 155.

34. The District Court of Kentucky in 1867 captures the federal case law perspective:

The decisions and opinions in the district and circuit courts of the United States, both before and since the decision in *Ableman v. Booth*, have denied the state jurisdiction . . . I might fortify my decision by copious extract from the opinions of federal and state judges, but the opinion of the supreme court is so conclusive, and I shall be obliged to quote from it so extensively, that I can not, without extending this opinion to an inordinate length, make any further reference to them than has already been made.

In re Farrand, 8 Fed. Cas. 1070, 1072 (No. 4678) (D. Ky. 1867). At the Confederacy's outset, Congress declared the United States laws as of November 1, 1860 would be law in the Confederate States, so United States federal precedent would remain controlling in the Confederacy. Act of Apr. 19, 1862 ch. 37, Pub. Laws, 1st Sess., in STATUTES AT LARGE, 1862, *supra* note 5, at 27. Secession did not alter state precedent either because the states did not see secession as an interruption in their sovereignty, as Robinson writes:

No change had been necessary in the organic or statutory law except the simple substitution for the word *Confederate* for *United* wherever the name of the federal union occurred The executive, legislative, and judicial branches served out their terms under the new confederation in complete harmony with the will of the people The transition was so orderly and natural that the very fact of secession fails to appear in many classes of State records The State judicial systems remained intact.

ROBINSON, *supra* note 18, at 70–71. Firebrand secessionist and Confederate Senator William Yancey argued United States precedents should never be followed and that the Confederate Constitution ought to be construed on its own terms. Currie, *supra* note 7, at 1375 (citing Senate Proceedings (Mar. 17, 1863) (statement of Sen. Yancey), *reprinted in*

The Supreme Court first addressed the state habeas doctrine in *Ableman v. Booth*. In 1854, abolitionist newspaper editor Sherman M. Booth led a crowd to free a former slave working in Wisconsin. After his arrest by a federal officer for aiding and abetting a fugitive slave's escape, Booth obtained a habeas writ from a Wisconsin Supreme Court Justice discharging him on the grounds that the 1850 Fugitive Slave Act was unconstitutional.³⁵ A federal grand jury subsequently indicted Booth for the same charge, but Booth again obtained a release from the Wisconsin Supreme Court, after which the United States Attorney General filed a petition with the United States Supreme Court Chief Justice Roger Taney, an open supporter of slavery, on the grounds that state courts lacked habeas jurisdiction over federal officers.³⁶ Taney's opinion in *Ableman* denying the Wisconsin supreme court's habeas jurisdiction fit into the broader jurisprudential trend in federal law constricting the states' concurrent jurisdiction and expanding federal power.³⁷

Writing for a unanimous Court, Taney portrayed state habeas as a usurpation of federal power threatening to upset the careful balance of federalism, a viewpoint later shared by the Davis administration.³⁸ State habeas doctrine, Taney declared, rested on

48 SOUTHERN HISTORICAL SOCIETY PAPERS 318, 318–19 (1992).

35. *Ableman v. Booth*, 62 U.S. 506, 507–08 (1858).

36. *Id.* at 508.

37. See generally INGERSOLL, *supra* note 28 (explaining how the lower federal courts denied state habeas); see also *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 600–04 (1821) (holding that a state court could not issue a writ of mandamus to the United States land surveyor because he was acting as a functionary of United States law); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 124 (1819) (asserting the supremacy of the federal prerogative whenever the two sovereigns come into contact); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 12 (1817) (ruling that the Rhode Island state court did not exceed its jurisdiction by bringing a writ of replevin against the cargo of a ship held in custody by a United States official under an embargo law because the federal law only extended exclusive federal jurisdiction to the ship). Further, the federal government expanded its habeas authority over those detained by state officers, with acts in 1833 and 1842 nationalizing habeas corpus. GREGORY, *supra* note 24, at 85. The 1833 Force Act granted federal judges habeas authority over any prisoner for an act pursuant to a United States law, prompted by South Carolina's detention of federal tariff officials during the Nullification Crisis. See Act of Mar. 2, 1833, ch. 57, 4 Stat. 632–33 (1833) (providing for the collection of duties imports). The 1842 Habeas Corpus Act granted federal courts habeas jurisdiction over foreign nationals held by state officials. See GREGORY, *supra* note 24, at 85–86. These acts were more symbolic of the way the wind was blowing, as “[t]he changes to habeas jurisdiction did not really come into effect until after the Civil War.” *Id.* at 86.

38. On this point, the Lincoln and Davis administration's agreed, though the former was more effective in having its way. Solicitor of the Union War Department, William Whiting issued a circular on July 1, 1863, that conscription officers should follow Taney's instructions in *Ableman*, the only duty to state judges was to respond that the prisoner/petitioner was in their care. Act of Aug. 29, 1842, ch. 263, 5 Stat. 543 (1842). The Su-

the presumption of the state courts' paramount power.³⁹ To permit state habeas in practice would mean "no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the state in which the party happens to be imprisoned."⁴⁰ Taney's misgivings were rooted in the belief that state judges beholden to local interests would control federal officers at will and upset national policy.⁴¹ A harmonious federal structure demanded federal exclusivity. The Tenth Amendment stated as much, Taney argued.⁴² Any attempt for a government to exceed its sovereign boundaries would result in "lawless violence."⁴³ This position was informed by Taney's dual sovereignty conception of the Union. In Taney's view, both governments derived power directly from the sovereign people and the Supreme Court had been granted final authority in the Constitution to arbitrate disputes about whether state and federal governments wandered outside their proper spheres.⁴⁴ The Constitution had been entered into by the states as

preme Court of Pennsylvania similarly read *Ableman* to have ended state habeas, which the court went on to characterize as "simply the Calhoun heresy of nullification." Kneeder v. Lane, 45 Pa. 238, 293-94 (1863). Northern state judges did not broadly assert their habeas jurisdiction over conscriptees during the war, leading Civil War historian James Randall to treat state habeas in the North as an annoyance for the Lincoln administration by a small number of local judges employing state habeas to oppose conscription. RANDALL, *supra* note 12, at 428-32. The United States Congress passed the Indemnity Act of 1863 in order to protect federal officials from state courts jurisdiction so that acting on the President's orders provided a complete defense and required removal of actions against federal officers to the Federal courts. *Id.* at 428; see also James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers*, 20 MICH. L. REV. 589, 595 (1922).

39. *Ableman*, 62 U.S. at 514.

40. *Id.*

41. Earl Maltz suggests Taney conceived of the Court as a neutral arbiter—in spite of its place in the federal government—well positioned to mediate conflicts between the state governments and federal branches. Maltz, *supra* note 21, at 105-06. *Ableman* should consequently not be read as a strong endorsement of federal power so much as of the Supreme Court's power. Taney biographer Bernard Steiner questioned how anyone could speak of Taney as a states' rights man after reading *Ableman*, an advocate of Jacksonian federalism. BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT* 428, 430 (1922). A large number of scholars suggest he acted primarily to serve the slave interests. See, e.g., GREGORY *supra* note 24, at 89 (explaining the constants in both *Ableman* and *Dred Scott* are a support for slavery and opposition to legal obstruction to slavery, rather than any principled attachment to either federal supremacy or states' rights). See generally FEHRENBACHER, *supra* note 6.

42. See *Ableman*, 62 U.S. at 518.

43. *Id.* at 524.

44. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342-43 (1816) (holding the United States Supreme Court as the ultimate authority over state courts in civil matters under federal law, so the Supreme Court has appellate power over any state supreme court decision touching on federal law).

an agreement.⁴⁵ Per the binding contractual terms of that relationship, states had given up part of their sovereignty to secure harmony, creating distinct sovereign bodies independent within their constitutionally granted spheres.⁴⁶ For the integrity of the sovereignty of both governments, complete separation was imperative. Wisconsin then had no right to confer state habeas jurisdiction.⁴⁷ Upon receiving a writ from a state judge, a federal officer need only explain that the petitioner is in custody under federal authority.

Contemporary legal reactions to Taney's opinion's and the constitutionality of state habeas doctrine was mixed until 1871 when the United States Supreme Court decided *Tarble's Case*.⁴⁸ Confed-

45. *Scott v. Sandford*, (*Dred Scott*), 60 U.S. (19 How.) 393, 449–50 (1856).

46. *Ableman v. Booth*, 62 U.S. 506, 516 (1858).

47. Jurisdiction must be conferred by a government or sovereignty and, according to Taney, the United States had neither conferred the habeas authority claimed by the Wisconsin court, nor did Wisconsin have the power to do so. *Id.* at 515–16. “[N]o State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government.” *Id.* In fact, Taney pointed out, Wisconsin statute mandated a state judge remand a person brought up on a habeas corpus if a United States court had begun process. *Id.* at 516. Since “the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties.” *Id.* at 523

48. So too, modern federal courts scholars increasingly question the strength of Taney's argument. William Duker argues the Suspension Clause's location, contemporary commentary and records of the state ratification conventions suggest there was a fear of federal interference with personal liberties, and that state courts were the proper forums for redressing unjust detention claims. DUKER, *supra* note 21, at 126–35. Duker prominently injected this argument to existing constitutional historiography, but this is by no means a minority position. Noted federalism scholar Akhil Amar reads William Duker to have “established that the very purpose of the habeas non-suspension clause of Article I, section 9, was to protect the remedy of state habeas from being abrogated by the federal government.” Amar, *supra* note 21, at 1509. Anthony Gregory similarly posits,

The status of the American states as free and independent before the adoption of the Constitution, and the American understanding of habeas corpus as a common law right merely acknowledged, not created, by state statutes and constitutions, suggest that it was understood at the birth of the American nation that state courts had the power to review federal detentions—a radical states' rights power and institutionally diffuse check on federal authority.

GREGORY, *supra* note 24, at 62–63. Ann Woolhandler and Michael Collins argue nothing in debates over 1789 Judiciary Act or Habeas Statute suggests federal exclusivity for habeas outside criminal prosecutions and constitutionally granted maritime jurisdiction. “To interpret the statute as making federal court jurisdiction exclusive may therefore require resort to a common law of federalism whereby the Court might decide that reading the statute to make the grant exclusive is necessary to avoid needless conflict in the federal system.” Woolhandler & Collins, *supra* note 21, at 157. Moreover, the availability of habeas corpus would be virtually non-existent if Congress had not created lower federal courts, and without a grant of widespread habeas jurisdiction to inferior courts and the Supreme Court's appellate jurisdiction. See DUKER, *supra* note 21, at 140. See generally *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (granting federal courts widespread habeas corpus jurisdiction).

erate state judges framed their opinions on state habeas as a clarification of *Ableman*, which they reasoned *a priori* could not have stripped the states' of an integral part of their sovereignty by congressional or constitutional implication. Taney, confederate state judges opinions insisted, had unduly transposed the threat posed to the federal-state equilibrium by *Abelman's* facts onto the state habeas doctrine, which only created equality between state and federal courts for the purpose of protecting citizens' liberty against unlawful detention. Confederate state judges read *Ableman's* holding as controlling only in instances when a state judge issued a writ after a federal court had begun process, a viewpoint apparently widely held enough, both North and South, to prompt the United States Supreme Court to hear *Tarbles Case* to expressly settle state habeas unconstitutionality.

The jurisprudential grounds for state habeas can be understood as a moderated form of the compact theory of federalism. State habeas aligned with the compact theory in that state habeas proponents reasoned that when the states as sovereigns entered into the constitutional compact the states had agreed to transfer only enumerated sovereign powers to the new federal government. All residual attributes of state sovereignty, including state habeas, remained with the states unless explicitly forfeited.⁴⁹ Where ambiguity arose about whether federal power superseded that of the states it was assumed the states had not ceded over sovereign power, which necessitated a narrow reading of federal sovereignty, and a correspondingly narrow grant of federal jurisdiction. But state habeas doctrine diverged from the compact theory in that state habeas did not necessarily presuppose that what the states as sovereigns had bestowed the states could also take away, or that states shared authority commensurate with the United States Supreme Court's to interpret the national laws' constitutionality.⁵⁰ State habeas doctrine was not imbued with the

49. Even Alexander Hamilton in *Federalist No. 82* presumed the states' jurisdiction would carry on exactly as before under the United States Constitution.

I hold that the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal, and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

THE FEDERALIST NO. 82 (Alexander Hamilton).

50. RANDALL, *supra* note 12, at 14.

The people, they said, may bestow supreme power where they will, and what they bestow they may recall. Thus the people of the States, possessing the right to bestow supreme governmental power as they should see fit, conferred

pro-secession and nullification theories' conviction that the states' sovereign prerogative prevailed when in conflict with the federal. The spirit of the state habeas doctrine was cooperation. The doctrine's imperative was that a judicial body reviews the lawfulness of a citizen's detention. For this task state courts were fungible with lower federal courts. As a matter of practicality, in the antebellum United States state courts were far more accessible than federal.

Attachment to the secessionist variant of states' rights quickly faded from the evolving dialogue about the nature of states' rights in the Confederacy, belying the secessionists' commitment to the compact theory as a jurisprudential doctrine rather than as a political expedient to protect slavery. Secessionism and the Confederate Constitution, modeled on the United States', had not begot clarity about the balance of federal-state power in the Confederacy. The constitutional disputes for which southerners purportedly fought the war remained alive with the Confederacy as the Confederate government interpreted the new Constitution to support a more expansive federal prerogative than any exercised by the United States before the war. Conscription created the medium for state judges to introduce coherency into this muddled constitutional landscape by supporting the moderated compact theory of states' rights embodied in the state habeas doctrine, thereby formulating a nascent confederate constitutionalism that institutionalized a variant of states' rights that did not interfere with the war effort.

By spring of 1862, the Confederacy's manpower deficit convinced the Davis administration and the Confederate Congress that conscription, along with other iterations of military centralization, was imperative to conduct a successful war effort. From

such power upon a general government as their agent, limiting, to that extent, their State governments, but not limiting their own sovereignty.

Because the Union was a compact between sovereign equals, each state had an equal right to construe national laws' constitutionality, a power commensurate with that of the Supreme Court because the federal government could not be expected to decide the extent of its own power. Hayne took the extreme states' rights position that because the Union was a compact between sovereign equals, each individual state has the right to construe federal law and refuse to abide, to "nullify," by those laws that are repugnant to the state. Mathew Brogdon, *Defending the Union: Andrew Jackson's Nullification Proclamation and American Federalism*, 73 REV. POL. 245, 251–52 (2011). Note, the most prominent proponent of extreme states' rights, John C. Calhoun, relied less on the doctrine of state sovereignty, because concurrent jurisdiction deferred too much to the national government, preferring the concurrent majority theory that a state majority was needed to affirm national policy in that state. FEHRENBACHER, *supra* note 6, at 52.

its beginning, conscription incited controversy as a significant minority of politicians decried the contravention of the states' rights principles for which the South had left the Union. Regardless of conscription's salutary effect for the war effort, for many the antebellum specter of federal tyranny had become a manifest reality in the Confederacy. The Confederate Congress and Davis administration passed the First Conscription Act on April 16, 1862, as a war measure permissible under the Congress's constitutional authority to raise armies.⁵¹ The First Conscription Act granted the Davis administration authority to call to service all men between eighteen and thirty-five, and stipulated that conscripts could hire substitutes or apply for exemptions pursuant to War Department regulations.⁵² Those regulations required those applying for military exemption to provide a certificate evincing their qualification for exemption to a federal enrolling officer; principals furnishing substitutes had to furnish the substitute to the enrolling officer, who would then provide the principal with a certificate of exemption.⁵³ Growing demand for troops prompted another conscription act expanding the draft age in September 1862.⁵⁴ Another exemption act and further regulations followed to close loopholes and narrow access to exemption.⁵⁵ Previously ex-

51. Act of Apr. 16, 1862, ch. 31, Pub. Laws, 1st Sess., in *STATUTES AT LARGE*, 1862, *supra* note 5, at 29.

52. *Id.* After the President made the call for conscription all men within the specified range were to enroll with enrolling officers, who could be state officers if the Governor consented to their use for national conscription. Once enrolled a man became liable for military duty and if he refused the call to active service—whenever casualties in existing state regiments necessitated replacements—the conscripted man could be apprehended and detained as a deserter. “An Act to exempt certain persons from enrollment for service in the Armies of the Confederate States [First Exemption Act],” *Id.*, § 6, § 9 at 62–63. War Department regulations required those applying for exemption to provide a certificate evincing their qualification for exemption to an enrolling officer; principals furnishing substitutes must furnish the substitute to the enrolling officer who would then provide the principal with a certificate of exemption. General Orders No. 30, 1 *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 1097–1100 (Gov't Printing Office 1880–1900) [hereinafter *OFFICIAL ARMY RECORDS*], General Orders No. 37, *OFFICIAL ARMY RECORDS*, *supra* at 1123–24.

53. Act of Apr. 16, 1862, ch. 31, § 1, Pub. Laws, 1st Sess., in *STATUTES AT LARGE* 1862, *supra* note 5, at 45.

54. The Second Conscription Act was enacted on September 27, 1862, and expanded the age of those liable for conscription to forty-five and required those already enlisted to serve for the war's duration. Act of Sept. 27, 1862, ch. 15, Pub. Laws, 2d Sess., in *STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE SECOND SESSION OF THE FIRST CONGRESS* 61–62 (R.M. Smith ed., Richmond 1864).

55. Act of Apr. 21, 1862, ch. 74, Pub. Laws, 3d Sess., in *STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE THIRD SESSION OF THE FIRST CONGRESS* 57 (R.M. Smith ed., Richmond 1864). For example, laborers no longer were considered railroad personnel and a “Twenty Negro Rule” for exempt overseers was implemented. *Id.* On May 1, 1863 Congress repealed the Second Exemption Act and imposed

empted conscripts who found themselves liable for military service under subsequent laws turned to state courts to contest the expanding conscription regime.

The confederate constitutional identity crisis took form in the controversy over conscription. The Confederate Constitution had enshrined states' rights in certain provisions, but its similarity to the United States Constitution, particularly with regards to the President's expansive war powers, did not create much of a clearer road map for navigating the boundaries between federal-state sovereignties than had existed in the United States. Because the Confederate Congress had not yet established the constitutionally mandated Supreme Court, state courts were the primary forums for adjudicating constitutional grievances in the Confederacy. Conscripts favored state courts over federal because the prior were more readily accessible and familiar than federal courts.⁵⁶ It could also be reasonably assumed that a local judge would be more sympathetic than a federal appointee. Because state courts entertained concurrent jurisdiction with confederate federal courts under state habeas doctrine, and because there was no appeal available from state to federal courts absent a Supreme Court with appellate review, the state courts' decisions were of greater importance than in the North.⁵⁷ The Davis administration accepted as much by litigating conscription controversies in state courts, possibly assuming legal actions in state courts would command more popular respect.⁵⁸

In droves conscripts appealed to state courts to release them from confederate service, necessitating that state courts weigh in on the evolving conscription regime. When conscripts petitioned state judges to issue habeas writs to conscription officers, officers' commonly responded by denying states judges' jurisdiction over federal prisoners. The North Carolina, Georgia, and Alabama supreme courts gave the most extensive and authoritative riposte to the conscription officers' arguments, argued by the conscription officer as proxies, against the state habeas doctrine's constitu-

further restrictions, including section 4, which required that exempted state officers also be exempted by their states.

56. See generally ROBINSON, *supra* note 18, at 122–72 (recognizing that the Confederate district courts essentially replaced the United States courts and continued to operate throughout the war, but there were far fewer Confederate courts than United States courts).

57. Brummer, *supra* note 16, at 388.

58. See *id.* at 389.

tionality.⁵⁹ The integrity of states' rights to these supreme court judges, and by insinuation the corresponding role for states' rights in the confederate constitutional landscape, comes across in how they framed arguments in favor of state habeas as integral to state sovereignty as a substantive right of liberty and as an element of the separation of powers.

II. STATE COURTS' DEFENSE OF STATE HABEAS

The Alabama, Georgia, and North Carolina supreme courts handed down opinions in favor of state habeas within months of each other in 1863. *In re Bryan* arose when Bryan applied to the North Carolina Supreme Court after his arrest pursuant to the Second Conscription Act because the substitute conscript Bryan hired had become liable for service.⁶⁰ North Carolina Supreme Court Chief Justice Richmond M. Pearson wrote the majority opinion for *Bryan*, joined also by Justice William H. Battle in a concurrence.⁶¹ In Georgia, a J.K. Wimberly applied for a habeas writ alleging unlawful detention by conscription officers, who counterclaimed that "the case is within the limits of the sovereignty assigned by the Constitution to the Confederate States, and a habeas corpus issued by a State Judge or Court has no authority within said limits."⁶² Georgia Supreme Court Justice Charles J. Jenkins delivered the opinion in *Mims v. Wimberly*. *Ex parte Hill* consisted of two claims, the gravamen of both was unlawful detention of conscripts who had previously procured substitutes.⁶³ Alabama Supreme Court Justice George W. Stone wrote the majority opinion for *Ex parte Hill*, with a dissent written by Chief Justice A.J. Walker.⁶⁴ Although written by judges with diverse jurisprudential leanings, the opinions upheld the

59. See *In re Bryan*, 60 N.C. 1, 9 (1863); *Mims v. Wimberly*, 33 Ga. 587, 598 (1863); *Ex parte Hill*, 38 Ala. 458, 462-63 (1873).

60. *In re Bryan*, 60 N.C. at 1 (1863) (citing Second Conscription Act).

61. *Id.* at 2, 9.

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

63. *Ex parte Hill*, 38 Ala. 458, 459-60 (1863). W.B. Armistead had procured a substitute who was not liable for conscription, at which time Armistead was discharged. He was later held in custody as liable for conscription by L.H. Hill, a Confederate enrolling officer, and sought discharge through a habeas petition. *Id.* Hill applied for a writ of prohibition to the Alabama Supreme Court to enjoin further proceedings by the probate judge to which Armistead had made his habeas petition. *Id.* Charles H. Dudley applied for a remedial writ against a state chancellor to obtain a full hearing on habeas corpus and then a discharge from custody as a conscript. *Id.*

64. *Id.*

same principle that state habeas doctrine was constitutional under both the United States and Confederate Constitutions.⁶⁵

The judges' underlying argument that state habeas ensured the integrity of state sovereignty presented procedure as the bulwark of states' rights in the balance of federalism. Pearson emphasized in *Bryan* that his court's habeas jurisdiction derived from North Carolina's sovereignty.⁶⁶ A judge's authority to protect state citizens with the habeas writ was an obligation attendant sovereignty the North Carolina courts inherited from the King's obligation "to inquire by his courts into the condition of any of his subjects."⁶⁷ Battle framed the issue presented by *Bryan* as "[an inquiry into] whether the State gave up any portion of that sovereignty, which was necessary to be retained for the purpose of enabling her to discharge the duty of protecting the personal liberty of her citizens."⁶⁸ Battle's impression was that, of all the duties imposed by sovereignty, "none was higher than that of protecting all her citizens in the full and free enjoyment of life, liberty and private property," accomplished by judges through the writ of habeas corpus.⁶⁹ In *Mims* Jenkins explained that the states entered into the United States Constitution at the behest of the people of *the states* (and not as a common people) so United States sovereignty existed by virtue of a grant from states, not from its citizens as a collective.⁷⁰ That neither the United States nor Confederate Constitution had explicitly deprived the states of their habeas jurisdiction was to Jenkins an undeniable "truth of history" as Georgia had never "yielded the prerogative of protecting the personal liberty of her citizens."⁷¹ Wary of how the United

65. *Id.*

66. *See generally In re Bryan*, 60 N.C. 1 (1863).

67. *Id.* at 42 (noting that the King had the obligation "to protect all of his subjects in the enjoyment of their right of personal liberty").

68. *Id.* at 29.

69. *Id.* at 28.

70. *Mims v. Wimberly*, 33 Ga. 587, 592 (1863). In Jenkins' reading of history, "we find ourselves, at every step, treading in the footprints of State sovereignty, the most severe test, the clearest demonstration, is to be found in the ratification, which alone gave efficacy to the instrument." *Id.* at 590. This account closely resembles that given by Davis, see note *infra* re ratification. Further, it resembles Calhoun's account of the founding: "[t]he several states of the Union, acting in their confederated character, ordained and established the Constitution." JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT, AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 131 (Richard K. Crallie ed., 2002) (1851). The United States Constitution had lent itself to all manner of confusion regarding the locus of sovereignty, but, "happily for us" Jenkins noted, the Confederate drafters had replaced "We the people" with "We, the people of the Confederate States," thereby conforming to "the truth of history." *Mims*, 33 Ga. at 591.

71. *Mims*, 33 Ga. at 589, 593, 598. If the question before a court is whether a federal

States government had encroached on the states' sovereignty, Stone concluded that because the states existed as separate sovereigns, they, through their judges, could exercise overlapping power to review whether an enrolling officer had acted outside his authority.⁷² For Stone, the question was whether a usurpation of power had occurred rather than whether power had been applied properly, so state and federal judges were equally competent to protect one another's sovereignty.⁷³

The judges may have found state habeas as an attractive expression of states' rights because the doctrine rested on the sovereign's imperative to preserve individual liberty, with a mandate rooted in the common law. With great care and veneration, Pearson expounded on state habeas' connection with the common law. For Pearson, the statutes conferring habeas jurisdiction on North Carolina's courts confirmed the courts' preexisting common law jurisdiction that had remained unbroken from colonial times.⁷⁴ The state courts' habeas jurisdiction in Pearson's opinion resided on an elemental and sacrosanct jurisprudential plane; without habeas authority writ large North Carolina could not hope to fulfill its sovereign duty to protect its citizens. In contrast to federal courts, whose authority must be conferred by the Constitution, Pearson believed state courts may derive their jurisdiction from common law principles.⁷⁵ His understanding of state courts' com-

officer has "erroneously applied his authority . . . to a person" outside the subject matter of his proper jurisdiction, then courts of either government may "determine the question of such erroneous application of authority, unless the law, in its terms, inhibit such inquiry." *Ex parte Hill*, 38 Ala. 458, 463 (1863).

72. *Ex parte Hill*, 38 Ala. at 462-63 (basing his conclusion on *Slocum v. Mayberry* and *McClung v. Silliman*).

73. *Id.*

74. *In re Bryan*, 60 N.C. 1, 42 (1863). The nation that habeas jurisdiction was derived from the common law was featured more prominently in Pearson's opinion than in other judges'. *Id.* In his opinion, Pearson noted that the North Carolina Habeas Corpus Acts copied longstanding English habeas statutes and that one need only look to North Carolina positive law if they were unconvinced of the courts' common law jurisdiction. *Id.* at 43-45. Secession theory held a state's sovereignty had not been fundamentally changed by secession from the Union because the states had acted as established and recognized sovereigns. JOHN W. BURGESS, *THE CIVIL WAR AND THE CONSTITUTION, 1859-1865* 77 (1908). Habeas jurisdiction attached to North Carolina's sovereignty when it entered the union, therefore, it had existed unabated into the Confederacy. The other judges made little mention of the actual state statutes conferring habeas jurisdiction except in passing. *In re Bryan*, 60 N.C. at 37. In response to such arguments, Mr. Strong, arguing on behalf of the Confederacy, stated, "The *Common Law itself*, in this State, depends for its force upon a statute. And the Legislature could uproot it to-morrow, and establish the code of Napoleon in its stead." *Id.* (internal citations omitted).

75. *In re Bryan*, 60 N.C. at 19. Because state courts' authority flowed from the common law, Pearson argued, "the power of the Legislature to confer jurisdiction is unlim-

mon law jurisdiction vis-à-vis federal courts was not without merit as it had been handed down by John Marshall in *Ex parte Bollman*.⁷⁶ Pearson's opinion presented state judges' common law authority to issue habeas writs as a "sacred trust" that flowed from North Carolina's sovereignty to ensure laws were administered so as not to infringe personal liberty, part and parcel to the Bill of Rights North Carolina was bound to maintain.⁷⁷ Jenkins and Battle's opinions echoed Pearson's sentiment by framing state habeas as a common law doctrine dating back before independence in 1783.⁷⁸ As a common law doctrine entwined in the fabric of the Anglo-American legal tradition, the judges' deductions about state habeas had far reaching implications. The purpose for which state habeas existed, they claimed, was to check executive tyranny, a duty incumbent upon judges to defend the sovereignty granted the state by the people. So the habeas writ prevented lawlessness by executive and protected the integrity of the state-people sovereign compact. The argument for state habeas lauded that jurisdiction to issue writs rather than a particular outcome because it was the ability of judges to serve as a check that satisfied the duty to protect the people and the rule of law.

ited." *Id.*

76. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807), Marshall acknowledged the state courts' expansive common law jurisdiction, stating, "[c]ourts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles." *Id.* Regarding habeas as part of that jurisdiction, Marshall further suggested all common law courts innately could exercise the writ without indicating any limit upon that power if the prisoner be in federal, opposed to state, detention:

The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

Id. at 93–94.

77. See *In re Bryan*, 60 N.C. at 9.

Our conclusion is that the Court has jurisdiction to discharge a citizen by the writ of *habeas corpus*, whenever it is made to appear that he is *unlawfully* restrained of his liberty by an officer of the Confederate States; and that when a case is made out, the Court is bound to exercise the jurisdiction, which has been confided to it *as a sacred trust*, and has no discretion and no right to be influenced by considerations growing out of the condition of our country, but must act with a single eye to the due administration of the law, according to the proper construction of the acts of Congress.

Id. (internal quotation marks omitted). Even Taney could not help but pay service to the writ's venerated place in Anglo-American jurisprudence after Lincoln first suspended the writ, writing: "From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench." *Ex parte Merryman*, 17 Fed. Cas. 144, 150 (1861).

78. See *Mims v. Wimberly*, 33 Ga. 587, 597 (1893); *In re Bryan* 60 N.C. at 11–12.

To give state habeas the full weight of precedential legitimacy, these confederate state judges took great care to explain that state habeas was not a new doctrine, but existed as part of a continuum of states' rights in American constitutional history. State habeas existed because the sovereign states had never parted with this jurisdiction, these judges reasoned. This argument depended on a textualist understanding of federalism wherein federal sovereignty was strictly limited to those areas enumerated in the constitution the sovereign states, which held true in their minds under both the United States and Confederate States of America Constitutions; the federal government's sovereign authority could not grow by implication. The Tenth Amendment, taken at face value, evidenced as much according to Judge Battle.⁷⁹ Early United States Constitutional authorities such as Alexander Hamilton in Federalist No. 82 and eminent jurist James Kent, were of the opinion that the state courts' existing jurisdiction remained untouched except where Congress had expressly excluded state courts in a proper constitutionally enumerated mode.⁸⁰ Members of the antebellum bench and bar could assume the state courts' concurrent jurisdiction with federal courts ran even to cases arising under federal law (i.e., the interpretation of military enlistments). And of all the jurisdictional realms over which the state courts had previous cognizance, Battle argued, "none were more important" than habeas corpus.⁸¹ Battle doubted that North Carolina, or any other sovereign state for that matter, would have entered into a constitution under which they lost habeas jurisdiction within their boundaries, regardless of whether detention was under the aegis of state or federal authority; in his opinion, he ventured: "A jurisdiction so essential to the great privilege of going where one may please—a privilege which every citizen of the State would wish to enjoy as freely as he did the air he breathed—the State courts would hardly have parted with, except upon the most urgent necessity."⁸² In a similar vein, Pearson's opinion placed the onus on those claiming federal judicial exclu-

79. See *In re Bryan*, 60 N.C. at 9–10. Battle specified that the United States Constitution's Tenth Amendment had been "unnecessary, as the General Government had no powers except what the States had granted to it." *Id.*

80. THE FEDERALIST NO. 82. (Alexander Hamilton). Hamilton extolled concurrent jurisdiction: "Among the cause, of which the State courts had previous cognizance, none were more important than those in which they claimed the right to inquire, through the means of writs of habeas corpus, into the reasons for the imprisonment of person alleged to be illegally restrained of their liberty." *In re Bryan*, 60 N.C. at 11.

81. *In re Bryan*, 60 N.C. at 11.

82. *Id.* at 11–12.

sivity to show that a positive grant of constitutional authority existed to oust state jurisdiction. Congress must prove it first has the authority to take away the state jurisdiction, and then that it has exercised that power and nothing in the historical record of the United States or Confederacy, Pearson observed, explicitly had limited the states' habeas jurisdiction.⁸³

One need only read federal and state precedent for support of state habeas, but the invocation of *stare decisis* in support of state habeas under the United States Constitution demanded a discussion of *Ableman v. Booth*.⁸⁴ Pearson read the Supremacy Clause in the United States Constitution to require state courts not to interfere with the federal judicial process by issuing a habeas writ after a federal court had asserted its jurisdiction over the matter. This, Pearson reasoned, had been the holding in *Ableman* because, in that case, the United States Marshall detaining the habeas petitioner had been acting on a federal district court's indictment. So Taney had not precluded state courts' ha-

83. *Id.* at 4 (quoting *Lockington's Case*, Brightly 269, 273 (Pa. 1813)).

84. For state support, Pearson pointed to, *inter alia*, *State v. Brearly*, 5 N.J.L. 555 (1819) and treatises by Hurd and Kent. *See In re Bryan*, 60 N.C. at 4. Pearson reasoned the weight of precedent from state courts was on his side: "It must be presumed that this long series of cases which establish the concurrent jurisdiction of the State Courts, and their power to put a construction on acts of Congress, when necessary to the decision of a case before them, is supported by the most clear and satisfactory reasoning . . ." *Id.* Not only did state decisions support habeas jurisdiction, but so did federal precedent according to Pearson, particularly *Slocum v. Mayberry*, in which a customs officer, suspecting an intention to violate the U.S. embargo laws, seized a vessel in Newport Rhode Island. *Id.* at 5; *see also* *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) (1817). The owners of the cargo aboard the ship brought an action in state court seeking a writ of replevin, which the state judge granted, to have the cargo discharged from the custom officer's control. *In re Bryan*, 60 N.C. at 5. The Supreme Court affirmed the state court's action because it determined the United States officer was entitled only to detain the ship under the federal law, not the cargo. *Id.* Although *Slocum's* facts differed from the present case—habeas was not involved—Pearson understood *Slocum* to broadly support state courts' concurrent jurisdiction when a federal officer detained an object or person without proper congressional authorization.

[S]o, it is directly in point to show that a State court has jurisdiction wherever the law gives no authority to detain the person or the thing; and, in order to decide that question, the State court has power to put a construction on the act of Congress under which the officer justifies the imprisonment or detention.

In re Bryan, 60 N.C. at 5. Stone and Jenkins likewise sought to legitimize state habeas by looking to United States precedent rather than by crafting a new argument under the Confederate Constitution. Jenkins argued that one need only look to United States law to understand why state habeas was unproblematic to the federal scheme as part of the states' concurrent jurisdiction. Procedurally, Jenkins pointed out, judicial power under the United States Constitution extended to cases "between citizens of different States," but plaintiffs could elect between pursuing their claims in state or federal courts. *Mims v. Wimberly*, 33 Ga. 587, 595 (1863).

beas jurisdiction over federal detainees before federal process began.⁸⁵ A broader reading of *Ableman* "against the jurisdiction of the State courts in all cases where one is restrained of his liberty" by a federal officer was merely *obiter dictum* and could not be taken seriously lest "such an inference . . . do great injustice to that able jurist [J. Taney]."⁸⁶ Jenkins likewise asserted that compliance with *Ableman* required only that, upon learning that a Confederate district court with jurisdiction over the subject of detention had begun proceedings, a state judge dismiss the writ to avoid conflict.⁸⁷ Stone explained that a proper application of state habeas jurisdiction abided by federal precedent because the judges would not control federal officers, as state judges could only adjudicate whether an "accident incidental to proper federal authority" occurred.⁸⁸

Jenkins notably discussed state habeas under the Confederate Constitution at length. There was no question for him that Georgia had entered the Confederacy as a sovereign power, and the sovereignty of its people remained explicitly unimpaired.⁸⁹ To limit Georgia courts' habeas jurisdiction, "it must appear that by the Constitution exclusive jurisdiction has been given to the Confederate Courts" in order to divest state courts of their previous jurisdictional authority, and no such thing had occurred in the Confederacy according to Jenkins.⁹⁰ Embedded throughout other judges' opinions was the suggestion that while state habeas served as part of the separation of powers under the United

85. See *In re Bryan*, 60 N.C. at 5–6.

86. *Id.*

87. *Mims*, 33 Ga. at 596.

88. That Stone framed his discussion as whether federal authority exceeded authority, rather than exercised authority properly, evinces his greater concern for the Confederacy's survival. The difference between his reasoning style and the stronger advocates of state habeas illustrates his amenability to strong federal power. Stone's opinion relied almost exclusively on federal precedent, *Slocum v. Mayberry* and *McClung v. Silliman* especially. There was little mention of state law and none of the common law discussion, which occupied so much of Pearson's opinion. *Ex parte Hill*, 38 Ala. 458, 463–64 (1863).

89. *Mims*, 33 Ga. at 593.

90. *Id.* at 595.

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

Id.

States Constitution, state habeas had greater import in the Confederacy.⁹¹

State habeas doctrine had value to the separation of powers in nascent Confederate constitutionalism because state habeas checked executive action in theory, without hamstringing executive action to win the war in practice. The cases' outcomes illustrate the degrees to which the judges accepted the Davis Administration's federal prerogative. On the merits of *Bryan*, Pearson and Battle discharged Bryan based upon two earlier cases, which held that, when War Department regulations conflicted with the Conscription Acts, the latter controlled.⁹² In contrast, the court in *Hill* concluded that one petitioner had been properly discharged by a probate court under the First Conscription Act, but had then become liable under the Second Conscription Act's expansion of the conscription age, because congressionally authorized War Department regulations stipulated that the exemption lasted only as long as the substitute is not liable for conscription.⁹³ The other pe-

91. See Donald E. Wilkes, *From Oglethorpe to the Overthrow of the Confederacy: Habeas Corpus in Georgia, 1733–1865*, 45 GA. L. REV. 1015, 1062–63 (2011).

92. *In re Bryan*, 60 N.C. 1, 20 (1863). Pearson reasoned that the Second Conscription Act did not make those serving as substitutes liable for conscription because they were already bound in service, and it would be redundant for the act to merely reclassify them as liable to effectuate the Act's purpose of increasing the Army. *Id.* Yet, the Secretary of War's regulation holding principals liable required that the substitutes had become liable for conscription, to which Pearson responded:

A decent respect for our lawmakers forbids the courts from adopting a construction which leads to the conclusion that it was the intention, by the use of general words, to include within the operation of the act, substitutes who were already bound for the war; not for the purpose of affecting them, but for the indirect purpose of reaching parties who had furnished substitutes, and in that way asserting a power, which is at least doubtful, and certainly involves repudiation and a want of good faith.

Id. at 21–22 (quoting *In re Irvin*, 60 N.C. 20, 21–22 (1863)). Pearson relied on a similar interpretation of the Conscription Act with regards to the substitutes in the case, *In re Meroney*, when he pointed out that a different construction, such as that embodied by the War Department's regulation in question, was inconsistent with a congressional act. *Id.* at 22; see also *In re Meroney*, 60 N.C. 22 (1863). Further, to render the substitutes service void so as to exempt the principal, the War Department regulation would have had to insert an additional condition to the substitution contract—that a substitute cannot be made liable afterward by a subsequent act of Congress—which could only be accomplished by a legislative, rather than a bureaucratic, act. *In re Bryan*, 60 N.C. at 23–25 (Battle, J., concurring).

93. *Ex parte Hill*, 38 Ala. at 475.

The order of May [General Order No. 37] is too clear to admit of a cavil or doubt. It provides, that the exemption obtained on putting in a substitute, 'is valid only so long as the substitute is exempt.' This regulation, being made pursuant to authority conferred by congress, has the binding efficacy of law. It was part of the public law when Mr. Armistead put in his substitute, and therefore became part and parcel of the act done. He cannot complain of a

tioner could not be discharged as the War Department alone could hear questions of fraud *vel non* cases involving substitutes; such an inquiry involves only how federal officers make a factual decision under lawful authority, just like a land office register would make preliminary proofs of a preemption claim.⁹⁴ According to Stone, state habeas did not upset the balance of federalism because state courts were only discerning where federal authority ended so as to protect individuals, pursuant to their duty as agents of the state sovereign.⁹⁵ In the case of Armistead, as the question of law was whether Armistead's initial discharge exempted him from later conscription under the Second Conscription Act, it involved "nothing more nor less than determining whether the officer rightly decided the legal question as to the effect of the substitution and discharge—the accident in Mr. Armistead's case," so it could be decided by a state court,⁹⁶ as they were equally competent with federal courts to answer such a question. That diverging state opinions about federal laws could disorder the application thereof, a point raised by Taney in *Able-*

breach of governmental faith, for he is charged with a knowledge of the terms on which his substitute was received. Neither can it, with any plausibility, be contended, that the order of 19th of May, declaring when the exemption shall expire, must be restricted in its operation to a certain limited number of contingencies, on the happening of some one of which the exemption of the principal shall cease. . . . If under forty, he ceased to be legally exempt when the call was made for conscripts up to that age; and Mr. Armistead's exemption, by reason thereof, then ceased to be valid.

Id.

94. In *Ex parte Hill*, Justice Stone articulated:

In passing upon the question of fraud *vel non*, the commanding officer, commandant of conscripts, or secretary of war, as the case may be, must necessarily and uniformly hear and decide upon evidence, and draw inferences from facts. These things inhere in the very nature of the inquiry to be made. They always come up, and, hence, are not the accidents of the particular case. They are like the preliminary proofs, and documentary exemplifications, which pertain to the functions of a land-office register, in the matter of preemption claims. To allow the State courts to re-try or re-examine the facts on which such decision is pronounced, is to give to the courts of the State government appellate jurisdiction over the commanding officers, commandant of conscripts, or the secretary of war; officers who receive their appointments from the Confederate government, and who are specially charged, by that government, with the performance of these functions. The issue is not solely, nor even mainly, between the principal and the substitute. The Confederate government is directly concerned in the result; and, in its military service, will be the chief sufferer from a reversal of the decision pronounced by the commanding officer, or other officer acting in the premises. State courts have no authority to re-try the question of fraud *vel non*, in the matter of putting a substitute into the army, under the rules above copied.

Ex parte Hill, 38 Ala. at 470.

95. *Id.*

96. *Id.* at 465–66.

man, was not treated as a serious concern in the majority of these opinions. Jenkins believed the obligation placed upon judges to obey the Confederate Constitution “remove[d] any well-founded apprehension that they will unduly obstruct or hinder the Confederate government in the exercise of its proper functions.”⁹⁷

Pearson emphasized that state habeas strengthened the balance of judicial power, both federal and state courts acting together, against their executive colleagues.⁹⁸ The reasoning went that when a prisoner was detained, state and federal judges were equally competent to construe national laws to determine whether detention was lawful, as both interpreted constitutional law as a matter of course.⁹⁹ State habeas review did not interfere with federal executive action in Pearson’s estimation because executive officers did not have the power of judicial review, and for all intents and purposes, federal and state courts were fungible in the habeas realm. Review of the executive’s implementation of congressional acts was the proper role of the judiciary, and state judges were supplementing rather than usurping the federal courts’ prerogative.¹⁰⁰ A fellow North Carolina justice had argued in an earlier habeas case that the Confederate Congress had delegated the War Department with quasi-judicial powers precluding state court review of the Conscription Act.¹⁰¹ Pearson’s riposte was that: (1) Congress could not make the Secretary of War a

97. *Mims v. Wimberly*, 33 Ga. 587, 598 (1863). David Currie suggests Jefferson Davis largely acted within the bounds of the Confederate Constitution; whereas, Congress was generally willing to follow strong national policies—“virtually everything can be made necessary and proper to military success.” See Currie, *supra* note 7, at 1355, 1399. Fehrenbacher concluded, “the truly striking feature of this constitution written and adopted by representatives of the deep South is not the extent to which it incorporated states-rights doctrines, but rather the extent to which it transcended those principles in order to build a nation.” FEHRENBACHER, *supra* note 6, at 63. Richard Bensei asserts the confederate governing culture and Constitution were “much more centralized tha[n] those of the Union.” Richard F. Bensei, *Southern Leviathan: The Development of Central State Authority in the Confederate States of America*, 2 AM. POL. DEV. 68, 90 (1987).

98. *In re Bryan*, 60 N.C. 1, 1–16 (1863).

99. *Cf. Slocum v. Mayberry*, 15 U.S. 1, 6 (1817) (applying this reasoning to the seizure of cargo).

100. Pearson reiterated that any construction by a Confederate district court would be controlling and non-reviewable by state courts, but because the executive branch has no judicial power,

any construction it might give to an act of Congress would be the subject of review, either by the State courts or the Confederate courts; and when a citizen is unlawfully deprived of his liberty or property by an executive officer, acting under an erroneous construction of an act of Congress, the State courts may give redress, as in [*Slocum*] *v. Mayberry*.

In re Bryan, 60 N.C. at 8.

101. *Id.* at 15–16.

judge without violating constitutionally mandated separation of powers; (2) Congress had in fact not attempted to delegate judicial power as there were no plain and direct terms suggesting as much; and (3) if such judicial power existed in conscription officers, federal courts would be excluded from reviewing their decisions as well.¹⁰² Pearson wrote that it was "surely not" the case that individual liberty depended "solely on the action of the War Department and its subordinate officers;"¹⁰³ such circumstances would be tantamount to an abdication of judicial authority.

The defense of state habeas coincided with an expectation that state courts would play a more active role in the balance of federalism than they had in the United States. Confederate policymakers sought to weaken the federal judiciary by limiting review of state court decisions, a divergence from a tenant of United States federalism wherein, after the Supreme Court's ruling in *Martin v. Hunter's Lessee*, all state court decisions touching on civil matters of federal law were subject to appeal to the United States Supreme Court.¹⁰⁴ With no Confederate Supreme Court,

102. *Id.* at 26.

103. *Id.* at 9.

104. See 14 U.S. (1 Wheat.) 304, 314-15 (1816). The relationship between state and federal courts in the Confederacy was a topic of much debate. The Confederate Constitution stipulated that there would be a Supreme Court and the Senate Judiciary Committee, at Davis' behest, offered a bill to establish the Court in March 1861. Currie, *supra* note 7, at 1368-69. This bill was indefinitely postponed after a debate arose regarding whether or not to repeal the Judiciary Act provision for Supreme Court review of state judgments. *Id.* at 1369-70; see Act of Mar. 16, 1861, ch. 61, Pub. Laws, in STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 75 (J. Matthews ed., Williams, Hein & Co. 1988) (1864) [hereinafter STATUTES AT LARGE, PROVISIONAL GOVERNMENT OF THE CONFEDERATE].

That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the Confederate States . . . the decision may be re-examined, and reversed or affirmed in the Supreme Court of the Confederate States.

See Act of Mar. 16, 1861, ch. 61, § 45, Pub. Laws, in STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE, *supra*.

Currie notes that this provision mirrors section 25 of the Judiciary Act of 1789. See Currie, *supra* note 7, at 1368. During the following session of Congress in September 1863, another attempt was made to set up the Supreme Court in order to address a number of questions that had arisen, such as whether an income tax would be constitutional, and to fulfill the constitutional mandate. Currie, *supra* note 7, at 1370. Yet, opponents pointed to the history of the United States' Court, which time and again, they cautioned, had sanctioned the expansion of federal power to the states' detriment. See *id.* at 1375. Opponents and proponents vigorously debated the virtues and drawbacks of establishing a Supreme Court. The former had the better of the argument—a Supreme Court would be beholden only to Richmond rather than to protect the states' sovereignty, they argued. See *id.* at 1371-75. The Senate consequently voted in favor of establishing the Court only after the 1861 Judiciary Act's provision for Supreme Court review of state supreme court decisions

state habeas represented the new vision for the Confederacy's judicial structure in practice. State judges took the initiative to forge a new landscape of federalism by staking a claim for their courts to act as a check on abuses of executive power and engaging in an active discussion of federal policy. Conveniently for the war effort, the state habeas check generally did not interfere with conscription.¹⁰⁵ Alabama's Justice Walker's dissent teased out this tension and questioned why, with the internal threat to slavery gone and a war raging in their midst, the courts should concern themselves with the nuances of states' rights.¹⁰⁶

In a tone reminiscent of Taney's in *Ableman*, Walker challenged the position that state habeas was essential to state sovereignty. In Walker's eyes, the use of state habeas was nothing more than judicial politicking. Stripped of the grand trappings of state sovereignty, Walker argued that the issue before the court was whether a court could "by writ of habeas corpus, supervise, control, and annul the act of officers of the Confederate States, done in the exercise of authority given by the law of that government, and required to be done under regulations prescribed by the secretary of war?"¹⁰⁷ The sovereign states had delegated the power to provide for the national defense to the Confederate government as they had under the United States Constitution. The Confederate states were thereby bound by the Constitution not to interfere with the execution of congressional law pursuant to those war powers. The relinquished portion of state sovereignty

was repealed. *Id.* at 1375 (citing Senate Proceedings (Mar. 18, 1863), reprinted in 48 SOUTHERN HISTORICAL SOCIETY PAPERS (1992)). The bill then stalled in the House. *Id.*

105. Judges took a role in pushing back against policy on the fringes. The Supreme Court of Texas reasoned that nothing in the Constitution prohibited Congress from violating contractual obligations (this had only been denied to the states), and that the *ex post facto* provision related only to criminal legislation. *Ex parte Mayer*, 27 Tex. 715, 716 (1864). Other courts took a more generous view of whether an exemption contract had been formed. Assuming an exemption contract had been formed, the Court of Appeals of South Carolina discharged a man who had been exempted as an overseer on the basis that subsequent legislation changing the exemption qualifications for overseers could not operate retroactively absent a clear intention to do so. *Ex parte Graham*, 47 S.C.L. 277, 283–84, 290 (S.C. Ct. App. (1864)). The Supreme Court of Alabama relied on contract law in 1864 when it held that a party has a right to have acceptance and approval of an exemption application within a reasonable time, and that if a reasonable time has passed after such an application was made, exemption could be assumed. *Ex parte Mitchell*, 39 Ala. 442, 496–49 (1864). Judges utilized state habeas to define the boundaries of the War Department's regulations and the evolving conscription-exemption regime, thereby assuming the empowered role in the Confederate federal structure discussed.

106. *Ex parte Hill*, 38 Ala. 429, 430 (1863).

107. *Id.* at 435. In 1861, Walker had set a similar tone in *Ex parte Kelly*, by holding based on *Ableman v. Booth*, that state courts had no jurisdiction to interfere with a detention under federal law. See *Ex parte Kelly*, 37 Ala. 474, 476 (1861).

imbued federal executive officers as the sole authorities to investigate and decide conscription liability.¹⁰⁸ It was the exclusive province of federal courts to address the wrongful impairment of a citizen's liberty by the Confederacy because,

[t]o concede the power of a State court to apply that remedy, and thus to interfere with, and control and govern as to the manner of executing the law, is to confess that the power of execution is qualified and restricted to such mode and to such line of conduct as a State judge may approve.¹⁰⁹

The antebellum use of state habeas by northern judges to challenge the Fugitive Slave Act loomed large in Walker's opinion of state habeas. Animated by sectional antipathy, northern judges had employed state habeas to oppose the federal prerogative with "a boldness and ingenuity without a parallel in the history of the country;"¹¹⁰ a far cry from the hallowed depiction of state habeas precedent the majority opined. Walker saw no jurisprudential distinction between the fugitive slave and conscription cases. Indignantly he questioned: "Upon what ground, then, can it be maintained, that the State courts can interfere with the execution of the conscript law, and yet were without power to interfere with the enforcement of the fugitive-slave act?"¹¹¹ Walker seemed to

108. *Ex parte Hill*, 38 Ala. at 439. Walker stated:

I do not say that congress can abridge or qualify the jurisdiction of the State courts. The want of authority in the State tribunals, to supervise and control the executive officers of the Confederate States, in the exercise of their appointed functions, by the writs of injunction, replevin, habeas corpus, or other process, results from the delegation in the constitution of an unqualified power to execute the laws which congress may enact, and not from any denial of such authority by act of congress. If a State court cannot correct, under a writ of habeas corpus, the errors of the enrolling officers engaged in enforcing the law of conscription, it is because the constitution bestows the power to execute the law without any qualification that it shall be done in a manner consistent with the judgment of a State judge, and not because congress has suspended, or can suspend, the writ of habeas corpus.

Id. at 479.

109. *Id.* at 478-79.

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

Id. at 477.

110. *Id.* at 490.

111. *Id.* at 489. War Department clerk Robert Kean observed, on February 26, 1864, "It is pitiful to see how closely the factionists of North Carolina and Georgia, in their resistance to the conscription by the abuse of the habeas corpus, are imitating the tactics with which the Abolitionists fought the fugitive slave law." ROBERT G. KEAN, *INSIDE THE*

suggest that Confederate state judges' jurisdictional overreach was more brazen than their northern counterparts because the former circumvented *Ableman*, which Walker read to have laid the state habeas doctrine to rest.¹¹²

Walker honed in on the practical implications of state habeas to undermine the more abstract constitutional arguments offered in support by his colleagues. To Walker, and soon thereafter the Davis administration, state habeas was a gratuitous impediment to the nation's future. The Confederate Congress passed laws for the nation's benefit that were too important for local tribunals to undermine with varying interpretations. National defense would suffer if a judge could "utterly subvert the application of the power to raise armies to that State," which could in turn induce "peculiar rulings" in other states.¹¹³ Further, state habeas would unjustly leave an enrolling officer open to criminal conviction for false imprisonment only because "a State court differs from him upon the question which he is bound to decide."¹¹⁴ Drifting into hyperbole, Walker warned that judges with peculiar views and clothed with state habeas power could disband an army in a day.¹¹⁵ After Lincoln recast the war as a struggle over the exist-

CONFEDERATE GOVERNMENT: THE DIARY OF ROBERT GARLICK HILL KEAN 138 (Younger ed., 1957). In a letter from mid-1863, Assistant Secretary of War J.A. Campbell similarly linked contemporary state habeas with the abolitionists' use of habeas, expressing frustration that the state habeas problem could not presently be settled:

The Department has been forced to inquire into the extent of the jurisdiction of local judges to determine such questions. It is well known to you that the writ of habeas corpus was the favorite instrument by which the Abolitionists sought to defeat the fugitive slave law. In some cases they decided that law to be unconstitutional, and discharged from the custody of the Federal officers those who were held for violation of it.

Letter from J.A. Campbell to Hon. E. Barksdale (July 21, 1863), in 2 OFFICIAL ARMY RECORDS, *supra* note 52, at 655–56.

112. See *Ex parte Hill*, 38 Ala. 429, 496–98 (1863). In response to the charge that *Ableman*'s "broad and comprehensive principle" denying state habeas was merely obiter dictum, Walker replied, "It is not right to denounce the statement of a principle as obiter dictum, because it is large enough to cover other cases than those decided." *Id.* at 495. That the Supreme Court had been unanimous in *Ableman* suggested there was no ambiguity about the ruling. The Court's language had been precise, indicating the true opinion of each justice, and should not be read narrowly. See *id.* at 494. Because *Ableman* broadly denied state habeas, Walker dismissed the variety of state precedent and constitutional theory relied upon in *Bryan*. *Id.* at 496–97.

113. *Id.* at 499.

114. *Id.* The Union anticipated this concern and passed an Indemnity Act so that federal officers would not be held personally liable for, *inter alia*, carrying out the draft. See James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers*, 20 MICH. L. REV. 589, 589 (1922).

115. *Ex parte Hill*, 38 Ala. at 499. The Davis Administration took a similar view. In a message to Congress on February 3, 1864, Davis characterized state judges exerting habeas

ence of slavery with the Emancipation Proclamation, Confederate victory became all the more imperative. In the early days of the war, reunion may have been possible without abolition, but the war evolved into an existential contest over slavery's survival. Against this backdrop, states' rights were a distraction at best, and a viper in the nest at worst, to state habeas opponents.

Walker well understood that he was in the minority about state habeas. At the time of his dissent, he lamented, "[t]he question has been now, expressly and by implication, passed upon by several of the appellate State tribunals in our Confederacy; and in no case known to me has an appellate State court sustained the doctrine which I maintain."¹¹⁶ Although he remained convinced that legal reasoning and precedent was on his side, and that a hypothetical Confederate Supreme Court would agree, Walker resigned himself to "suffer the State jurisdiction to be exercised, to the extent agreed upon by this court, without further controversy."¹¹⁷ Practical and precedential points of contention raised by Walker about state habeas suggest that majority authors defended state habeas as a matter of principle out of respect for state sovereignty in a post-secession environment where such concerns were increasingly subordinate to the war effort.

III. THE DAVIS ADMINISTRATION AND STATE HABEAS

The tenor of the Davis administration's relationship with state habeas shifted from tolerance to hostility over the course of 1862-1864. The administration may have declined to officially oppose state habeas because its members may have felt a constitutional identity crisis about the role of states rights' in the Confederacy amidst military centralization and a corresponding impulse to respect state sovereignty where practicable.¹¹⁸ Instructions to con-

as as an undue obstruction to conscription. The danger, Davis warned, could come from just one judge for, "[i]f a single judge, in any State, should hold the act to be unconstitutional, it is easy to see that that State will either furnish no soldiers from that class, or furnish them only when too late for the pressing need of the country." 3 OFFICIAL ARMY RECORDS, *supra* note 52, at 69. Even with the law on the Confederacy's side, Davis expressed aggravation that appealing decisions through the courts would create a delay that "will be tantamount in its consequences to a discharge." *Id.*

116. *Ex parte Hill*, 38 Ala. at 503-04.

117. *Id.* at 504.

118. Historian Burton J. Hendrick concluded Jefferson Davis quickly abandoned states' rights philosophy "when faced with the inexorable realism of war" and only the opposition of other leaders such as Alexander Stephens made him tread warily on the path towards centralized nationalism. BURTON J. HENDRICK, STATESMEN OF THE LOST CAUSE:

scription officers to ignore state habeas writs may have been seen as an undiplomatic gesture in an already tense environment—critics accused Davis of ignoring states' rights from the war's onset.¹¹⁹ Instead, conscription officers contested the legitimacy of state habeas in state courts. The fact that the administration's legal minds disputed the constitutionality of state habeas doctrine, but instructed its officers to answer state habeas writs in state courts, suggests the administration may have felt constrained by respect for state sovereignty. But the war ultimately eroded that respect. Delays imposed by litigating conscription in state courts, and the discharge of conscripts by Justice Pearson in particular, wore down the administration's patience, and in early 1864, Davis suspended habeas corpus across the Confederacy.¹²⁰

Jefferson Davis extolled habeas corpus as a central pillar of individual liberty in the war's early days. In a message to Congress in late 1861, Davis villainized Lincoln as one who threatens judges for maintaining the writ of habeas corpus, thereby trampling the rule of law "under the armed heel of military authority."¹²¹ Davis implicitly sought to distinguish himself as a protector of the rule of law, as protected by the writ of habeas corpus. In an exchange with Georgia's governor, Joseph E. Brown, in mid-1862, Davis denied that conscription would upset the balance between federal and state power: "The right of each State to judge in the last resort whether its reserved powers had been usurped by the general government, is too familiar and well settled a principle to admit of discussion."¹²² In a letter to Governor Francis W. Pickens of South Carolina, Davis pointed to the state courts as the proper venue for solving exemption disputes to assuage public fears

JEFFERSON DAVIS AND HIS CABINET 429 (1939). An influential work on why the Confederacy failed posits Confederate nationalism failed, and that states' rights had little effect on the war effort. BERINGER ET AL., *supra* note 6, at 428–29. Paul D. Escott has argued Davis failed to respond to the needs of the common people. See PAUL D. ESCOTT, *AFTER SECESSION: JEFFERSON DAVIS AND THE FAILURE OF CONFEDERATE NATIONALISM* 146 (1978). The interplay between the self-identity crisis and state habeas provides fuller context than these works for Davis' complicated relationship with states' rights. The administration's relationship with habeas further marks the irretrievable shift in policy where states' rights lost meaning, and winning the war for independence took precedence over all else.

119. HENDRICK, *supra* note 118, at 429.

120. *Id.*

121. Jefferson Davis Address to the Congress of the Confederate States (Nov. 18, 1861), in 1 A COMPLICATION OF THE MESSAGES AND PAPERS OF THE CONFEDERACY, 1861–1865 140–41 (James D. Richardson ed., 1904) [hereinafter MESSAGES AND PAPERS OF THE CONFEDERACY].

122. Jefferson Davis Address to Gov. Joseph E. Brown (July 10, 1862), in MESSAGES AND PAPERS OF THE CONFEDERACY, *supra* note 121, at 54.

about conscription: "Let him apply to the judges of the land for relief from the action of the Confederate officer, and if the State law be indeed valid and operative in his favor he will be released."¹²³ The conciliatory tone Davis took early in the war possibly reflected the popular perception that the war would be a limited conflict that would not disrupt existing institutions.¹²⁴ Before the war effort demanded centralization to mobilize and direct the South's resources, engagement with state governments was political. In late 1862, Davis informed the Mississippi legislature that he had intended for state officials rather than federal officials, to administer the conscription process to further diminish points of contention between the two governments.¹²⁵ As the import of states' rights to Confederate policymakers waned, functionaries of the administration increasingly contested the constitutionality of state habeas.

The question of who would pay for conscription officers' attorneys' fees prompted the Confederate Attorney General's Office to address state habeas. On November 26, 1862, Attorney General Thomas H. Watts gave his opinion to Secretary of War James A. Seddon that conscription officers pay for counsel retained to contest conscription in state courts out of conscription funds.¹²⁶ The

123. Letter from Jefferson Davis to Gov. Francis W. Pickens (Sept. 3, 1862), in *MESSAGES AND PAPERS OF THE CONFEDERACY*, *supra* note 121, at 74–75. Further placed state courts on par with federal courts as avenue to redress grievances:

The Confederate courts, *as well as those of the State*, possess ample powers for the redress of grievances, whether inflicted by legislation or executive usurpation, and the direct conflict of executive authorities presents a condition of affairs so grave and is suggestive of consequences so disastrous that I am sure you cannot contemplate them without deep-seated alarm.

Id. at 75.

124. Internal problems in the Confederacy multiplied as the war went on, and the administration increasingly contended with the populace's discontent as commodity prices skyrocketed and supplies became scarce, leading to riots by women in a number of southern cities. PAUL D. ESCOTT, *THE CONFEDERACY: THE SLAVEHOLDERS' FAILED VENTURE* 49, 60 (2010). On January 1, 1863, the Emancipation Proclamation raised the stakes by making the war about the very existence of slavery as opposed to slaveholders' rights. In his memoirs, Davis wrote, "[Lincoln] put arms in their hands, and trained their humble but emotional natures to deeds of violence and bloodshed, and sent them out to devastate their benefactors." 2 JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 193 (1881). A series of new legislation in early 1864 signaled the dire measures Confederate leaders thought necessary to continue the war. In addition to a still more expansive conscription act, Congress passed laws establishing higher taxes, a compulsory funding measure to reduce the currency in circulation by as much as two-thirds, an act strictly regulating the trade of commodities, and the suspension of habeas corpus. See THOMAS, *supra* note 6, at 263–65.

125. Address to Legislature of Mississippi at Jackson (Dec. 26, 1862), in 8 *THE PAPERS OF JEFFERSON DAVIS* 572–73 (Lynda L. Crist & Mary Seaton Dix eds., 1995).

126. Letter from Thomas H. Watts to James Seddon (Nov. 28, 1862), in *THE OPINIONS*

question of which department would foot the bill required Watts to respond a few weeks later, although only to clarify that the Department of Justice was not on the hook for attorneys' fees arising from state habeas cases.¹²⁷ The decision to contest state habeas in state courts through conscription officers was an accommodation for states' rights from the administration's perspective. In contrast, the Lincoln administration instructed army officers to explain only why conscripts were held in response to habeas writs from state judges, and that thereafter officers need not respond to further orders from state judges.¹²⁸ But, the Davis administration's response to state habeas grew increasingly conflicted. Later in 1863, Watts was ambiguous about the authority a general had to detain a conscript when challenged by a state court.¹²⁹ Watts instructed that the general was required to answer a state habeas writ with specificity and the conscript in question should be brought before the judge or "could not otherwise enjoy his full constitutional privileges" given that it was undoubted state judges could issue the writ within the territorial limits of their state.¹³⁰ But Watts then tacked in the other direction, and, echoing Taney in *Ableman*, suggested to Davis that,

[w]hen . . . it is ascertained, in proceedings under the writ of *habeas corpus* issued by a State Judge or State Court, that the prisoner is held by a Confederate Officer, under the Authority of the Confederate States, for any matter over which the Confederate laws operate, the State Judge or State Court can proceed no further.¹³¹

OF THE CONFEDERATE ATTORNEYS GENERAL, 1861–1865 183 (Rembert W. Patrick ed., 1950) [hereinafter, *OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL*].

127. Letter from Thomas H. Watts to James Seddon (Dec. 15, 1862), in *OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL*, *supra* note 126, at 188–91.

128. Circular No. 36 from James B. Fry (July 1, 1863), in 3 *OFFICIAL ARMY RECORDS*, *supra* note 52, at 460–61; *see also*, RANDALL, *supra* note 12, at 431.

129. Letter from Thomas H. Watts to Davis, (Aug. 8, 1863), *OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL*, *supra* note 126, at 311, 313.

It may be that Genl. Buckner, as a Military Commander of a Department, by virtue of his powers and duties to defend the country, independent of any specific laws of Congress, had the right to arrest and hold temporarily, suspicious persons, to prevent them communicating with, or otherwise giving aid and comfort to the enemy. (emphasis added).

130. *See id.* at 313. Watts' instructions were prompted because General Buckner had only replied, "Abe Tipton is held as an open and avowed enemy of the Confederate Government. He is held by the Military Authorities, under the laws of the Confederacy." *Id.* Watts further stated, "The Court or Judge of a State has the clear right to inquire in this mode of proceeding for what cause, and by what authority the prisoner is confined within the territorial limits of the State Sovereignty." *Id.* at 314.

131. *Id.* at 314.

Attorneys representing the Confederacy in the flagship state habeas cases in 1863 captured the administration's doubts about the constitutionality of state habeas.¹³² In *Bryan*, District Attorney George V. Strong argued on behalf of the Confederacy with the help of Thomas Bragg, a former Confederate Attorney General and later governor of North Carolina.¹³³ Bragg and Strong communicated what became the administration's official position that state habeas was an improper assertion of states' rights

based upon recent antebellum precedent, claiming that "[t]he old Union was destroyed, not by the encroachments of the General Government upon the rights of the State, but by the encroachments of the fanatical States of the north and northwest upon the Constitution. . . . These encroachments took the shape of 'personal liberty bills,' and interference of the courts by writs of habeas corpus with the proper jurisdiction of the General Government. Let us avoid the bad example."¹³⁴

By the latter half of the war, Jefferson Davis changed his tone and began to label state habeas officially as obstructionist and unconstitutional. Even if conscripts were not discharged en masse, state courts slowed down the conscription process. In a message to Congress on February 3, 1864, Davis asserted state judges exerting habeas were an undue obstruction to conscription. The danger, Davis warned, could come from just one judge, for "[i]f a single judge, in any State, should hold the act to be unconstitutional, it is easy to see that that State will either furnish no soldiers from that class, or furnish them only when too late for the pressing need of the country."¹³⁵ Regardless of whether discharge was the final result, the appeal of an initial state habeas determination was "tantamount in its consequences to a discharge," according to Davis.¹³⁶ By nature, state habeas lent itself to abuse as,

[a] petition for a habeas corpus need not and ordinarily does not declare the particular grounds upon which the petitioner claims his discharge . . . and every enrolling officer will be kept in continual motion to and from the judge, until the embarrassment and delay will amount to the practical repeal of the law.¹³⁷

132. *Id.* That federal officers had always disputed the doctrine suggests the administration's tacit support of state habeas in 1862-1863 was lukewarm at best.

133. *In re Bryan*, 60 N.C. 1, 141-15 (1863).

134. *Id.*

135. 3 OFFICIAL ARMY RECORDS, *supra* note 52, at 69.

136. *Id.*

137. *Id.*

Weighed against the costs, the benefits of state habeas did not justify its continuation to Davis: "Must the independence for which we are contending, the safety of the defenseless families of the men who have fallen in battle and of those who still confront the invader, be put in peril for the sake of conformity to the technicalities of the law of treason?"¹³⁸ Davis was hardly alone in his opinion. Other members of the administration shared in Davis's frustration and disdain. In a letter dated March 19, 1864, Secretary of War Seddon complained to a general: "This Department has experienced much embarrassment from the eccentric decisions of inferior judges who have had the power to issue writs of habeas corpus, and can appreciate the difficulties that General Greer has had to encounter on that subject."¹³⁹ Robert Kean, Chief of the Bureau of War, captured a trend within the administration to view the use of state habeas as complicit in an anti-confederate agenda, writing in his diary immediately after *Bryan*: "The local judiciary are doing what they can to defeat the conscription and encourage desertion in many places . . . I mistrust that these feelings have a good deal to do with these decisions by which they thwart and obstruct the execution of the conscription."¹⁴⁰

The administration's shifting position on state habeas illuminates the elastic allegiance to states' rights. Military necessity trumped all other considerations in a constitutional discourse delineating boundaries between state and federal sovereignty. Allowance for states' rights wore so thin that the relatively minor number of conscripts discharged by Justice Pearson tipped the scales against state habeas.

Congress had suspended habeas twice before at Davis' urging in more limited circumstances. In February 1862, Congress had authorized a habeas corpus suspension for a finite period of time and only in those localities where there was "such danger of attack by the enemy as to require the declaration of martial law for their effective defen[s]e."¹⁴¹ Davis suspended habeas corpus in counties along Virginia's coast, eastern Tennessee, and a swath of

138. *Id.*

139. Letter from James Seddon to General Edmund Kirby Smith (Mar. 19, 1864), in 3 OFFICIAL ARMY RECORDS, *supra* note 52, at 231.

140. KEAN, *supra* note 111, at 64; cf. JOHN B. JONES, A REBEL WAR CLERK'S DIARY 443, 457 (Earl Shenck Miers ed., 1958) (indicating War Clerk John B. Jones' attitude, who expressed concern over Jefferson Davis assuming absolute power (October 19, 1864) and the preference conscription superintendents gave the rich (December 6, 1864)).

141. Act of Feb. 27, 1862, ch. 2, Pub. Laws, in STATUTES AT LARGE, PROVISIONAL GOVERNMENT OF THE CONFEDERATE, *supra* note 104, at 1 (James Matthews ed., 1862).

South Carolina, which were either under Union occupation or home to large concentrations of unionist sympathizers.¹⁴² Later in 1862, Congress granted Davis authority to suspend habeas corpus wherever the public safety so required, with the caveat that the administration investigate the cause of arrest to ensure release of improperly detained persons.¹⁴³ A year passed until Davis again requested authority to suspend habeas corpus. In February 1864, Davis, citing state habeas as *raison d'être*, implored Congress to pass a comprehensive habeas corpus suspension act.¹⁴⁴ Congress obliged and licensed the suspension of habeas corpus across the entire Confederacy until mid-September 1864 for a laundry list of offenses including "attempts to avoid military service."¹⁴⁵ Although cause for suspension affected the entire Confederacy, Davis singled out Justice Pearson's use of state habeas as compelling justification.¹⁴⁶ With state habeas at an end, Davis believed

142. Currie, *supra* note 7, at 1328–29.

143. Act of Oct. 13, 1862, ch. 21, Pub. Laws, in STATUTES AT LARGE, PROVISIONAL GOVERNMENT OF THE CONFEDERATE, *supra* note 104, at 84 (James Matthews ed. 1862) ("The President shall cause proper officers to investigate the cases of all persons so arrested, in order that they may be discharged, if improperly detained, unless they can be speedily tried in due course of law.")

144. See *supra* notes 122–25 and accompanying text.

145. Act of Feb. 15, 1864, ch. 37, Pub. Laws, 4th Sess., in STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, PASSED AT THE FOURTH SESSION OF THE FIRST CONGRESS 1863–64, 28–30 (R.M. Smith ed., Richmond 1864). Neely frames the February 1864 Act as the request to end civil liberties in the Confederacy. Representing a departure from earlier requests to suspend habeas, it was purportedly necessary for protection from disloyalty within the heart of the Confederacy. See NEELY, *supra* note 6, at 166. Neely further argues that, similar to Lincoln, Davis showed little sincere interest in constitutional restrictions on government authority in wartime. *Id.* at 167.

146. Pearson took an expansive view of state habeas jurisdiction even after Congress passed a comprehensive grant for the suspension of habeas corpus across the Confederacy. Addressing the Act's scope in *In re Roseman*, Pearson concluded that the petitioner's case was not covered because by applying for the writ, the petitioner was not seeking to "avoid" service, which implied that the petitioner would have kept out of the way, "taking to the woods, instead of coming up and appealing to the courts to decide upon their rights." 60 N.C. 368 (1 Win.) 443, 445 (1863). But other North Carolina judges' unwillingness to push the boundary of state habeas was more representative of the general relationship between state judges and the doctrine. See J.G. de Roulhac Hamilton, *The North Carolina Courts and the Confederacy*, 4 N.C. HIST. REV. 366, 366, 390 (1927). The administration resolved that something had to be done before other judges start following Pearson's example. Perceived disruption arising from Pearson's decisions, more than any other judge, prompted Davis to recommend suspension of the writ. *Id.* at 390. Detractors called Pearson a traitor and "predicted that North Carolina would become a haven for all those desiring to shirk their military duties." Jennifer Van Zant, *Confederate Conscription and the North Carolina Supreme Court*, 72 N.C. HIST. REV. 54, 70–71 (1995). In a letter to Thomas Bragg, who had argued for the Confederacy in *Bryan*, Davis wrote:

The decision of Judge Pearson releasing the conscript in the case before him will of course be respected until the action of the appellate court, for the case was before him prior to the passage of the law suspending the writ of habeas corpus; and although I do not believe that his decision is right, the public in-

the war effort would run more smoothly absent "treasonable practices" by obstructionist state judges.¹⁴⁷

CONCLUSION

The state habeas cases provide unique insight into how confederate state judges and the Davis administration sought to navigate the tension between states' rights and military centralization in the Confederacy. The cases were a product of, and solution to, the Confederacy's constitutional identity crisis. Although individual motivations cannot be known, southern state judges' near universal decision to embrace the hitherto unsettled state habeas doctrine was a public declaration, crossing judges' various antebellum jurisprudential leanings,¹⁴⁸ in favor of expansive concurrent jurisdiction and a vision of federalism wherein the state judiciary occupied a greater role as a check on the federal executive. *Bryan, Hill*, and *Mims* reveal how the state habeas doctrine both gave meaning to states' rights and represented a nascent confederate constitutionalism in which state judges took a more active role in charting the boundaries of federalism. Historian J.G. de

terest will not suffer by awaiting the result of the appeal in the one case before him.

Letter from Jefferson Davis to Thomas Bragg (Mar. 7, 1864), in 3 OFFICIAL ARMY RECORDS, *supra* note 52, at 201. Davis placed faith in the North Carolina supreme court's other justices to counteract Pearson's meddling influence. Should they fail and should Pearson continue to "pursue the factious course," Davis ominously pledged, "I shall not shrink from the issue." *Id.*

147. Resolution to House of Representatives (May 14, 1864), 3 OFFICIAL ARMY RECORDS, *supra* note 52, at 429–30.

148. Their northern counterparts, the principal advocates for state habeas before the war, did not defend state habeas doctrine with the same vigor. Notable, the Supreme Court of Michigan in *In re Spangler* adopted a tone similar to Walker in *Ex parte Hill* in holding state habeas unconstitutional. *In re Spangler*, 11 Mich. 298, 307 (1863). Echoing Taney in *Abelman*, the Michigan Supreme Court reasoned:

The Constitution was not framed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home: for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesman who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the general government, and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.

Id.; see also *Ex parte Anderson*, 16 Iowa 595 (1864) (giving a lukewarm defense of state habeas by the Supreme Court of Iowa, but deciding the case on other grounds); cf. *Commonwealth ex rel. M'lain v. Wright*, 3 Grant 437 (Pa. 1863) (defending the state habeas jurisdiction). After the war, northern courts remained divided regarding state habeas until *Tarble's Case*. See *In re Farrand*, 8 Fed. Cas. 1070, 1072 (D. Ky. 1867); *Ex parte Hill*, 5 Nev. 154 (1869) (following *Abelman* and denying state habeas).

Roulhac Hamilton observed that the unanimity with which state judges accepted conscription was a “wonder” when eleven courts, each of last resort because no federal appeal existed, independently construed organic law.¹⁴⁹ The unanimity with which state judges accepted state habeas and the commonalities of reasoning in the flagship state habeas cases are a previously unexplored wonder.

149. Hamilton, *supra* note 10, at 448.